TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1914.

No. [redacted] 30

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, FRED W. BRUCH, GEORGE REEVES, AND JOHN MATTHEWS, PETITIONERS,

vs.

CHARLES HEBARD AND THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY.

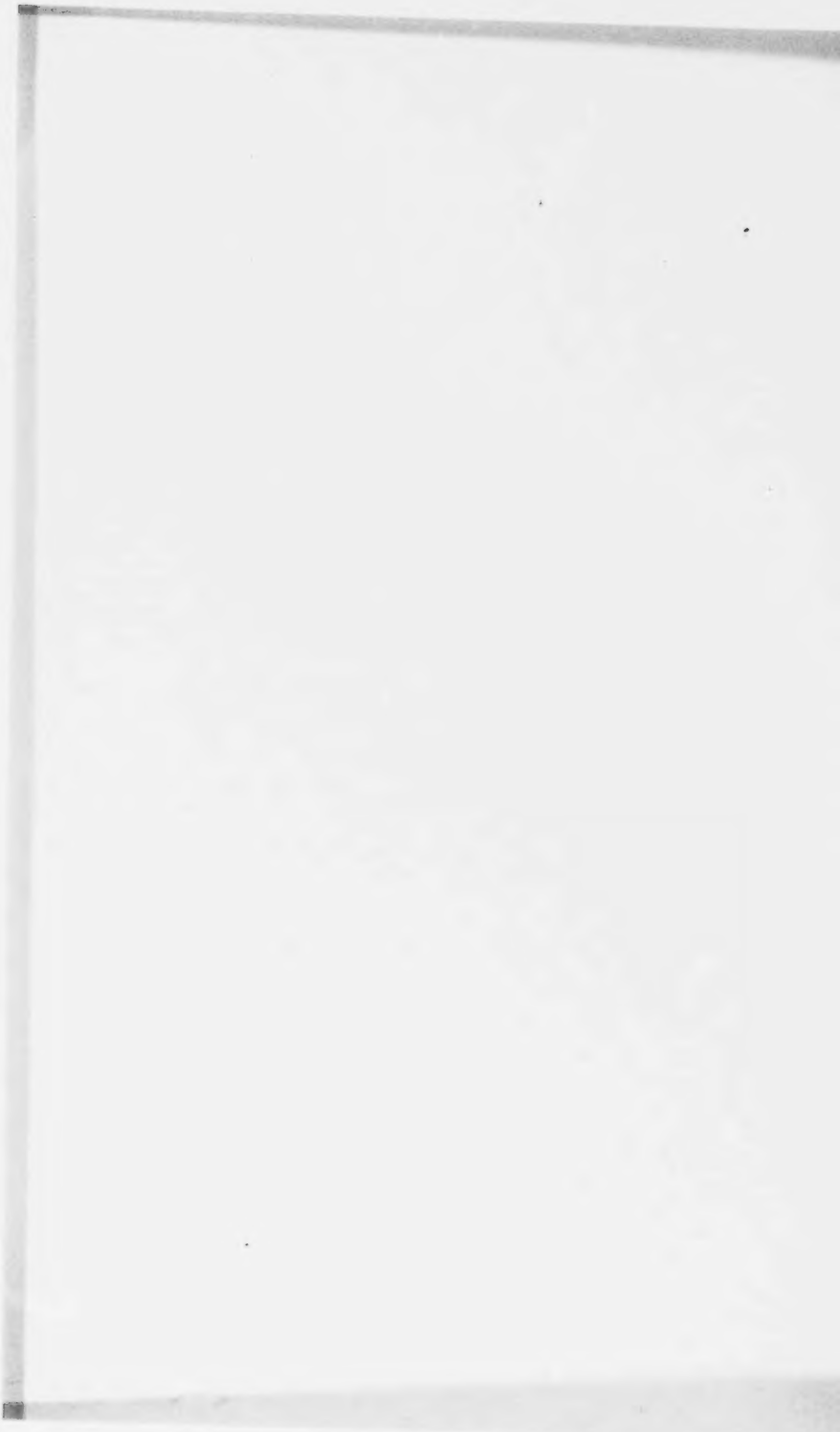
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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 17, 1912.

CERTIORARI AND RETURN FILED MAY 22, 1912.

(23,163)



(23,163)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 232.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, FRED W. BRUCH, GEORGE REEVES, AND JOHN MATTHEWS, PETITIONERS,

vs.

CHARLES HEBARD AND THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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1 TRANSCRIPT OF RECORD.

The Circuit Court of the United States in and for the Northern Division of the Eastern District of Tennessee.

2031.

CHARLES HEBARD, Plaintiff,

vs.

D. W. BELDING, M. M. BELDING, A. N. BELDING, HENRY STIX, Nathan Stix, Lewis Kohn, D. W. Hyman, Mary Bragg, R. L. Cooper, J. W. Cooper, and R. N. Archer, Defendants.

Charles Hebard, a citizen and resident of Pequaming, in Baraga county, in the state of Michigan, brings this his bill against D. W. Belding, Nathan Stix, D. W. Hyman, Henry Stix, Lewis Kohn, Mary Bragg and R. N. Archer, who are citizens and residents of the Southern District of the state of Ohio, residing in or near Cincinnati, in Hamilton county, of said state, and R. L. Cooper and J. W. Cooper, who are citizens and residents of Cherokee county in the Western District of the state of North Carolina, and M. M. Belding and A. N. Belding, who are citizens and residents of the state of New York, in or close vicinity of New York City.

And, thereupon, your orator complains and says:

That he is the owner in fee of about forty thousand (40,000) acres of land, lying in the Northern Division of the Eastern District of Tennessee, in the eastern portion of Monroe county, south of Little Tennessee river, and adjoining the North Carolina state line. Said state line is the eastern boundary of said 40,000 acres owned by complainant, and bounds it for a distance of some ten miles. Said land is mountainous, very little of it being under cultivation, and is practically unfit for cultivation. Complainant, however, has tenants scattered over the land, who have small enclosures in the coves and small valleys. The land was bought principally for the timber on it.

2 The title to said land is derived from the state of Tennessee by grants duly and regularly issued, and mesne conveyances and descent, terminating in complainant.

The defendants, except R. N. Archer, claim to own by deeds to themselves and as tenants in common, a large body of land containing twenty thousand (20,000) acres or more in Graham county, North Carolina, adjoining the lands of complainant, the state line being the dividing line between the two bodies of land. Defendants claim to derive title by grants from the state of North Carolina.

There is now a contention between your orator and the defendants as to the true location of the state line, and this contention involves some eight thousand (8,000) acres of valuable timber lands, upon which the defendant, R. N. Archer, under authority from the other

defendants, recently entered and was cutting and preparing to remove valuable and merchantable timber, and only desisted and left said land after writ of injunction against further trespass issued in suit below described, covering part of the land in controversy.

The land thus in dispute includes all the land drained by the waters of Slick Rock Creek, which has its source in the mountains west of the main or leading mountain, the crest of which forms the dividing line between North Carolina and Tennessee as complainant insists, and after flowing some six miles in a northeast course, empties into Little Tennessee river about one-half mile below and west of the point where the state line crosses the river.

The land thus drained by Slick Rock creek forms an irregular basin, the eastern side of rim being what is called Hangover Mountain, running in a northeast and southwest course, and much the higher and more nearly straight than any other mountain on the right or left in that vicinity. On the southern and western sides of the basin, the Fodderstack lead and smaller spurs or ridges form the rim of the basin, and are much lower than the Hangover Mountain or lead, and gradually diminish until the river is reached. The basin thus formed being about six miles in length and extends northeast and southwest, whilst the average width is about three miles.

Complainant further shows that in the year 1821 joint commissioners were appointed by the states of North Carolina and Tennessee to locate and establish the line between the two states; and that said commissioners, pursuant to their appointment, did locate and establish the line. "Beginning at a stone set up on the north side of the
" Chattahoochie turnpike road, marked on the west side Ten. and
" on the east side N. C., 1821; running thence southwestwardly
3 " to the Bald Rock on the summit of the Great Iron or Smoky
" Mountain, and continuing southwestwardly on the extreme
" heights thereof to where it strikes Tennessee river about seven miles
" above the old Indian town of Tallassee," * * * "crossing Ten-
" nessee river at a distance of sixty-five miles from the beginning.
" From the Tennessee river to main ridge and along the extreme
" height of same to the place where it is called Unicoi or Unaka
" Mountain." This latter clause, "from Tennessee river to the main ridge and along the extreme height to where it is called Unicoi or Unaka Mountain," is the portion of the state line now in dispute.

Complainant shows that the state line running southwestwardly from the beginning, crosses Tennessee river about one-half mile above and nearly east of the mouth of Slick Rock creek, as the old marked line clearly shows; that it there crosses the river and following a leading ridge reaches the main ridge at a place called the Hangover; thence runs along the extreme heights of the Hangover Mountain and passing Stratton's Ball some six miles or more from the river; and thence continuing on top of mountain, same course southwestwardly, runs to where the ridge is called Unicoi or Unaka Mountain.

From the Little Tennessee river to the Unicoi or Unaka Mountain, the Hangover lead is the more direct course southwestwardly, and the Hangover ridge is from 400 to 1,000 feet higher than any other

ridge or spurs in that section of country, and along this ridge the old marked line still exists as made by the commissioners in 1821, when they located and established the line. Therefore complainant insists and charges that the same is the true state line as established by the commissioners and that the Slick Rock Creek basin, to wit, all the land drained by said creek, is entirely within the boundary of the state of Tennessee.

On the other hand the defendants insist that the state line crosses the river from one-half to one mile below the mouth of Slick Rock Creek and thence following low ridges and spurs, first northwest, then west, southwest, south and southeast until it strikes the main ridge at the Stratton Ball, intercepting the line as contended for by Complainant, and by this line including all the lands in the Slick Rock basin and tributary to its waters, within the boundary of North Carolina.

There are various good and sufficient reasons why this line as contended for by defendants is not the true line:

First. The distance is ten miles or more, instead of about six miles as contended for the other line, and forms a semi-
4 circle or circuitous route with an unexplained offset at the river.

Second. Following the ridges claimed by defendants, they are from four hundred to one thousand feet lower than the Hangover Ridge; and

Third. Leaving the river as claimed by defendants, there is no defined ridge or spurs which lead to the main ridge. The first ridge leaving the river below the mouth of Slick Rock Creek, leads to what is called Tallassee Mountain; thence along said mountain from one to two miles in a northwest course; thence leaving said mountain and following a divide between the head waters of Tallassee and Little Slick Rock creeks about one mile or more to the Fodder Stack lead at or near Little Fodder Stack; thence south and southeast, passing Big Fodder Stack, Rock Stack, &c., to the Stratton Ball on the main ridge and the true line.

The Fodder Stack lead which is claimed by the defendants as a part of the state line is a spur or ridge leaving the main mountain at or near the Stratton Ball, and where it leaves the main ridge is from 300 to 500 feet lower than the main ridge. It starts off at about right angles in a north or northwest course, and runs a general northwest course to Little Fodder Stack, some six or seven miles. From thence the same ridge or spur is called Salt Spring Mountain, and runs first northwestwardly, then southwestwardly some ten miles or more, terminating at Citico Creek, some fifteen miles in an opposite direction from the river. This Fodder Stack and Salt Spring lead is well defined its entire length, and by following it it is impossible to reach Tennessee River. The only way to reach the river is by following it to Little Fodder Stack and then across by the head waters of Little Slick Rock Creek to Tallassee Mountain and thence to the river.

The result is that the defendants, to establish the line as claimed by them are compelled to follow different and distinct ridges and

spurs, and by a circuitous route, so as to include the land in dispute in North Carolina.

Complainant further shows that the lands on Slick Rock creek, together with a large boundary both in North Carolina and Tennessee were formerly occupied by the Cherokee Tribe of Indians. The Indian claim was bought and extinguished by the United States government prior to 1836, and the Indians were in 1836 and 1837 gathered together and removed to the Indian Territory by the U. S. government. In 1836 the legislature of Tennessee passed an act directing a survey of the lands thus obtained from the Indians and lying in Tennessee, and called it the Ocoee Land District.

5 During the years 1837-8-9, said Ocoee Land District was surveyed and laid off into ranges, townships, sections and fractions of sections. When the surveyors reached the Slick Rock Creek basin they surveyed and laid off the land up to and along the main creek for about four miles up from its mouth, making the creek the outside or eastern line of the survey. It thus followed that only about one-half the land in said basin, being the land on the head waters and the land on the western side of the lower part of the creek, were surveyed and sectionized, while the eastern side near the river was not surveyed. The unsurveyed part being that portion lying east of the main creek and between the creek and the top of the Hangover lead or mountain. Complainant is unable to give the reason for this omission.

After the leads were surveyed, and about the year 1842, entries were made and grants obtained from the state of Tennessee by H. A. M. White for himself and associates for about 30,000 acres of land, including all the sectionized lands in the Slick Rock creek basin except some small scraps of land which were granted to others. And complainant is now the owner of the land in the basin of Slick Rock Creek by connected chain of titles, by descent and conveyances from occupants and grantees of the state.

The unsurveyed land lying east of Slick Rock creek as above described was not entered and granted at that time; the title remaining in the state of Tennessee until 1882, when H. M. and T. E. H. McCroskey entered all the lands lying east of Slick Rock creek, estimated at 5,000 acres and in 1893 obtained a second entry and a grant, based on said two entries as provided under the Act of 1852. Complainant has bought said land from H. M. and T. E. H. McCroskey, obtaining a deed therefor, and is now the owner of the land. The defendants, if they have any title to the land, in the Slick Rock creek basin, derive the same from the state of North Carolina.

Complainant further charges and shows that he and those from whom he derives title have for many years had a number of tenants living upon the land in the Slick Rock creek basin dating back to the year 1882 or longer, and that he and those from whom he derives title have been in open, notorious, continuous and adverse possession by and through their tenants since the year 1882, and is now in actual occupation and possession by his tenants and employés claiming under his deeds as above set out.

He further charges and shows that the defendant, D. W. Belding, and the other defendants, claiming title to the land or a portion of it, contracted with their co-defendant, R. N. Archer, that he and the said Archer should cut and remove the valuable
6 timber standing on said land, and remove the same from the lands in the Slick Rock creek basin, and on both sides of the creek, and that the said Archer about the month of May, 1895, employed men, who, as his agents, and employés, went upon said lands and begun to cut and remove the valuable timber therefrom.

On the 10th day of June, 1895, complainant brought his action in the Chancery Court for Monroe county, Tennessee, to enjoin the defendant, R. N. Archer, and his employés from cutting and removing the timber from certain parts of said land, and to declare valid the title of complainant. On the 31st day of August, 1895, before answer or other defense had been made, the said R. N. Archer and the others made defendants in said cause in said Chancery Court of Monroe county, Tennessee, filed their petition in said cause, seeking to remove the same from said Chancery Court to the U. S. Circuit Court in the Eastern District of Tennessee and the Northern Division thereof, and thereafter said cause was so removed and is now pending in your honor's court.

That complainant is in sole and undisputed occupation of his said land by tenants and employés, and that the respondents while asserting their claims and having committed and still threatening to commit trespasses thereon, are not in actual occupation of any part of said land of complainant on the waters of Slick Rock Creek.

That the matters in controversy in this cause exclusive of interests and costs, exceed in value the sum of five thousand dollars, and that the land alone is worth more than five thousand dollars.

And your orator, by his agents, endeavored to stop and prevent the trespass threatened, and to have the claims of said defendants properly released, which they have refused to do. But now so it is that the said defendants colluding and confederating with each other, refuse to recognize the rights and titles of your orator, and pretend that they own the said land of your orator which he is in possession of so far as such land is susceptible of pedal occupation, and the defendants, with said Archer, who is claiming under some contract between him and his codefendants, are preparing, intending and threatening to cut timber on your orator's said land, on waters of Slick Rock, and have caused pretended surveys to be made to include all of it in their grants, and have placed on record sundry writings attempting to show record, title and claim in them to a large part of the Slick Rock basin. All which actings, doings and
7 pretenses of said defendants are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orator in the premises. In consideration thereof, and for as much as your orator is remediless in the premises at and by the strict rules of the common law, and can only have relief in a court of equity where matters of this nature are properly cognizable and relievable;

To the end, therefore, that the plaintiff may have that relief which

he can only obtain in a court of equity, that the true line of defendants' easterly boundary, to wit: the state line between Tennessee and North Carolina, at the places stated in the foregoing bill; to wit: From the Little Tennessee river southwesterly to the Stratton Ball, a distance of about six miles, be declared, ordained and established by proper decree of this court, and, if necessary, the line surveyed and monumented under the order of this court, as establishing the right of property;

That all the lands on the waters of said Slick Rock creek be declared and decreed to lie and be in the state of Tennessee, in accordance with the calls as given by the acts of commissioners who surveyed and established the line in 1821;

That the title of complainant to all the land in said Slick Rock Creek basin, waters falling on which run into Slick Rock creek, and all the land shown in complainant's title papers above referred to, be declared valid, and that the claims of respondents to said land, derived from grants from the state of North Carolina, be declared invalid and void, and that the same be annulled and canceled as clouds upon the title of complainant;

That a writ of possession be awarded complainant to put him in possession, should the same be deemed necessary;

That the defendants above named, be enjoined by writ of injunction issuing out of this honorable court, inhibiting them and each of them and their employés from cutting and removing the timber or otherwise trespassing upon the said land upon the waters of Slick Rock creek pending this suit, and, upon final hearing, that the injunction be made perpetual;

That the cause now pending in this court by removal from Chancery Court of Monroe county, Tennessee, as hereinbefore stated, be consolidated with this cause and the two heard together, since the same questions raised in said cause are also raised in this, and the same parties in interest are concerned; and

That your orator may have such other, further and general relief as his circumstances may require and as may be consistent with equity.

8 May it please your honors to grant unto the plaintiff a writ of subpœna to be directed to the said D. W. Belding, D. W. Hyman, Henry Stix, A. N. Belding, R. L. Cooper, Lewis Kohn, Nathan Stix, M. M. Belding, Mary Bragg, J. W. Cooper, R. N. Archer, thereby commanding them and each of them at a certain time and under a certain penalty therein to be limited, personally to appear before this honorable court and then and there full, true, direct and perfect answer make, but not under oath, which is expressly waived, to all and singular the premises, and, further, to stand to, perform and abide such further order, direction and decree therein as to this honorable court should seem meet.

And your orator will ever pray, &c.

McCROSKEY & McCROSKEY,
Solicitors.

WEBB & McCLUNG,
CHARLES SEYMORE,
Of Counsel.

THE UNITED STATES OF AMERICA,
Northern Division of the Eastern District of Tennessee:

On this, the 16th day of January, 1896, personally came before me, T. E. H. McCroskey, who, having been duly sworn, made oath that he is the attorney and agent of the above named plaintiff, Charles Hebard, and that he subscribed the foregoing bill and that the statements contained in the foregoing bill are true to the best of affiant's knowledge and belief.

T. E. H. McCROSKEY.

Sworn to and subscribed before me this 16th day of January, 1896.

HENRY O. EWING,
Deputy Clerk.

I become security for the costs of this cause Jan'y 16, 1896.
T. E. H. McCROSKEY.

(Endorsed:) No. 1056. In the U. S. Circuit Court at Knoxville. Chas. Hebard against D. W. Belding, et al. Original Bill. Filed Jany. 16, 1896. Henry O. Ewing, Deputy Clerk.

9

No. 1056.

CHAS. HEBARD
vs.
D. W. BELDING et als.

In this cause the complainant, by his solicitor, moved the court for an order on the defendants, requiring them to appear, plead, answer or demur by a day certain to be designated, and that such order be served upon said defendants. Upon consideration of said motion it appears to the court, from the bill which is sworn to, that the object of said bill is to remove cloud from the title of real property within the Northern Division of the Eastern District of Tennessee, and that the defendants are not inhabitants of said district, but that D. W. Belding, Henry Stix, Nathan Stix, Lewis Kohn, D. W. Hyman, Mary Bragg and R. N. Archer are citizens and residents of Hamilton county, in the Southern District of the State of Ohio, and that A. N. Belding and M. M. Belding are citizens and residents of the state of New York, in the Southern District of said state, in or near the City of New York; and that R. L. Cooper and J. W. Cooper are citizens and residents of Cherokee county, in the Western District of the state of North Carolina.

Therefore it is ordered that the said defendants appear, plead, answer or demur to said bill on or before the 1st day of March, 1896; and it is further ordered that the clerk of this court make out and place in the hands of the United States Marshals of the several districts of the residents of the said several defendants copies of

this order, and that said copies be served by said marshals on said several defendants.

(Endorsed:) No. 1056. In the U. S. Circuit Court at Knoxville. Chas. Hebard against D. W. Belding et al. Order. Filed Jan. 17", 1896, entered 156 P. Henry O. Ewing, Deputy Clerk.

In Chancery Court at Madisonville, Tenn.

No. 1265.

CHAS. HEBARD
vs.
R. N. ARCHER et als.

McCroskey & McCroskey, Webb & McClung, Sol's for the Complainants.
Lucky, Sanford & Tyson, Sol's for Defendants.

10 Filed Jan'y 13, 1896. H. H. Taylor, Clerk, by J. T. Carter, D. C.

In Chancery Court at Madisonville, Tennessee.

No. 1265.

CHAS. HEBARD
vs.
R. N. ARCHER et als.

Prosecution and Injunction Bonds.

Filed June 10th, 1895.

Know all men by these presents; that we, Charles Hebard and T. E. H. McCroskey, are held and firmly bound unto J. A. Archie, D. S. Ballew, William Jenkins, John Jenkins, T. C. Carringer and Robert Ore in the penal sum of five hundred dollars, for which payment well and truly to be made we bind ourselves and each of us, our and each of our heirs, executors or administrators jointly and severally by these presents, sealed with our seals and dated this the 10th day of June, 1895. The condition of the above obligation is such that whereas, Charles Hebard hath the day of the date hereof prayed for and obtained from the Court of Chancery, holden at Madisonville, in the State of Tennessee, a Writ of Injunction returnable to the Chancery Court, holden at Madisonville on the first Monday in December next.

Now if the said Charles Hebard shall prosecute the said Injunction Bill with effect, or in case he fails therein shall well and truly pay and satisfy the said defendants or either of them of all such costs

and damages as may be awarded and recovered against the said Charles Hebard in any suit or suits which may be hereafter brought for wrongfully suing out of said Injunction and shall moreover abide by and perform such orders and decrees as the court may make in this cause and pay such costs and damages as the court may order, then the above obligations to be void, otherwise to remain in full force and effect.

CHARLES HEBARD,
By T. E. H. McCROSKEY, *Att'y.*

T. E. H. McCROSKEY, *Sec't'y.*

We acknowledge and bind ourselves for the prosecution of the above suit and pay all such costs as may be awarded on the final hearing hereof.

T. E. H. McCROSKEY, *Sec't'y.*

11 *Original Injunction Bill.*

Filed June 10th, 1895.

To the Hon. T. M. McConnell, Chancellor, holding the Chancery Court for Monroe County, Tennessee:

CHARLES HEBARD, a Citizen of Pequaming, Michigan,
vs.
J. A. ARCHIE, D. S. BALLEW, Known as Capt. BALLEW; WILLIAM Jenkins, John Jenkins, T. C. Carringer, and Robert Ore, all of Whom Except J. A. Archie are Presumed to be Residents of North Carolina, But are Temporarily in Monroe County, Tennessee.

The said J. A. Archie being a resident of the State of Michigan.

Complainant would respectfully show to the court, that he is the owner in fee and by deeds of a large body of mountain land, containing over thirty thousand acres, lying in the 17th Civil District of Monroe Co., Tennessee, on the waters of Citico and Big and little Slick Rock Creeks. Complainant derives his title to said land by grants from the State of Tennessee and chain of intermediate conveyances terminating in himself, said land being valuable principally for its timber, which alone was the moving cause of the purchase by complainant.

The defendants have within the last two weeks gone upon the following parts of said land, to wit: On the waters of Big and Little Slick Rock Creeks in the second fractional township north range six, east of the meridian, Ocoee Land District and upon Sections 1-2-9-10-11-12-13-14-15-22-23-26-27-34-35-36 and perhaps other sections in said fractional township and are trespassing therein by cutting down and preparing to haul away the valuable timber. In addition to this they are cutting out roads and say that they will have fifty hands at work within the next ten days cutting down and hauling away

timber and unless restrained by the fiat of the court, said defendants and those working under them will commit permanent and irreparable waste upon the lands of complainant.

The parties above mentioned as complainant is informed and charges are principals who have a number of hands working
12 under them, whose names are unknown to complainant. Complainant is further informed and charges that the other defendants are contractors under the defendant J. A. Archie.

The defendants nor those under whom they claim have no sort of title which is or could be valid either in a court of law or equity, and so far as complainant knows they have not even a color of title. Complainant has notified said defendants to stop cutting timber or otherwise trespassing on said land, but they refused to do so and declare that they will continue to cut the timber and remove as rapidly as possible even if "Notified by the Courts."

While the damage committed so far is not great unless restrained the timber will be removed and the land rendered practically valueless.

The premises considered complainant prays that the defendants be made parties hereto by direct summons and if that can not be served and there be a return of not found in the State then that publication be made as to those not found and that they be required to answer, but their answer under oath is expressly waived. That process and publication be returnable to August Rules 1895 of this court.

—2—

Upon final hearing complainant prays that his title to said land be declared valid and that the defendants and those working under them be declared trespassers and perpetually enjoined from further trespassing upon said land by cutting and destroying the valuable timber, hauling it away or in any other manner and that a writ of possession be awarded, if necessary, to oust the defendants and put complainant in possession.

—3—

In the meantime complainant prays for a writ of injunction issue enjoining the defendants and those working under them from further cutting and destroying the timber, hauling the same away, making roads or in any other manner trespassing upon said land, and if mistaken in his special prayer, complainant prays for such other and further relief as may be suited to his cause and consistent with equity. This is the first application for an injunction in this cause.

McCROSKEY & McCROSKEY, *Sol's.*

13 STATE OF TENNESSEE,
Monroe County:

Before me, personally appeared T. E. H. McCroskey, agent and attorney for complainant, who makes oath that the facts stated in

the foregoing bill are within his personal knowledge and those made of his own knowledge are true and those stated on information he believes to be true.

T. E. H. McCROSKEY.

Sworn to and subscribed before me June 7th, 1895.

VASTINE STICKLEY, *C. & M.*

To the clerk and master of Monroe County, Tenn.:

On bond therefor being given with security in penalty, conditioned as the law requires, issue injunction as prayed.

This 8th. June 1895, at 8:15 a. m.

T. M. McCONNELL, *Chancellor, &c.*

Subpœna to Answer.

Issued June 10th, 1895.

STATE OF TENNESSEE:

To the Sheriff of Monroe County, Greeting:

We command you to summons J. A. Archie, D. S. Ballew, known as Capt. Ballew, William Jenkins, John Jenkins, T. C. Carringer and Rob't Ore, if to be found in your county, to appear before the clerk and master of the Chancery Court at Madisonville, at the next court, to be held at the court house in Madisonville, on the first Monday of August next, then and there to answer the original injunction bill of complainant of Charles Hebard vs. J. A. Archie and others and further do and receive what our said court shall consider in that behalf and this you shall in no wise omit under the penalty prescribed by law. Herein fail not and have you then and there this writ. Witness, Vastine Stickley, Clerk and Master of our said Chancery Court at office in the Court House at Madisonville, this 1st Monday in June, 1895, on the — year of American Independence.

VASTINE STICKLEY, *C. & M.*

Endorsed: Came to hand same day issued, executed by reading a copy of original bill to Wm. Jenkins, John Jenkins, T. C. Carringer & Rob't Ore, and left copy of original bill with John Jenkins and summoned said parties to appear as herein commanded.

14 J. A. Archie & D. S. Ballew not to be found in my county. June 11th, 1895. Cost, $4.00. W. N. Barr, D. Sheriff.

Injunction.

Issued June 10th, 1895.

STATE OF TENNESSEE:

To J. A. Archie, D. S. Ballew or Capt. Ballew, William Jenkins, John Jenkins, T. C. Carringer and Rob't Ore, and to their counsellors, attorneys, solicitors and agents and each and every one of them, Greeting:

Whereas in a certain suit this day instituted in our Court of Chancery at Madisonville, by Charles Hebard, complainant, against J. A. Archie & others, defendants, the complainant having obtained from Hon. T. M. McConnell, chancellor, a fiat for a writ of injunction to issue to enjoin the above named defendants and those working under them from further cutting and destroying timber hauling the same away, making roads or in any manner trespassing upon the land mentioned in the bill in this cause. And the complainant having executed the bond required by said fiat $500.00. We therefore in consideration of the premises aforesaid do strictly enjoin and command you the said J. A. Archie, D. S. Ballew, known as Capt. Ballew, William Jenkins, John Jenkins, T. C. Carringer and Rob't Ore and all and every person before mentioned under the penalty prescribed by law, of you and every of your goods, land and tenements to be levied to our use that you and every of you do absolutely desist from further cutting and destroying timber, hauling the same away, making roads in or in any other manner trespassing upon the lands mentioned in the bill in this cause until hearing of this cause in our said court of chancery. Witness, Vastine Stickley, Clerk and Master of our said court at office, the first Monday in June in the year of our Lord, one thousand eight hundred and ninety-five and in the — year of independence.

VASTINE STICKLEY, *C. & M.*

Endorsed: "Came to hand same day issued, executed by reading the within to William Jenkins, John Jenkins, Rob't Ore, T. C. Carringer also read the within to the hands working under the above named parties and notified all parties present to desist from further work on said land described in the injunction and the original bill. J. A. Archie and D. S. Ballew, not found in my county they being reported as non-residents of the state. This June 11th, 1895. Cost. $4.00. W. N. Barr, Deputy Sheriff.

Non-resident Notice.

To J. A. Archie and D. S. Ballew:

In Chancery Court at Madisonville, Tenn.

CHAS. HEBARD
vs.
J. A. ARCHIE et al.

In this, cause, it appearing from the bill which is sworn to, and by the return of the sheriff, that J. A. Archie and D. S. Ballew, two of the defendants are non-residents of the state, they are therefore hereby required to appear on or before the first Monday of August next, before the Clerk and Master of said court at his office in Madisonville and make defense to the bill filed against them in said court by Charles Hebard or otherwise the bill will be taken for confessed. It is further ordered that this notice be published for four consecutive weeks in the Madisonville Democrat. This June 13th, 1895.

VASTINE STICKLEY, *C. & M.*

Amended Bill.

Filed June 28th, 1895.

Chancery Court, Monroe County, Tennessee.

CHAS. HEBARD
vs.
J. A. ARCHIE et al.

Amended Bill.

Complainant respectfully shows to the court that on the 10th day of June, 1895, he filed his original bill in the Chancery Court,
16 Monroe County, Tennessee, making J. A. Archie and D. S. Ballew parties thereto including a number of others. Among other things it was alleged that J. A. Archie and D. S. Ballew who are made parties defendants are non-residents. By way of amendment had before answer or any defense whatever had been made to said bill complainant comes and shows that the name J. A. Archie is a misname and that R. N. Archer instead of J. A. Archie is the party committing the trespass upon the land described in the original bill and instead of being a non-resident of the state, complainant is informed and so charges that the said R. N. Archer and D. S. Ballew are both residents of Lenoirs in Loudon County, Tenn. The premises considered complainant prays that he be allowed to file this bill as an amendment to his original bill and the mistake as to name

of one of defendants be corrected and that the name of R. N. Archer be substituted for that of J. A. Archie as a defendant, both to the original and amended bill, that copies of both the original and this amended bill be read to and delivered to the said R. N. Archer and D. S. Ballew when subpœna to answer is served and that they be required to answer both the original and amended bill returnable to August Rules 1895, and the complainant prays for the relief as asked in the original bill.

McCROSKEY & McCROSKEY, *Sol's.*

STATE OF TENNESSEE,
Monroe County:

Before me personally appeared T. E. H. McCroskey, who makes oath that he is attorney for complainant and that the facts stated in the foregoing amended bill made of his own knowledge are true and those made on information he believes to be true.

T. E. H. McCROSKEY.

Sworn to and subscribed before me June 28th, 1895.

VASTINE STICKLEY, *C. & M.*

Subpœna to Answer on Amended Bill.

Issued June 28th, 1895.

STATE OF TENNESSEE:

To the Sheriff, Loudon County, Greeting:

We command you to summon R. N. Archer and D. S. Ballew, if to be found in your county, to appear before the chancellor
17 of the Chancery Court at Madisonville, Tennessee, at the next court to be held at the court house on the 1st Monday of August next, then and there to answer the original and amended bill of complaint of Charles Hebard vs. R. N. Archer, D. S. Ballew & others, and further do and receive what our court shall consider in that behalf, and this you shall in no wise omit under the penalty prescribed by law, herein fail not and have you then and there this writ.

Witness, Vastine Stickley, Clerk & Master of our said court at office in the court house at Madisonville this 1st Monday in June 1895.

VASTINE STICKLEY, *C. & M.*

Endorsed: "Came to hand June 30th, 1895, executed as commanded by reading the original and amended or supplemental bill and also the within subpœna to R. N. Archer and left a copy of the original or supplemental bill with the said R. N. Archer. D. S. Ballew not to be found in my county this July 3d, 1895. Fee $1.00. J. E. Pickel, Sheriff.

Injunction on Amended Bill.

Issued July 28th, 1895.

STATE OF TENNESSEE:

To R. N. Archer and D. S. Ballew and to your counsellors, attorneys, solicitors and agents and each and every one of them, Greeting:

Whereas in a certain suit this day instituted in our Court of Chancery at Madisonville, Tenn., by Charles Hebard complainant against R. N. Archer, D. S. Ballew, et al., defendants, the complainant having obtained from Hon. T. M. McConnell a fiat for a writ of injunction to issue to enjoin the above named defendants and those working under them from further cutting and destroying timber, hauling the same away, making roads or in any other manner trespassing upon the land described in the original bill in this cause. And the complainant having executed the bond required by said fiat, we therefore in consideration of the premises aforesaid do strictly enjoin and command you the said R. N. Archer and D. S. Ballew and all and every persons before mentioned under the penalty prescribed by law of you and every of your goods, lands and tenements to be levied to our use that you and every of you do absolutely desist from
18 further cutting and destroying timber, hauling the same away, making roads or in any other manner trespassing upon the lands mentioned in the original bill in this cause until the hearing of this cause in our said Court of Chancery.

Witness, Vastine Stickley, Clerk and Master of our said Court of Chancery at office the 1st Monday in June, 1895.

VASTINE STICKLEY, *C. & M.*

Endorsed: Came to hand June 30th, 1895. Executed by reading the within injunction to R. N. Archer, D. S. Ballew not to be found in my county. This July 3, 1895. Cost $1.00. J. E. Pickel, Sheriff.

Petition for Removal.

Filed August 31st, 1895.

STATE OF TENNESSEE:

Chancery Court, Monroe County.

CHARLES HEBARD
vs.
R. N. ARCHER and Others.

Original Injunction & Amended Bill.

Petition for Removal to the Circuit Court of the United States for the Eastern District of Tennessee, Northern Division.

To the Hon. T. M. McConnell, Chancellor, holding the Chancery Court in and for the County of Monroe and State of Tenn.:

Your petitioners R. N. Archer, D. S. Ballew, William Jenkins, John Jenkins, T. C. Carringer and Robt. Ore respectfully show to this Honorable Court that they are the defendants in the above entitled suit; that the said suit is of a civil nature, in equity, involving the title to land and the ownership to timber thereon and that the amount in dispute in said suit exceeds the sum or value of two thousand dollars exclusive of interest and costs that the controversy in said suit is between citizens of different states; that the complainant,
Charles Hebard was at the time of the commencement of the
19 said suit and still is a citizen of the State of Michigan, residing at Pequaming in said state; that your petitioner R. N. Archer, was at the time of the commencement of said suit and still is a citizen of the State of Ohio and of no other state, residing at Cincinnati in said state; that your petitioner the defendant D. S. Ballew was at the time of the commencement of said suit and still is a citizen of the State of Virginia and of no other state, residing near Sugar Grove in said state and that your petitioners the defendants William Jenkins, John Jenkins, T. C. Carringer and Robt. Ore were at the time of the commencement of said suit and are still citizens of the State of North Carolina and of no other state, residing in Graham County in said state and that your petitioners desire to remove this suit before the trial thereof into the next Circuit Court of the United States to be held in the Eastern District of Tennessee and the Northern Division thereof. And your petitioners offer herewith good and sufficient surety for their entering in the Circuit Court of the United States for the Eastern District of Tennessee, Northern Division, on the first day of its next session. A copy of the record in said suit and for paying all costs that may be awarded by the said Circuit Court of the United States if said Court should hold that this suit was wrongfully and improperly removed thereto, and your

petitioners therefore pray that the said surety and bond may be accepted and that the said suit may be removed into the next Circuit Court of the United States to be held in the Eastern District of Tennessee, Northern Division, in pursuance of the statutes of the United States in such case made and provided and that no further proceedings may be had therein when in this court, and your petitioners will ever pray, etc.

LUCKY, SANFORD & TYSON,
Sol's for Petitioners.

R. N. ARCHER.
D. S. BALLEW,
By R. N. ARCHER, *Att'y in Fact.*
WILLIAM JENKINS,
By R. N. ARCHER, *Att'y in Fact.*
JOHN JENKINS,
By R. N. ARCHER, *Att'y in Fact.*
T. C. CARRINGER,
By R. N. ARCHER, *Att'y in Fact.*
ROB'T ORE,
By R. N. ARCHER, *Att'y in Fact.*

20 STATE OF TENNESSEE,
County of Loudon, ss:

R. N. Archer makes oath that he is one of the petitioners above named and that the foregoing petition is true to the best of his knowledge, information and belief.

R. N. ARCHER.

Subscribed and sworn to before me this 29th day of August, A. D. 1895.

O. B. HALL,
Notary Public in and for Loudon County, Tennessee.

In the Chancery Court of Monroe County, Tennessee.

CHARLES HEBARD
vs.
R. N. ARCHER et al.

Original Injunction and Amended Bill.

Know all men by these presents, that we, R. N. Archer, of the City of Cincinnati, in the state of Ohio, D. S. Ballew, near Sugar Grove, in the state of Virginia, and William Jenkins, John Jenkins, T. C. Carringer and Robt. Ore, of the state of North Carolina, as principals, and E. P. McQueen, of the city of Loudon, state of Tennessee, and Edward T. Sanford, of the city of Knoxville, in the state of Tennessee, as sureties, are holden and stand firmly bound unto Charles Hebard, his heirs, representatives and assigns, we bind ourselves,

payment whereof well and truly to be made unto the said Char Hebard, his heirs, representatives and assigns, we bind ourselv our heirs, representatives and assigns, jointly and firmly by the presents. Upon condition, nevertheless, that whereas the said R. Archer, D. S. Ballew, William Jenkins, John Jenkins, T. C. Ca ringer and Robt. Ore, have filed their petition in the Chancery Cou of Monroe county, in the state of Tennessee, for the removal of certain cause therein pending, wherein the said Charles Hebard plaintiff and the said R. N. Archer, D. S. Ballew, William Jenkin John Jenkins, T. C. Carringer and Robt. Ore are defendants to th Circuit Court of the United States in and for the Eastern District Tennessee, Northern Division.

Now, if the said R. N. Archer, S. D. Ballew, William Jenkin John Jenkins, T. C. Carringer and Robt. Ore shall enter into th said Circuit Court of the United States on the first day of it
21 next session a copy of the record in said suit and shall wel and truly pay all the costs that may be awarded by sai Circuit Court of the United States, if said court shall hold that sai suit was wrongfully and improperly removed thereto, then thi obligation shall be void, otherwise it shall remain in full force and virtue.

In witness whereof, we, the said R. N. Archer, D. S. Ballew William Jenkins, John Jenkins, T. C. Carringer and Robt. Ore, as principals, and E. P. McQueen and Edward T. Sanford, as sureties, have hereunto set our hands and seals this the — day of August, A. D. 1895.

R. N. ARCHER. [SEAL.]
D. S. BALLEW, [SEAL.]
By R. N. ARCHER,
Att'y in Fact.
WILLIAM JENKINS, [SEAL.]
By R. N. ARCHER,
Att'y in Fact.
JOHN JENKINS, [SEAL.]
By R. N. ARCHER,
Att'y in Fact.
T. C. CARRINGER, [SEAL.]
By R. N. ARCHER,
Att'y in Fact.
ROBT. ORE, [SEAL.]
By R. N. ARCHER,
Att'y in Fact.
E. P. McQUEEN, [SEAL.]
EDWARD T. SANFORD. [SEAL.]

Approved & filed August 31st, 1895.

VASTINE STICKLEY, *C. & M.*

WEDNESDAY MORNING, *December 4th,* 1895.

Court met pursuant to adjournment, Hon. T. M. McConnell, Chancellor, &c., present and presiding, the minutes of yesterday were read and signed and the further business transacted.

In Chancery Court, Madisonville, Tennessee.

No. 1265.

CHARLES HEBARD
vs.
R. N. ARCHER et al.

The defendants in the above entitled cause having within the time provided by law filed their petition for the removal of this cause to the Circuit Court of the United States for the Eastern District of Tennessee, Northern Division and having at the same time offered their bond in the sum of five hundred dollars ($500.00)
22 with E. P. McQueen and Edward T. Sanford, good and sufficient sureties pursuant to the statutes and conditioned according to law: Now, therefore this court doth hereby accept and approve said bond and accept said petition and doth order that this case be removed for trial to the next Circuit Court of the United States for the Eastern District of Tennessee, Northern Division, pursuant to the statutes of the United States and that all other proceedings in this court be stayed to which action in removing said cause complainant excepts.

In Chancery Court, at Madisonville, Tenn.

CHARLES HEBARD
vs.
R. N. ARCHER et al.

Bill of Costs.

State Tax		$2 50
Co. Tax		2 50
Clerk & Master, V. Stickley, prosecution bond, .75	75	
Injunction bond, 1.00, filing orig. bill, .25	1 25	
Affd. on bill, .25, 2 copies of orig. bill, 1.50	1 75	
1 copy of orig. & amended bill	1 50	
3 subpœnas to answer, 2.25	2 25	
Issd. 2 injunctions, 1.00, 1 order publication, .50	2 50	
Copy of order, .25, filing amended bill, .25	50	
Aff. on same, .25, filing bond for removal, .75	1 00	
Filing petition for removal, .25, notice, .25	50	
Taxing up bill costs, .50, docketing, .30	80	
Order at Dec. term, 1895	25	
		13 05
Madisonville Democrat, non-resident notice		5 00

Depty. Sheriff W. N. Barr summoning 4 defts.....	4 00	
Depty. Sheriff serving injunction on 4 defts.....	4 00	
		8 00
Sheriff J. E. Pickel summoning 1 deft., 1.00, serving injunction, 1.00.....		2 00
		$33 05

Clerk & Master, V. Stickley:

This transcript, certificate & Seal & Postage..... $5 62

23 STATE OF TENNESSEE,
Monroe County, ss:

I, Vastine Stickley, clerk and master of the Chancery Court at Madisonville, Tennessee, do certify that the foregoing is a full, true and perfect transcript of the record and papers and bill cost up to date remaining in my office in the case of Charles Hebard vs. R. N. Archer, et als., No. 1265, in said court. Given under my hand and seal of office this 26th day of Dec., 1895.

VASTINE STICKLEY, *C. & M.*

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(Endorsed:) No. 1055. In the U. S. Circuit Court at Knoxville. Charles Hebard against J. A. Archie, et al. Transcript. Filed Jany. 13, 1896. H. H. Taylor, Clerk. By J. T. Carter, D. C.

STATE OF OHIO,
—— *County, ss:*

Personally appeared before me, —— ——, a notary public in and for said county and state, R. N. Archer, with whom I am personally acquainted and who made oath, that he is the defendant of that name in the suit brought by Charles Hebard against said defendant, R. N. Archer and others, in the Chancery Court of Monroe county, Tennessee, which has been removed to the United States Circuit Court for the Eastern District of Tennessee, Northern Division, by order of the chancellor of said court; that the said cause involves the title to about ten thousand acres of land claimed by complt. under a

Tennessee grant, and claimed by affiant under a North Carolina grant, from which affiant has derived title by various mesne
24 conveyances; that affiant is advised by his counsel that he has the better title to the land in dispute; that at the time this bill was filed he, Deft. Archer, had employed a force of about eight hands and had made preparations for cutting timber from the tract of land in dispute; that he had been to an expense in fitting out his hands with tools and provisions; that this affiant has entered into contracts to cut timber from said lands, about five million feet, and said contractors were on said lands at work carrying out said contracts; that said work has been stopped by the injunction herein and said contracts will be forfeited, and this affiant has paid a large amount of damages for the stoppage of said work, to wit: Fifteen hundred dollars, including expense of fitting out and hiring his own hands; that the value of said lands lie principally in its timber; that the only means of getting said timber out is by floating it down the Slick Rock creek and down the Little Tennessee River to Lenoir, Loudon County, Tennessee, where the affiant has a lumber mill, costing sixty-five thousand dollars, and equipped for sawing logs; that the tides in said river are very variable and that it is only once in every three or four years that sufficient tide is obtained to float down logs; that there has not been a high tide for more than two years and that there is every indication that there will be a good tide in the spring or winter of 1896; that if the injunction sued out by complt. in this cause remains in force, the affiant will not only lose the amount expended by him in fitting out his hands as aforesaid, but will lose the opportunity of floating his logs down the river on such tide and will probably not have another opportunity for several years; that the loss to affiant by the idleness of his mill and his inability to manufacture and use his timber at the present price will be at least ten thousand dollars and that the injunction bond for $500 given by complt. in this cause is grossly inadequate to cover the damages that will result to affiant by the injunction sued out on the same.

Therefore he prays that the court have such injunction bond fixed at the sum of fifteen thousand dollars.

R. N. ARCHER.

Sworn to and subscribed before me, this 10th day of Jan., A. D. 1896.

WADE CUSHING,
Notary Public in and for Hamilton Co.

(Endorsed:) Chas. Hebard vs. R. N. Archer, et al. Affidavit & Petition of R. N. Archer. Filed Jan. 27, 1896. H. H. Taylor, Clerk. By J. T. Carter, Dept. Clerk.

25 Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

Know all men by these presents: That Charles Hebard, as principal, and Charles Seymour and T. E. H. McCroskey, as sureties, are

held and firmly bound unto R. N. Archer and the other defendants in the below described cause in the sum of twenty-five hundred dollars, to the payment of which they bind themselves, each for himself and his heirs, executors and administrators firmly by these presents.

Sealed with our seals, and dated this 11th day of February, 1896.

The condition of the above obligation is such that whereas, Charles Hebard, citizen of the state of Michigan, having in the Chancery Court of Monroe county, in the State of Tennessee, filed a bill, and having obtained an allowance of an injunction as prayed for in said bill from said court, and said bill having been removed to the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee. Now, if the said Charles Hebard shall abide the decision of said court, and pay all moneys and costs which shall be adjudged against him in case the said injunction shall be dissolved, then these presents shall be void; otherwise to remain in full force.

CHARLES HEBARD. [SEAL.]
By T. E. H. McCROSKEY, *Att'y.* [SEAL.]
T. E. H. McCROSKEY, *Sec't'y.* [SEAL.]
CHARLES SEYMOUR. [SEAL.]

(Endorsed:) No. 1056. In the U. S. Circuit Court at Knoxville. Charles Hebard against D. W. Belding, et als. Injunction bond. Filed Feb. 11, 1896. H. H. Taylor, Clerk.

In the United States Circuit Court of the Eastern District of Tennessee, Northern Division.

In Equity.

CHARLES HEBARD
vs.
R. N. ARCHER et al.

Removed from Chancery Court of Monroe Co., Tenn.

Joint and several answer of the defendants, R. N. Archer, D. S. Ballew, William Jenkins, John Jenkins, T. C. Carriger and
26 Robert Ore, to the original and amended bills filed against them in the above entitled cause.

These defendants for answer to said original and amended bill, say:

I.

They deny that the defendant R. N. Archer and D. S. Ballew are residents of Loudon county, Tennessee, and show to the court that the defendant, R. N. Archer, was at the time of the commencement of this suit and still is a citizen of the state of Ohio, and of no other state, and that the defendant, D. S. Ballew, was at the time of the commencement of this suit and still is a citizen of the state of Vir-

ginia and of no other state. They further show to the court that William Jenkins, John Jenkins, T. C. Carringer and Robert Ore were at the time of the commencement of this suit and still are citizens of the state of North Carolina and of no other state.

II.

They deny that the complainant is the owner in fee of a body of mountain land containing over thirty thousand acres lying in the 17th Civil District of Monroe county, Tennessee, on the waters of Citico and Big and Little Slick Rock creeks as alleged in the original bill and will require strict proof of each and every allegation in the bill in regard to his alleged ownership thereof. The boundaries of said tract of land alleged to be owned by complainant not being set out in the bill, these defendants do not know in what its principal value consists, or what was the cause of complainant's alleged purchase, and will require strict proof of each and every material allegation in regard thereto.

III.

These defendants deny that within two weeks before the filing of the original bill in this cause, they had gone on any land belonging to complainant and specifically deny that they have gone upon any land belonging to complainant on the waters of Big and Little Slick Rock creeks and fractional township north, range six, east of the meridian, in the Ocoee Land District of the state of Tennessee, and upon sections 1, 2, 9, 10, 11, 12, 13, 14, 15, 22, 23, 26, 27, 34, 35 and 36 or any other sections in said fractional township, and deny that they are or were trespassing thereon by cutting down and preparing to haul away the valuable timber therefrom, or that
27 they are or were getting out logs and sawing same, or that they will have men at work cutting down and hauling away timber on any lands whatever of complainant in the state of Tennessee, or unless restrained by the fiat of the court they would have done any waste whatever upon any of complainant lands.

IV.

The facts as these defendants show to the court are as follows: The defendant, R. N. Archer, as trustee, is the owner of the timber on a tract of land in the county of Graham, state of North Carolina, which is bounded and described as follows: Beginning on a beech tree on the state line, where the Hangover Mountain strikes said line near a corner of No. 5051, and runs with the state line south, eighty (80) east, three hundred and twenty (320) poles to a mountain oak; then with the line of No. 4455 north forty (40) east, three hundred and twenty (320) poles to a Spanish oak; then north forty-five (45) east, twenty-eight (28) poles to two water oaks; then east ninety-two (92) to a large rock on the top of the second high peak of the Hangover; then down the ridge with its meanderings to a service tree on the bank of the Cheoah river; then down said river and its meanders to the Tennessee river; then down said river and its meanderings to a corner of No. 611 to the mouth of Slick Rock

creek and the state line; then up said line to the top of the mountain to a locust on said line; then with said line and its meanders to the beginning, being the same tract of land which was granted by the state of North Carolina to L. W. Gilbert and William H. Peet, by grant No. 2336, dated Dec. 19, 1860, and then lying and being in the county of Cherokee, Section No. 1035, in District No. 10.

Said tract of land lies entirely in the state of North Carolina, and the defendant, R. N. Archer, as trustee, has obtained a good and valid title to the timber upon said tract by mesne conveyances from the original grant-s of said tract of land from the state of North Carolina. Shortly before the original bill was filed in this cause, the defendant, R. N. Archer, made preparations for cutting the timber upon said land and employed his co-defendants for that purpose, the defendant, D. S. Ballew, being his superintendent and the other defendants being his contractors. At the time this bill was filed and injunction issued, the defendant, Archer, had already been to an expense of about $1,500.00 in making ready to cut the aforesaid timber from said tract of land, and had cut a portion of the same and was preparing to cut a larger portion of the balance, the defendant, Archer, being desirous of cutting the timber in order that it might be ready for removal down the
28 river to market on the spring tide of the year 1896. The only method of removal of said timber to market as the defendants show to the court is by said river. There has been no high tide in said river for two or three years and it has been impossible to remove said timber. There is every indication that there will be a high tide this coming spring. This timber is constantly falling in market value and if it is not cut and removed this spring, it is probable that it can not be removed for several years, until there is another high tide, and the injury that will be incurred by the defendant, Archer, will probably amount to several thousand dollars. Shortly after the employés of the defendant, Archer, went upon said land for the purpose of cutting this timber, the complainant through his agents unlawfully claimed that a portion of said land did not lie in the state of N. C., but that it lay in the state of Tennessee, and that it was owned by complainant, this claim being based, as these defendants are informed, upon an attempt to change the location of the state line between the states of North Carolina and Tennessee from its true location so as to throw a large portion of defendant Archer's timber land into the state of Tennessee, but these defendants are advised and will insist that the true location of the state line will throw all the lands in dispute into the state of North Carolina and not in the state of Tennessee, that the valid and superior title thereto is in the defendant, Archer, and that the complainant has no valid title to the same or any portion thereof, or the timber thereon.

The principal value of the land within the boundaries above set forth in this section consists in its timber.

V.

Further answering these defendants deny that the complainant has any title whatever to the tract of land described in section

four of this answer, as above set forth or to any interest therein, and deny that complainant has any right whatever to the possession of said land or any part thereof or the timber thereon, and these defendants will require the complt. to prove his title and right of possession by strict legal proof. Defendants deny also that they are guilty of any unlawful trespass on any portion of the said tract of land and show that the title to the timber on same is in the defendant, Archer, and not in the complainant.

VI.

Further answering the defendant, Archer, says, that the title to the timber on the land described in section four of this
29 answer is in him; that he has been in peaceable, continuous and adverse possession of said land, the timber thereon in person and by those through whom he claims for more than twenty years before this bill was filed, claiming title thereto; and this defendant relies upon and pleads said twenty years' possession; and also pleads that he had seven years' actual, continuous and adverse possession of said land and the timber thereon, for more than seven years before complainant's bill was filed and pleads the statute of limitation of seven years in bar of said bill.

Further answering the defendant, Archer, says, that before the bill was filed in this cause, he by himself and those through whom he claims had had seven years' actual continuous, adverse possession of the tract of land described in section four of this answer and the timber thereon, holding by conveyances, devises, grants and other assurances of title purporting to convey to said defendant, Archer, and those through whom he claims, an estate in fee, and this defendant says that he has a good and indefeasible title in fee to the timber upon the lands described in said conveyances, devises, grants and other assurances of title and he also pleads and relies upon the statutes of limitation of seven years in bar of said bill.

VII.

These defendants deny each and every material allegation of complainant's bill not hereinbefore specifically admitted or denied, and deny that complainant is entitled to the relief prayed for in his bill or to any other relief.

And now having fully answered these defendants pray to be hence dismissed with their reasonable costs.

LUCKY, SANFORD AND TYSON, *Sol's.*
R. N. ARCHER.
D. S. BALLEW.
By R. N. ARCHER, *Agt. and Att'y in Fact.*
WILLIAM JENKINS.
By R. N. ARCHER, *Agt. and Att'y in Fact.*
JOHN JENKINS.
By R. N. ARCHER, *Agt. and Att'y in Fact.*
T. C. CARRIGER.
By R. N. ARCHER, *Agt. and Att'y in Fact.*
ROBERT ORE.
By R. N. ARCHER, *Agt. and Att'y in Fact.*

(Endorsed:) No. 1055. Charles Hebard vs. R. N. Archer, et al. Answer to original and amended bill. Filed Feb. 18, 1896. H. H. Taylor, Clerk.

30

No. 1056.

CHAS. HEBARD
vs.
D. W. BELDING et al.

It appearing to the court that an order was entered in this cause on the 17th day of January, 1896, requiring the non-resident defendants to appear and plead, answer or demur to the bill on or before the 1st day of March, 1896, and directing the clerk of this court to make out and place in the hands of the United States marshals of the several districts of the residence of the said several defendants copies of said order; and that said copies be served by said marshals on said several defendants; and it further appearing to the court that the clerk has not issued said copies, but has delay the issuance of the same by the direction of the complainant; upon the application of the complainant now made, it is now ordered that the said defendants named in said order of January 17th, 1896, appear and plead, answer or demur to said bill on or before the first Monday of June, 1896, and it is further ordered that the clerk of this court make out and place in the hands of the United States marshals of the several districts of the residence of the said several defendants copies of this order and of said order of January 17th, 1896, and that said copies be served by said marshals on said several defendants.

(Endorsed:) No. 1056. Chas. Hebard vs. D. W. Belding, et al. Order for service on non-resident defendants. Entered M'ch 25, 1896, in Book P., p. 315.

Be it Remembered, That at a Circuit Court of the United States, Begun and Held for the Northern Division of the Eastern District of Tennessee, at the Federal Court Rooms in the City of Knoxville, within said District and the Sixth Circuit, on the Second Monday, it Being the 13th Day of January, A. D. 1906.

Present and presiding, the Honorable Charles D. Clark, judge of the United States District Court for the Eastern and Middle Districts of Tennessee, the following proceedings were had, towit:

FRIDAY MORNING, *January 17th*, 1896.

Court met pursuant to adjournment. Present and presiding, the
31 Honorable Charles D. Clark, judge of the United States District Court for the Eastern and Middle Districts of Tennessee.

No. 1056.

CHAS. HEBARD
vs.
D. W. BELDING et al.

In this cause the complainant by his solicitor moved the court for an order on the defendants requiring them to appear, plead, answer or demur, by a day certain to be designated, and that such order be served upon said defendants. Upon consideration of said motion, it appears to the court, from the bill which is sworn to, that the object of said bill is to remove cloud from the title of real property within the Northern Division of the Eastern District of Tennessee, and that the defendants are not inhabitants of said district, but that D. W. Belding, Henry Stix, Nathan Stix, Lewis Kohn, D. W. Hyman, Mary Bragg, and R. N. Archer are citizens and residents of Hamilton county in the Southern District of the state of Ohio; and that A. N. Belding, and M. M. Belding, are citizens and residents of the state of New York, in the Southern District of said state, in or near the city of New York; and that R. L. Cooper and J. W. Cooper are citizens and residents of Cherokee county, in the Western District of the state of North Carolina.

Therefore it is ordered that the said defendants appear, plead, answer or demur to said bill on or before the first day of March, 1896; and it is further ordered that the clerk of this court make out and place in the hands of the United States marshals of the several districts of the residence of the said several defendants copies of this order, and that said copies be served by said marshals on said several defendants.

UNITED STATES OF AMERICA,
Eastern District of Tennessee, Northern Division, ss:

I, H. H. Taylor, clerk of the Circuit Court of the United States, within and for the Division and District aforesaid, do hereby certify that the foregoing order is truly taken, and correctly copied from the journal of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Knoxville, Tenn., this 17th day of Jany. A. D. 1896.

H. H. TAYLOR, *Clerk*,
By HENRY O. EWING,
Dep. Clerk.

32 WEDNESDAY MORNING, *March 25th*, 1896.

Court met pursuant to adjournment.

Present and presiding, the Honorable C. D. Clerk, judge of the United States District Court for the Eastern and Middle Districts of Tennessee.

No. 1056.

CHAS. HEBARD
vs.
D. W. BELDING et al.

It appearing to the court that an order was entered in this cause on the 17th day of Jany., 1896, requiring the non-resident defendants to appear, and plead, answer or demur, to the bill on or before the 1st day of March, 1896, and directing the clerk of this court to make out and place in the hands of the United States marshals of the several districts of the residence of the said several defendants copies of said order, and that said copies be served by said marshals on said several defendants; and it further appearing to the court that the clerk has not issued said copies, but has delayed the issuance of the same by the direction of the complainant; upon the application of the complainant now made, it is now ordered that the said defendants named in said order of Jan'y 17th, 1896, appear and plead, answer or demur to said bill, on or before the first Monday of June, 1896, and it is further ordered that the clerk of this court make out and place in the hands of the United States marshals of the several districts of the residence of said several defendants copies of this order and of said order of Jan'y 17th, 1896, and that said copies be served by said marshals on said several defendants.

UNITED STATES OF AMERICA,
Eastern District of Tennessee, Northern Division, ss:

I, H. H. Taylor, clerk of the Circuit Court of the United States, within and for the Division and District aforesaid, do hereby certify that the foregoing order is truly taken, and correctly copied from the journal of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Knoxville, Tenn., this 25th day of March, A. D. 1896.

H. H. TAYLOR, *Clerk*,
By J. T. CARTER, *Dep. Clerk*.

33 UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

Received this writ at Cincinnati, Ohio, on the 26th day of March, A. D. 1896, and on the 30th day of March, at Cincinnati, O., I executed the same by serving personally on D. W. Belding, Henry Stix, Lewis Kohn, Mary A. Bragg and R. N. Archer; at the same time leaving with each of them a true copy hereof with all the endorsements thereon; I also served D. W. Hyman by leaving a true copy of this writ at his usual place of residence.

MICHAEL DEVANNEY,
United States Marshal S. D. O.
By JOHN G. HEHER, *Dept.*

Fees:

6 services	$12 00
Mileage	72
Return	30
	$13 02

On April 6th, 1896, I served a true copy of this writ on Nathan Stix, at his usual place of business at Cincinnati, Ohio.

MICHAEL DEVANNEY,
U. S. Marshal S. D. O.,
By W. E. MASON, *Deputy.*

Fees: $2.06.

Apr. 7, 1896, check sent U. S. mar. for 15.08.

J. D. CARTER, *D. C.*

UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

Received this writ at Cincinnati, Ohio, on the 17th day of April, A. D. 1896, and on the same day at Cincinnati, Ohio, I executed the same by leaving a true copy hereof with all the endorsements thereon on the desk, at the usual place of business of D. N. Hyman, he having no other quarters than desk room in this city; the said D. M. Hyman is the person named in the body of the order of the court as "D. W. Hyman."

MICHAEL DEVANNEY,
United States Marshal S. D. O.,
By R. P. SNYDER, *Dept.*

(Endorsed:) No. 1056. In the U. S. Circuit Court at Knoxville, Tenn. Chas. Hebard against D. W. Belding, et als. Order of court. Filed Apr. 7, 1896. J. T. Carter, dept. clerk.

34 Be It Remembered, That at a Circuit Court of the United States Began and Held for the Northern Division of the Eastern District of Tennessee, at the Federal Court Rooms in the City of Knoxville, within said District and the Sixth Circuit, on the Second Monday, It Being the 13 Day of January, A. D. 1896.

Present and presiding the Honorable Charles D. Clark, Judge of the United States District Court for the Eastern and Middle Districts of Tennessee, the following proceedings were had, to wit:

FRIDAY MORNING, *Jan. 17th,* 1896.

Court met pursuant to adjournment. Present and presiding the Honorable Charles D. Clark, judge of the United States District Court for the Eastern and Middle Districts of Tennessee.

No. 1056.

CHAS. HEBARD
vs.
D. W. BELDING et al.

In this cause the complainant by his solicitor moved the court for an order on the defendants, requiring them to appear, plead, answer or demur by a day certain to be designated, and that such order be served upon said defendants. Upon consideration of said motion it appears to the court, from the bill which is sworn to, that the object of said bill is to remove cloud from the title of real property within the Northern Division of the Eastern District of Tennessee, and that the defendants are not inhabitants of said district, but that D. W. Belding, Henry Stix, Nathan Stix, Lewis Kohn, D. W. Hymen, Mary Bragg and R. N. Archer, are citizens and residents of Hamilton Co. in the Southern District of the state of Ohio, and that A. N. Belding and M. M. Belding are citizens and residents of the state of New York, in the Southern District of said state, in or near the city of New York and that R. L. Cooper and J. W. Cooper are citizens and residents of Cherokee county in the Western District of the State of North Carolina.

Therefore it is ordered that the said defendants appear, plead, answer or demur to said bill on or before the 1st day of March, 1896; and it is further ordered that the clerk of this court make out and place in the hands of the United States marshals of the several districts of the residence of the said several defendants copies
35 of this order, and that said copies be served by said marshals on said several defendants.

UNITED STATES OF AMERICA,
Eastern District of Tennessee, Northern Division:

I, H. H. Taylor, clerk of the Circuit Court of the United States, within and for the Division and District aforesaid, do hereby certify that the foregoing order is truly taken, and correctly copied from the journal of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Knoxville, Tennessee, this Jan. 17, A. D. 1896.

H. H. TAYLOR, *Clerk*,
By HENRY O. EWING,
Dep. Clerk.

WEDNESDAY MORNING, *March 25th*, 1896.

Court met pursuant to adjournment.

Present and presiding, the Honorable C. D. Clark, judge of the United States District Court for the Eastern and Middle districts of Tennessee.

No. 1056.

CHAS. HEBARD
vs.
D. W. BELDING et al.

It appearing to the court that an order was entered in this cause on the 17th day of January, 1896, requiring the non-resident defendants to appear, and plead, answer or demur, to the bill on or before the 1st day of March, 1896, and directing the clerk of this court to make out and place in the hands of the United States marshals of the several districts of the residence of the said several defendants copies of said order, and that said copies be served by said marshals on said several defendants; and it further appearing to the court that the clerk has not issued said copies, but has delayed the issuance of the same by the direction of the complainant; upon the application now made, it is now ordered that the said defendants named in said order of Jan'y 17th, 1896, appear and plead, answer or demur to said bill, on or before the first Monday of June, 1896, and it is further ordered that the clerk of this court make out and place in the hands of the United States marshals of the
36 several districts of the residence of said several defendants copies of this order and of said order of Jan'y 17th, 1896, and that said copies be served by said marshals on said several defendants.

UNITED STATES OF AMERICA,
Eastern District of Tennessee, Northern Division, ss:

I, H. H. Taylor, clerk of the Circuit Court of the United States, within and for the Division and District aforesaid, do hereby certify that the foregoing order is truly taken, and correctly copied from the journal of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Knoxville, Tenn., this 25th day of March, A. D. 1896.

H. H. TAYLOR, *Clerk,*
By J. T. CARTER, *Dept. Clerk.*

Received March 28th, 1896.

Executed March 30th, 1896, by reading the within and delivering a true copy of the within orders of court to R. L. Cooper and J. W. Cooper, the defendants within named.

Fees $4.00 (due).

T. J. ALLISON,
U. S. Marshal,
Per J. M. VAUGHN, *D. M.*

April 7th, 1896, check sent U. S. mar. fee $4.00.

J. T. CARTER, *D. C.*

(Endorsed:) No. 1056. In the U. S. Circuit Court at Knoxville, Tenn. Chas. Hebard against D. W. Belding, et als. Order or court. Filed Apr. 7, 1896. J. T. Carter, Dept. Clerk.
Original.
For return see over. United States Marshal, received Mar. 27, 1896. No. 459, Statesville, N. C.

And afterwards, to wit, on the 27th day of May, 1896, a certain plea of R. N. Archer, one of the defendants, was filed in the clerk's office of said court, which said plea is clothed in the words and figures following, to wit:

37 In the Circuit Court of the United States for the Eastern District of Tennessee, Northern Division.

No. 1056. In Equity.

CHAS. HEBARD
vs.
D. W. BELDING et al.

The Plea of R. N. Archer, One of the Defendants, to the Bill of Complaint of Charles Hebard, Plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said plaintiff's bill of complaint mentioned and contained, to be true, in such sort, manner and form as the same are therein set forth and alleged, for plea to the whole of the said bill, says:

That on June 25th, 1895, the said present plaintiff filed his bill of complaint in the Chancery Court of Monroe county, Tennessee, against this defendant under the name of "J. A. Archie," and others, seeking to have the title of the said plaintiff declared superior to that of this defendant to the same tract of land to which he now claims superior title by his present bill, and to have this defendant enjoined from cutting timber thereon, and prayed relief against this defendant in the same manner and for the same matters and to the same effect as the said plaintiff now prays by his present bill against this defendant; that subsequently said present plaintiff amended said bill of complaint so as to make this defendant a party thereto by his proper name, and this defendant was duly served with subpœna to answer said former bill; that this defendant and the other defendants to said former bill filed a petition in said chancery court of Monroe county, for the removal of said cause to this Honorable Court, and the said cause was, by proper proceedings, removed from said Chancery Court to this Honorable Court, the transcript in said cause from said Chancery Court having been filed in this Court pursuant to said removal on Jan'y 13, 1896; that this defendant and the other defendants to said former bill have appeared and put in their answer to the said former bill, and the said former bill is now

at issue, and as this defendant avers, now remains depending and as of record in this Honorable Court, said suit being as yet undetermined; that so far as the subject matter of the controversy between Compl't and this defendant is concerned, this present suit is for the same subject matter as the former suit, the present plaintiff
38 in this present suit seeking no relief against this defendant which is not embraced in the pleadings in said former suit, this present plaintiff having in his present bill shown the dependency of said former suit, and having specifically averred in his present bill "that the same questions raised in said former cause are also raised in this, and the same parties in interest are concerned;" all of which matters and things this defendant doth aver and pleads the said former bill, answers, and the several proceedings in said former suit in bar to the said plaintiff's bill against this defendant; and humbly demands the judgment of this Honorable Court, whether he shall be compelled to make any further or other answer thereto; and prays to be hence dismissed, with his costs and charges in this behalf sustained.

EDWARD T. SANFORD,
Solicitor and of Counsel for the Defendant R. N. Archer.

KNOXVILLE, TENNESSEE.

I hereby certify that the foregoing plea is in my opinion well founded in point of law. Knoxville, Tennessee, May 27th, 1896.

EDWARD T. SANFORD,
Of Counsel for Defendant R. N. Archer.

STATE OF OHIO,
Hamilton County:

R. N. Archer, being duly sworn, deposes and says: I am the above named defendant. The foregoing plea is true in fact, and is not interposed for delay.

R. N. ARCHER.

Subscribed and sworn to before me this 26th day of May, 1896.

[SEAL.]

WADE CUSHING,
Notary Pubilc, Hamilton County, Ohio.

Filed May 27th, 1896. J. T. Carter, Deputy Clerk.

And afterwards, to wit, on the 30th day of May, 1896, J. W. Cooper, one of the defendants, filed a certain answer in the Clerk's office of said Court, which said answer is clothed in the words and figures following, to wit:

39 Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

CHARLES HEBARD, Plaintiff,
vs.
D. W. BELDING, M. M. BELDING, A. N. BELDING, HENRY STIX, Nathan Stix, Lewis Krohn, D. M. Hyman, Mary Bragg, R. L. Cooper, J. W. Cooper, and R. N. Archer, Defendants.

The answer of J. W. Cooper, one of the above named defendants to the Bill of Complaint of the above named plaintiff, says:

In answer to the said bill as follows:

This defendant does not know the extent of claim of said complainant to lands owned by him, but defendant avers that said claimant is not the owner of any of the lands hereinafter described as belonging to this defendant, nor in any lands which this defendant claims an interest in with the other defendants named in plaintiff's said bill, and this defendant denies that complainant has any tenants on that part of said land claimed by the defendants in said action as alleged in the said bill of said complainant (except he may have put some one in possession of some part thereof within the last three years, but if so that the same has been done secretly.)

This defendant denies that complainant has any grants duly and regularly issued for any of the lands owned or claimed by the defendants in this action. On the contrary, if the complainant has any grant or grants for any of the land claimed by the defendants the same were issued without consideration, and with full knowledge by the grantees that the said defendants had title, and held possession of the land claimed by the defendants, and that the said grants of said complainant were obtained by the said grantees in fraud of defendants' title, and as a mere scheme for making money, regardless of the wrong done or the way and manner done.

That the defendants claim and own all that part of the said lands bounded and described as follows: Beginning on a beech tree on the state line where the Hangover Mountain strikes said line and near a corner of No. 5051, and runs with said line of No. 5051 S. 80 degrees E. three hundred and twenty poles to a mountain oak; then with the line of No. 4455 N. 40 degrees E. three hun-
40 dred and twenty poles to a Spanish oak; then N. 45 degrees E. 20 poles to two water oaks. Then east ninety-two poles to a large rock on the second high peak of the Hangover Mountain. Then down the ridge with its meanders to a service tree on the bank of the Cheoah river. Then down said river with its meanders to the Tennessee river. Then down the Tennessee river to a corner of No. 611 at the mouth of Slick Rock creek and the state line. Then up with said line to the top of said mountain to a locust on said line. Then with said line and its meanders to the beginning; containing 14,800 acres, more or less.

That it is not true that the Slick Rock creek has its source west of the main leading mountain along which runs the state line

between North Carolina and Tennessee. That on the contrary, the Slick Rock Creek has its source and its whole length on the North Carolina side of main mountain, along the top of which is the Littie Fodder Stack and Big Fodder Stack, so called, which Little Fodder Stack knob or peak is some three miles northwest from the mountain called Hangover Mountain.

That the state line is plainly marked by the commissioners who ran the same in 1821, from the Little Fodder Stack, so-called, to the Unacoi or Unaka Mountain, as this defendant is informed and believes. That the line so marked from the Little Fodder Stack to the intersection of the Hangover Mountain is about three miles and the course is —. That the Hangover (so-called) on the Hangover Mountain is seven hundred and fifty-two poles, and nearly a due east course from the said state line, as shown by the angles and the lines of defendants' deeds and grant. That to follow the Hangover Mountain and its main heights will end at the Cheoah river, 6 miles above Slick Rock, and not at the Tennessee river. That the Hangover top, the Little Fodder Stack top and the place of intersection of the Hangover Mountain and the state line mountain form a triangle; that to follow the state line mountain from said intersection by way of the Fodder Stack toward the Tennessee river, the same ends about one hundred and fifty yards below the mouth of Slick Rock creek at the Tennessee river, which point is about seven miles above the old Indian town, Tallassee, and that is the only line which could be run to agree with the line described in the survey of 1821.

That to cross the Tennessee river one-half a mile above the Slick Rock creek a line from there could not reach the Little Fodder Stack and Big Fodder Stack without running a line nearly due west, and crossing both Big and Little Slick Rock creeks,
41 and then to go by Hangover would require another southeast line crossing both creeks again, and would be leaving the plain marked line which has been recognized by the citizens of North Carolina and many of the citizens of Tennessee for the last forty years, and as defendant is informed and believes the said line has been known and recognized by citizens of both states since ran in 1821. That the said line does not cross the Tennessee river one-half mile above the mouth of Slick Rock creek, but on the contrary that it does cross the said river below the mouth of Slick Rock creek.

That it is not true that defendant does insist that the said line does cross said river one-half mile or one mile below said creek, and then follow low ridges as alleged in complainant's bill, but it is true that defendant does claim that the said line does cross said river just a little below the mouth of said creek, and that it does run thence to the top of and with the main height of the said mountain, and that it does follow the same, running over the little and big Fodder Stack tops with the old marked line ran by the commissioners in the year 1821, as aforesaid.

And which said line was run by commissioners of the state of North Carolina, appointed under act of the general assembly of the state of North Carolina at its session of 1893. Ratified the —

day of —, 1893. That the argument made by complainant stated as first, second, third, are all denied except that the said Hangover Mountain on the North Carolina side about 2½ miles from the state line is very high, and is perhaps some higher than any of the state line mountains northwest of it.

The statement made in complainant's bill that the state line as claimed by defendants from the Strutton Ball runs off at about right angle in a northwest course is all untrue; on the contrary, from the Strutton Bull to the Tennessee river, running with the main height (and over the Rock Stack, Big & Little Fodder Stacks) is much of it nearly straight, *which* there are some angles but not as alleged by the complainant, neither could a line be run terminating at Citico except by leaving the state line on the main heights and running off in the direction of the Tennessee settlements, which could be done in the same way as to leave the state line and run off in direction of Robbinsville, of Graham county, North Carolina, nearly an east course over the Hangover Mountain, which defendant would suppose the complainant and his attorneys of record would be glad to have adopted, and done to the end that the attention of the court could be diverted from the wrong done or attempted to be done by the complainant's grantees.

42 Defendant denies that it is necessary to follow different ridges to reach the said river on the line claimed by the defendants.

The defendant admits the treaty made by the United States with the Cherokee tribe of Indians in 1835, not in 1836, but defendant is not sufficiently informed to admit or deny what act was passed by the legislature of the state of Tennessee, nor of what surveying was done thereunder. But defendant does aver that the lands on Slick Rock Creek do not belong in the state of Tennessee; that the said land has ever been recognized as lying in the state of North Carolina.

That the said lands were made the subject of purchase under the laws of North Carolina in 1836, later on in 1851 and the residue thereof were made subject of general entry in 1852-53. That the citizens of North Carolina and the citizens as well of the state of Tennessee entered and purchased the said lands on the waters of Slick Rock creek under the said laws of North Carolina, as will be shown on the trial of this action.

That the present claim of the claimant is but a trumped up claim, and seemingly unscrupulously done for what could be got out of same by sale under said grants, and in utter disregard of the rights of the defendants who were owner- of same, and in the open, adverse possession of same when complainant's grantors *of* obtained grants for same.

This defendant denies that complainant has for many years had tenants on any of the lands claimed by the defendants in this action.

That it is not true that complainant is in the sole and undisturbed possession of any part of the said lands covered by the titles of the defendants. And this defendant asserts that he and his co-defend-

ants are and have been in the actual, open and notorious, adverse possession of the tract of land described in the answer, holding and claiming the same under known and visible lines and boundaries since the year 1883, under entry made in 1853 and grant issued in 1860. That this defendant disclaims any title or possession in any of the lands claimed by said complainant which are not within the boundary of the description set out in this answer in this action.

That all the other allegations contained in the bill of said complainant which are not specially mentioned in this answer and specially admitted by this answer are hereby, by this defendant specially denied upon his best information and belief.

And for another and further answer to the complainant's said bill, and as plea to the jurisdiction of the court in this action, this defendant says:

43 That one Thomas F. McGarry, of Grand Rapids, of the state of Michigan, and who is a resident and citizen of said state of Michigan, and who was a citizen of said state of Michigan at the time of bringing of plaintiff's action and the filing his said bill is owner and tenant in common with defendants in this action (other than the defendants R. L. Cooper and R. N. Archer) in all the lands owned and claimed by said defendants as tenants in common. That the interest of said Thomas F. McGarry is one undivided one-twelfth part in said lands, purchased by him by deed in fee on the — day of — 189-.

That the said Thomas F. McGarry is an indispensable party to any action in which the title and rights of parties owning and claiming title to the said lands described in the answer of this defendant shall come in question.

That as shown by complainant's said bill he, complainant and said T. F. McGarry are both citizens of the same state, and not citizens of different states, and thus not within the judicial power of the United States as defined by the constitution, so as to give to this court jurisdiction of this action to try the same.

That the want of jurisdiction in this court to make any decree in this action affecting the rights of the defendant is hereby specially pleaded. That the court should not entertain further jurisdiction of this action.

Wherefore defendant asks the judgment of the court as follows:

I. That plaintiff's complainant's action be dismissed.

II. For costs.

J. W. COOPER.

(Endorsed:) No. 1056. Chas. Hebard vs. D. W. Belding, et al. In the United States Circuit Court at Knoxville. Answer of J. W. Cooper. Filed May 30, 1898. J. T. Carter, Deputy Clerk.

And afterwards, to wit, on the 10th day of August, 1896, the joint and several answer of D. W. Belding, M. M. Belding, A. N. Belding, Henry Stix, Nathan Stix, Louis Krohn and D. M. Hyman, seven of the defendants, was filed in the clerk's office of said court, which said answer is clothed in the words and figures following, to wit:

44 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Tennessee, Northern Division.

In Equity.

CHARLES HEBARD, Complainant,
vs.
D. W. BELDING, M. M. BELDING, A. N. BELDING, HENRY STIX, Nathan Stix, Lewis Krohn, D. M. Hyman, Mary Bragg, R. L. Cooper, J. W. Cooper and R. N. Archer, Defendants.

The Joint and Several Answer of D. W. Belding, M. M. Belding, A. N. Belding, Henry Stix, Nathan Stix, Louis Krohn, and D. M. Hyman, Seven of the Above-named Defendants, to the Bill of Complaint Filed by the Above-named Complainant.

These defendants, now and at all times hereafter saving and reserving unto themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as these defendants are advised it is or are material or necessary for them to make answer unto, answering say:

1. These defendants, D. W. Belding, Henry Stix, Nathan Stix, Louis Krohn and D. M. Hyman, answering for themselves, say that they are citizens of the state of Ohio.

2. This defendant, M. M. Belding, answering for himself, says that he is a citizen of the state of New York.

3. This defendant, A. N. Belding, answering for himself, says that he is a citizen of Connecticut.

4. These defendants, jointly and severally, deny that the complainant, Charles Hebard, is the owner in fee of forty thousand acres of land lying in the Northern Division of Monroe County, south of the Little Tennessee river, and adjoining the North Carolina state line; deny that said state line is the eastern boundary of said forty thousand acres owned by complainant; deny that the said complainant has tenants scattered over the said land, who have small enclosures in the coves and valleys thereof; deny that the said land is derived from the state of Tennessee by grants duly and regularly issued and mesne conveyances and descent terminating in complainant.

45 5. That these defendants admit that they are tenants in common with others, who have a large body of land containing twenty thousand acres or more, in Graham county, North Carolina, some portions of which are bounded by the state line between North Carolina and Tennessee; admit that these defendants claim to derive title by and from the state of North Carolina in the lands so owned by them; deny that until this suit was brought there was ever any contention between these defendants and complainant

as to the true location of the state line; admit that the amount of lands owned by these defendants and others, derived from the state of North Carolina and now sought to be reached by complainant, amounts to about eight thousand acres of valuable timber lands, and aver the value thereof to be of the sum of ten dollars ($10.00) per acre for lumber, and is also valuable for agricultural and mining purposes.

6. These defendants, upon information and belief, deny that within two weeks before the filing of the original bill in this cause, any of the defendants went upon any lands owned by complainant and specifically deny that these defendants ever authorized, licensed or empowered the said Robert N. Archer, or anybody working by or under him, to go upon any lands belonging to complainant; and upon information and belief, deny that any trespasses were made upon the complainant's lands by said Archer or his servants; deny that any timber was cut down, any logs hauled away, or any waste committed upon the lands of complainant by said Archer or his servants, or anybody acting under authority or conveyance from these defendants.

7. Deny that the State line between North Carolina and Tennessee, running southwesterly from the beginning, crosses the Tennessee River about one-half mile above and nearly east of the mouth of the Slick Rock Creek; deny that the State line was ever established as set out in said bill of complaint; deny that the Slick Rock Creek basin, to wit, all lands drained by said creek, are entirely within the boundary of the State of Tennessee; admit that defendants claim and insist that all the lands included in the Slick Rock Creek basin, and tributary to its waters, are within the boundaries of the State of North Carolina.

8. These defendants further answering, aver that heretofore, to wit, during the reign of Queen Elizabeth, the land in question, and the lands included within the boundaries of the State of North Carolina and Tennessee, were granted by charter to Sir Walter Raleigh; that during the year 1603, King James I of Eng-
46 land, conveyed by charter all such lands, including the lands in question, to a company known as the London Company; that in the year 1663, by royal grant of Charles II, King of England, such lands, including the lands in question, were again conveyed to Lord Clarendon and other noblemen, as successors of the said London Compny, which said grant comprised the territory between the Atlantic and Pacific Oceans, between the 29th degree and the 36th degree, 30 minutes north latitude, and which said grant covered a sea coast line of four hundred and fifty (450) miles; that in the year 1729, the lands in question, and other lands, became subject to the legal jurisdiction of King George II of England, by purchase and grant from the aforesaid London Company, and the territory so acquired was divided into the provinces of North and South Carolina respectively; that during the period from 1754 to 1769, many inhabitants of the colony of North Carolina made settlements along the Tennessee River, as well as along the Wautaga and Holston Rivers; that from 1769 to 1777, these settlements were

known as the Wautaga Association; that by treaty of Fort Stanwix, dated November, A. D. 1768, the British Crown acquired from the Six Nations "all that country south of the Ohio as far as the Cherokee or Tennessee River, excepting such lands as lay south of the Great Kenhawa, which was expressly reserved by the Cherokees as part of their hunting ground," and hereinafter described in paragraph 9 of this answer, as being the "Cherokee lands"; that the lands so reserved by the said Cherokees was south of the said Wautaga Association territory; that during the year 1776 a constitution was adopted by the State of North Carolina, and the said state became one of the thirteen original states; that the Wautaga Association aforesaid was represented in the assembly of the said State of North Carolina in the year 1776; that it formed a part of the State of North Carolina from the year 1776 to the year 1784; that in the year 1785, the State of North Carolina passed an Exclusion Act, whereby the said Wautaga Association was cut off from the said State of North Carolina and from participation in its legislative affairs; that the said Exclusion Act was soon thereafter repealed by the Legislature of North Carolina, and the said Wautaga Association again subjected to the jurisdiction of the said State of North Carolina; that during the year 1785 the said Wautaga Association disputed the jurisdiction of the State of North Carolina over the territory comprised in the counties of Sullivan, Green and Washington, and attempted to form a separate state under the name of the State
47 of Franklin; that the so-called State of Franklin continued to maintain a separate government until 1789, when it surrendered its jurisdiction to the State of North Carolina; that in the year 1789 the State of North Carolina ceded to the General Government certain of its territory lying west of the Unaka, Smoky, Bald and Iron Mountains of the Appalachian Range, which said territory was organized by the General Government during the year 1790 into the Territory of the United States South of the Ohio; that in the year 1794, the General Government organized the territory of Tennessee out of part of the land so ceded by the State of North Carolina; that in the creation of said Territory of Tennessee, the mountains aforesaid were recognized by the Federal Government as the eastern boundary of said territory; that they were also recognized as such boundary by the said Territory of Tennessee; that such boundary would place the land involved in this suit within the State of North Carolina; that in the year 1796, the said Territory of Tennessee was organized into a state, and as such from thence hitherto continued to acknowledge the correctness of the boundary as aforesaid; that in the year 1834, a commission was appointed by Congress to determine and report upon the boundary between North Carolina and Tennessee; that such commission recognized the aforesaid mountains as the natural boundary between said states, and recommended their adoption as such; that such recommendation went into effect; that by such act the boundary between North Carolina and Tennessee placed the land in controversy in this suit within the State of North Carolina; that in all the Charters, Grants, Treaties and Cessions aforesaid, the lands in question involved in this

suit, have always been recognized as being within the jurisdiction of the State of North Carolina.

9. That on December 29th, 1835, the lands in question together with other lands not involved in this action, were acquired by North Carolina by the treaty of New Echota from the Cherokee Indians; that the lands thus acquired were generally known and commonly called the "Cherokee Lands;" that the treaty by which such lands were acquired was ratified May 23, 1836.

10. That soon after the ratification of the New Echota treaty, and during the year 1836, the State of North Carolina, by its General Assembly, provided for the survey and sale of a portion of the Cherokee lands; that the Governor of the state was authorized and directed to give notice by proclamation in all papers published in the City of Raleigh, and in such other papers published in
48 the States of South Carolina, Georgia, Virginia and Tennessee, of the time and place of sale, as he might deem advisable; that it was further provided that such lands should be exposed at public sale and sold to the highest bidder, under the superintendence of the State Land Commissioner; that these defendants are informed and believe, and upon such information and belief aver the fact to be, that the Governor of the State of North Carolina, pursuant to the authority of the General Assembly above stated, gave notice by proclamation in papers published in the City of Raleigh, and in papers published in South Carolina, Virginia and Tennessee, of the time and place of the sale of such lands.

11. That in 1852 the State of North Carolina, by its General Assembly, by act provided that the residue of the Cherokee Lands in Cherokee County, should be subject to entry by any one, at the price and within the time named therein; that after the acts above mentioned went into effect, and after their provisions were complied with by the state authorities, and from the year 1838 until 1883, the Cherokee lands were so sold to the highest bidders, without limit or restriction of any kind, on account of the residence or citizenship of the buyers.

12. That in 1854, the State of North Carolina, by its General Assembly, provided that the Cherokee Lands were excepted from the provisions of the general law of the state concerning entries and grants, but that the said Cherokee lands were subject to be disposed of in accordance with the laws enacted with special reference thereto, and these provisions remained in force until on or about the 2d day of March, 1883, when the disposition of the Cherokee lands was, for the first time, made subject to the general law relating to "entries and grants."

13. That during the years, 1853, 1854, 1855 and 1856 the lands involved in this suit, being then — the corporate limits and jurisdiction of the State of North Carolina, were duly entered, and such proceedings were thereafter had and taken that the State of North Carolina, in keeping with the provisions of its law, and in harmony with its various interpretations thereof, and in recognition of the boundary line existing between it and the state of Tennessee, granted said lands to Peet & Gilbert; that the original enterers were A. W.

Colvard, Stephen Rhea, and others, who were citizens of Cherokee County, North Carolina, who caused the same to be duly surveyed, and gave their bonds, with good security for the purchase money of the same, as required by Chapter 119 of the Public Acts of 1852; that subsequently and for a valuable consideration, the
49 original enterers duly assigned their entry, rights and certificates of purchase to W. H. Peet and S. W. Gilbert, who were non-residents of the State of North Carolina, but were citizens of one of the other states; that subsequently, said Peet & Gilbert, having paid to the State of North Carolina the amount due for said lands, and thereby duly discharging the bonds of the original enterers, grants of the lands in question, together with other lands, were duly issued by the Secretary of the State of North Carolina to them.

14. That these defendants claim title through certain mesne conveyances, which are not questioned, from said W. H. Peet and S. W. Gilbert; that they purchased the same, under an order of the court, from the State of North Carolina, exercising jurisdiction in the premises; that they purchased the same in good faith, paying therefor a valuable consideration, and without notice or knowledge of any claim on the part of the State of Tennessee, or anybody holding, or assuming to hold any grants therefrom; that said lands were claimed as being within the territorial limit of Tennessee; that since the time said lands were respectively granted, these defendants, with other co-tenants, and those under whom they claim, have been in the actual, open, notorious and visible possession thereof.

15. That the General Assembly of North Carolina authorized the Governor of said State to appoint a competent commission on the part of said state, to act with the surveyors or commissioners appointed or to be appointed by any of the contiguous states of Virginia, South Carolina, Georgia or Tennessee, to re-run and remark by some permanent monument at convenient intervals, the boundary line between the State of North Carolina and any of said states; that under and by virtue of such provision, commissioners were appointed, and the boundary line between Tennessee and North Carolina was duly run by the commissioners so appointed by the State of North Carolina; that said line so run and located by said commissioners, was the original established line between North Carolina and Tennessee, and which placed the lands in controversy within the State of North Carolina.

16. That the boundary line between North Carolina and Tennessee, which constitutes the boundary line between complainant's land and the land of these defendants and others, and which places the land in controversy within the State of North Carolina, has been recognized by both states as constituting the boundary line
50 thereof for nearly one hundred years; that it is for this reason that the State of Tennessee did not survey or cause to be surveyed or granted, prior to 1883, the lands in controversy as belonging to the State of Tennessee.

17. That the lands in controversy are within the corporate limits and jurisdiction of the State of North Carolina, and that the State of North Carolina has exercised such jurisdiction since the State

of Tennessee was organized and admitted into the Union, and that the State of Tennessee has acquiesced in such jurisdiction, as well as in the boundary lines which placed the lands in controversy within the jurisdiction of the State of North Carolina ever since the organization of the State of Tennessee, and its admission into the Union.

18. That the maps in the land department of the United States, and that the recognized and authorized maps of North Carolina and Tennessee, place the boundary line between Tennessee and North Carolina here in controversy, substantially as claimed by these defendants, and thereby locate the same land as being within the State of North Carolina, and not within the State of Tennessee.

19. And these defendants beg leave to refer, as substantiating the facts aforesaid, to:

(*a*) The original charter from Queen Elizabeth to Sir Walter Raleigh.

(*b*) The original grants of James I and Charles II to the London Company and its successors.

(*c*) The purchase of said lands from said London Company by George II.

(*d*) The original treaty of Fort Stanwix and the reservations therein contained, of the Cherokee Lands.

(*e*) The diplomatic correspondence concerning said charters and grants, its locations and boundaries.

(*f*) The compact between the thirteen original colonies.

(*g*) The cession of the land to the General Government, its subsequent cession to the Territory of Tennessee, the formation of that state, and the admission thereof into the Union.

(*h*) The action of each state in fixing the boundaries thereof, between North Carolina and Tennessee.

(*i*) The reports of such surveyors or commissioners appointed to re-run and re-mark, as well as to run and mark the boundary line between North Carolina and Tennessee.

(*j*) The maps of each state, and the maps in the Land *of* War Departments, and the recognized official maps, plats, plans and diagrams, if any, relating to said boundary line.

51 (*k*) The exercise of corporate authority and jurisdiction by the State of North Carolina, over the lands in controversy, since the admission of Tennessee into the Union.

(*l*) The treaty with the Cherokee Indians and the correspondence relating thereto, the sequestration of the Cherokee lands and the other lands of the State of North Carolina, the special laws relating to the Cherokee lands, so-called, including the lands in controversy.

(*m*) The proclamation of the Governor of North Carolina advertising said Cherokee Lands in North Carolina for entry and sale.

(*n*) The granting and selling of such lands and issuing patents therefor, to actual enterers and bona-fide purchasers.

(*o*) The acquiescence of Tennessee on the exercise of such jurisdiction, and their surveying, granting and selling such lands, including the lands in controversy, as well as the long period of such acquiescence, the possession by these defendants and their co-tenants and those under whom they claim, since the lands were first open

to entry and settlement, the long period of acquiescence in such ownership, and the exercise of such control.

(*p*) The payment of taxes upon such lands to the State of North Carolina by these defendants and their co-tenants, from the time said lands were originally sold until the present time.

(*q*) the absence of any tax having been collected upon the lands in controversy by the State of Tennessee, during the long period of the exercise of jurisdiction by the State of North Carolina.

20. That after these defendants' title to said lands had become perfected, fixed and unalterable, except by their own acts, or operation of law, and after the General Assembly of North Carolina had provided that "from and after the first day of November, 1883, the Cherokee Lands shall be subject to entry under the same rules and regulations as are prescribed in the chapter entitled, 'Entries and grants for the other public lands of the state,'" then the complainant's grantors, H. N. and T. E. H. McCroskey, entered upon the lands so belonging to these defendants and their co-tenants, in the State of North Carolina, being the lands in controversy, and assumed to locate the same as citizens of Tennessee, and as lands belonging to the State of Tennessee; that the complainant claims title to the land in controversy, by virtue only of conveyances from such unwarranted enterers.

21. That the State of Tennessee has no title to the lands in controversy; that the enterers of said lands as belonging to the
52 State of Tennessee, obtained no title thereto; that the complainant, claiming through such enterers, obtained no title thereto.

22. That these defendants are informed and believe, and upon such information and belief aver the fact to be, that the solicitors for the complainant are the original enterers of said land in the State of Tennessee, and that they were not good faith enterers and good faith purchasers and holders.

23. And further answering, these defendants say, that the title to the land described in the bill is in them; that they have been in peaceable, continuous, adverse possession thereof, in person and by those through whom they claim, for more than twenty years before complainant's bill was filed, claiming title thereto in fee; and should the Court hold the lands in dispute to lie in Tennessee, these defendants rely on and plead said twenty years' possession; and also plead they have had seven years' actual, continuous, adverse possession to said land for more than seven years before complainant's bill was filed; and should the Court hold the lands in dispute to lie in Tennessee, they plead the statute of limitations of Tennessee of seven years, in bar of said bill.

24. And further answering, these defendants show that they had in person, and those through whom they claim, actual, continuous and adverse possession of the land described in Complainant's bill, holding by conveyances, devises, North Carolina grants and other assurances of title, purporting to convey to these defendants an estate in fee; and these defendants show that they had a good and indefeasible title in fee to the lands in question, in and through said deeds, and other assurances of title; and in the event the Court

should hold the lands in dispute to lie in Tennessee, they also plead and rely on the Statute of Limitations of Tennessee of seven years, in bar of said suit.

25. That these defendants, and their co-tenants, and those under whom they claim, have been in the actual possession of the lands involved in this suit for more than twenty years, and hereby invoke the protection of the Statute of Limitations, and they specifically plead and rely upon the North Carolina Statute of Limitations of seven (7) and twenty (20) years in bar of this suit.

26. And these defendants further answering say that they deny any and all other matter or thing in said bill contained, material or necessary for them to make answer unto, and not herein or hereby well or sufficiently answered unto, confessed and avoided,
53 traversed or denied, either to the knowledge and belief of these defendants; all of which matters and things these defendants are ready to verify, maintain and prove as this Honorable Court shall direct, and humbly pray that said bill may be dismissed as to these defendants, with their reasonable costs and charges in this behalf most wrongfully sustained; and that their title to the lands in controversy may be affirmatively adjudicated and determined.

M. M. BELDING,
A. N. BELDING,
D. W. BELDING,
LOUIS KOHN,
D. M. HYMAN,
Per E. LEMON,
Att'y-in-Fact.
HENRY STIX,
Per ERNST TROY,
Att'y-in-Fact.
NATHAN STIX.

T. F. McGARRY &
G. E. NICHOLS,
Solicitors for Defendants, M. M., A. N. and D. W. Belding, Henry & Nathan Stix, Louis Kohn and D. W. Hyman.
LUCKY, SANFORD & TYSON,
Of Counsel.

Filed Aug. 10, 1896. J. T. Carter, Deputy Clerk.

CHAS. HEBARD
vs.
D. W. BELDING et als.

In this cause the complainant, by his solicitor, moved the Court to refer the plea of the defendant, R. N. Archer, to a Special Master, for a report as to the truth and sufficiency of said plea; and it appearing to the Court that the said plea of the said R. N. Archer, presents and pleads that, on June 25th, 1895, complainant filed his bill in this cause, the Court is pleased to refer the said plea to Lewis

matters and to the same effect, as the said complainant prays by his bill in this cause, the Court is pleased to refer the said plea to Lewis Tillman as Special Master, who will examine and report instanter whether said plea is true and sufficient as a defense to complainant's bill; and the said Lewis Tillman is hereby appointed Special Master for that purpose.

Enter.

CLARK, J.

54 (Endorsed:) No. 1056. In the U. S. Circuit Court at Knoxville, Chas. Hebard against D. W. Belding et al. Order of reference. Ent'd Journal P, p. 422. Filed 14 day of Aug., 1896. J. T. Carter, Deputy Clerk.

In the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee, at Knoxville.

No. 1056.

CHAS. HEBARD
vs.
D. W. BELDING et als.

In this cause complainant, by his solicitor, moves the Court for a decree pro confesso against the defendant, R. L. Cooper, and it appearing to the Court that on March 25, 1896, an order was made in this cause directing and requiring the said R. L. Cooper to appear and plead, answer or demur to the complainant's bill on or before the first Monday of June, 1896, and that a copy of said order be served upon the defendant, R. L. Cooper; and it further appearing that a duly certified copy of said order was issued by the Clerk of this Court to the United States Marshal for the District of the State of North Carolina, in which the said R. L. Cooper resides, and that said certified copy of said order came to the hands of the said United States Marshal on the 28th day of March, 1896, and on the 30th day of March, 1896, was duly and regularly served upon the defendant, R. L. Cooper, and that the said R. L. Cooper has failed to plead, answer or demur or make other defense to complainant's bill within the time required by said order, and by law, the Court is pleased to order, adjudge and decree:

That judgment pro confesso be and hereby is entered against the said R. L. Cooper, and this cause is set for hearing ex parte as to him.

Enter.

CLARK, J.

(Endorsed:) No. 1056. Chas. Hebard against D. W. Belding et al. Decree pro confesso. Ent'd Journal P, p. 442. Filed 14 day of Aug., 1896. J. T. Carter, Deputy Clerk.

And afterwards, to wit on the 17th day of August, 1896, a certain report of Lewis Tillman, Special Master, on the plea of
55 the defendant, R. N. Archer, was filed in the Clerk's office of said Court, which said report is clothed in the words and figures following, to-wit:

In Circuit Court of United States, Northern Div. of Eastern Dist. Tenn.

In Equity. No. 1056.

CHARLES HEBARD
vs.
D. W. BELDING et als.

To the Honorable C. D. Clark, Judge of said Court:

The undersigned, Special Master, under your Honor's order in the above entitled cause, entered on 14 Aug., 1896 (Min. Bk. P., page 422), would respectfully report upon the matters therein referred:

(1). That the plea of the defendant Archer as to the dependency of the former suit, and the matters involved and parties interested, is substantially true. (See Record in Cause No. 1055.)

(2). That said plea is not sufficient to bar complainant's present suit, or even to require him at this stage thereof, to elect which action he will proceed with.

Respectfully submitted.

LEWIS TILLMAN,
Special Master.

Filed Aug. 17, 1896. J. T. Carter, Deputy Clerk.

In the Circuit Court of the United States, Eastern District of Tennessee, Northern Division.

In Equity. No. 1056.

CHARLES HEBBARD
vs.
D. W. BELDING et al.

Comes the defendant, by his solicitors, and excepts to the report filed herein by Lewis Tillman, Special Master, on August 17th, 1896, for that the said Special Master has reported that the plea of this defendant as to the pendency of a former suit, the matters involved therein and parties in interest is substantially true, but that said plea is not sufficient to bar plaintiff's suit, or require him
56 at this state hereof to elect which action he will proceed with; whereas, the said Special Master should have reported

that this defendant's plea being substantially true, the same operated as a bar to plaintiff's present suit, and that this defendant should be hence dismissed with his costs and charges in this suit, or that in any event plaintiff should be compelled to elect which action against this defendant he would proceed with.

Wherefore, this defendant excepts to the report of said Special Master and prays judgment of the Honorable Court thereon.

LUCKY, SANFORD & TYSON,
Solicitors of and for the Defendant R. N. Archer.

(Endorsed:) No. 1056. In the U. S. Circuit Court at Knoxville. Chas. Hebard against D. W. Belding, et al. Exceptions of R. N. Archer. Filed Aug. 19, 1896. J. T. Carter, Deputy Clerk.

No. 1056.

CHAS. HEBARD
vs.
D. W. BELDING et als.

This cause came on to be heard on this 22d day of September, 1896, before the Hon. C. D. Clark, Judge, upon the report of Lewis Tillman, Special Master, upon the plea of R. N. Archer, and the exceptions of the said Archer thereto, and argument of counsel having been heard, and the Court being of the opinion that said exceptions are not well taken, doth overrule the same and confirm said report of the Special Master.

It is therefore further decreed that the said plea of the said R. N. Archer be and hereby is overruled, and he is required to answer complainant's bill.

(Endorsed:) No. 1056. In the U. S. Circuit Court at Knoxville. Chas. Hebard against D. W. Belding, et al. Order confirming report of Special Master. Ent'd. Journal P, p. 552. Filed 22 day of Sept., 1896. J. T. Carter, Deputy Clerk.

57 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Tennessee, Northern Division. In Equity.

In Equity.

CHARLES HEBBARD, Complainant,
vs.
D. W. BELDING, M. M. BELDING, A. N. BELDING, HENRY STIX, Nathan Stix, Lewis Krohn, D. M. Hyman, Mary Bragg, R. L. Cooper, J. W. Cooper and R. N. Archer, Defendants.

The Several Answer of Mary Bragg, One of the Defendants, to the Bill of Complaint Filed by the Above-named Complainant.

This defendant now and at all times hereafter saving and reserving unto herself all benefit and advantage of exception which can

or may be had or taken to the many errors, uncertainties and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is or are material or necessary for her to make answer unto, answering says:

1. This defendant answering for herself, says that she is a citizen of the State of Ohio.

2. This defendant denies that the complainant, Charles Hebbard, is the owner in fee of forty thousand acres of land lying in the northern division of Monroe County, south of the Little Tennessee River, and adjoining the North Carolina State line; denies that said state line is the eastern boundary of said forty thousand acres owned by complainant; denies that the said complainant has tenants scattered over the said land, who have small enclosures in the caves and valleys thereof; denies that the said land is derived from the State of Tennessee by grants duly and regularly issued, and mesne conveyances and descent terminating in complainant.

3. This defendant admits that she is a tenant in common with others, who have a large body of land containing twenty thousand acres or more, in Graham County, North Carolina, some portions of which are bounded by the state line between North Carolina and Tennessee; admits that this defendant claims to derive title by and from the State of North Carolina in the lands so owned by
58 her; denies that until this suit was brought, there was ever any contention between this defendant and complainant as to the true location of the state line; admits that the amount of lands owned by this defendant and others, derived from the State of North Carolina and now sought to be reached by complainant, amounts to about eight thousand acres of valuable timber lands, and avers the value thereof to be of the sum of $10.00 (ten dollars) per acre for lumber, and is also valuable for agricultural and mining purposes.

4. This defendant, upon information and belief, denies that within two weeks before the filing of the original bill in this cause, any of the defendants went upon any lands owned by complainant, and specifically denies that this defendant ever authorized, licensed or empowered the said Robert N. Archer, or anybody working by or under him, to go upon any lands belonging to complainant; and upon information and belief denies that any trespasses were made upon the complainant's land by said Archer or his servants; denies that any timber was cut down, any logs hauled away or any waste committed upon the lands of complainant by said Archer or his servants, or anybody acting under authority or conveyance from this defendant.

5. Denies that the state line between North Carolina and Tennessee, running southwesterly from the beginning, crosses the Tennessee River about one-half mile above and nearly east of the mouth of the Slick Rock Creek; denies that the state line was ever established as set out in said bill of complaint; denies that the Slick Rock Creek basin, to wit, all lands drained by said creek, are entirely within the boundary of the State of Tennessee; admits that defendant claims and insists that all the lands included in the Slick Rock

basin, and tributary to its waters, are within the boundaries of the State of North Carolina.

6. This defendant further answering, avers that heretofore, to wit, during the reign of Queen Elizabeth, the land in question and the lands included within the boundaries of the State of North Carolina and Tennessee, were granted by charter to Sir Walter Raleigh; that during the year 1603, King James the First of England conveyed by charter all such lands, including the lands in question, to a company known as the London Company; that in the year 1663, by royal grant of Charles II, King of England, such lands, including the lands in question, were again conveyed to Lord Clarendon and other noblemen, as successors of the said London Company,
59 which said grant comprised the territory between the Atlantic and the Pacific Oceans, between the 29th degree and the 36th degree, 30 minutes north latitude, and which said grant covered a seaco-st line of four hundred and fifty (450) miles; that in the year 1729, the lands in question, and other lands, became subject to the legal jurisdiction of King George II of England by purchase and grant from the aforesaid London Company, and the territory so acquired was divided into the provinces of North and South Carolina respectively; that during the period from 1754 to 1769, many inhabitants of the colony of North Carolina made settlements along the Tennessee River, as well as along the Wautaga and Holston Rivers; that from 1769 to 1777, these settlements were known as the Wautaga Association; that by treaty of Fort Stanwix, dated November, A. D. 1768, the British Crown acquired from the six nations "all that country south of the Ohio as far as the Cherokee or Tennessee River, excepting such lands as lay south of the Great Kanhawa, which was expressly reserved by the Cherokees as part of their hunting ground;" and hereinafter described in paragraph 7 of this answer as being the "Cherokee Lands;" that the lands so reserved by the said Cherokees was south of the said Wautaga Association territory; that during the year 1776 a constitution was adopted by the State of North Carolina, and the said state became one of the thirteen original states; that the Wautaga Association aforesaid was represented in the assembly of the said State of North Carolina in the year 1776; that it formed a part of the State of North Carolina from the year 1776 to the year 1784; that in the year 1785, the State of North Carolina passed an Exclusion Act, whereby the said Wautaga Association was cut off from the said State of North Carolina and from participation in its legislative affairs; that the said Exclusion Act was soon thereafter repealed by the Legislature of North Carolina, and the said Wautaga Association again subjected to the jurisdiction of the said State of North Carolina; that during the year 1785, the said Wautaga Association disputed the jurisdiction of the said State of North Carolina over the territory comprised in the counties of Sullivan, Green and Washington, and attempted to form a separate state under the name of the State of Franklin; that the so-called State of Franklin continued to maintain a separate government until the year 1789, when it surrendered its jurisdiction to the State of North Carolina; that in the

year 1789, the State of North Carolina ceded to the General Government certain of its territory lying west of the Unaka, Smoky,
Bald and Iron Mountains, of the Appalachian range, which
60 said territory was organized by the General Government during the year 1790 into the territory of the United States south of the Ohio; that in the year 1794, the General Government organized the Territory of Tennessee, out of part of the land so ceded by the State of North Carolina; that in the creation of said Territory of Tennessee, the mountains aforesaid were recognized by the Federal Government as the eastern boundary of said territory; that they were also recognized as such boundary by the said Territory of Tennessee; that such boundary would place the land involved in this suit within the State of North Carolina; that in the year 1796, the said Territory of Tennessee was organized into a state, and as such from thence hitherto continued to acknowledge the correctness of the boundary as aforesaid; that in the year 1834, a commission was appointed by Congress to determine and report upon the boundary between North Carolina and Tennessee; that such commission recognized the aforesaid mountains as the natural boundary between said states, and recommended their adoption as such; that such recommendation went into effect; that by such act the boundary between North Carolina and Tennessee placed the land in controversy in this suit within the State of North Carolina; that in all the charters, grants, treaties and cessions aforesaid, the lands in question involved in this suit, have always been recognized as being within the jurisdiction of the State of North Carolina.

7. That on December 29th, 1835, the lands in question together with other lands not involved in this action, were acquired by North Carolina, by the treaty of New Echota, from the Cherokee Indians; that the lands thus acquired were generally known and commonly called the "Cherokee Lands;" that the treaty by which such lands were acquired was ratified May 23, 1836.

8. That soon after the ratification of the New Echota treaty, and during the year 1836, the State of North Carolina, by its General Assembly, provided for the survey and sale of a portion of the Cherokee Lands; that the Governor of the state was authorized and directed to give notice by proclamation in all the papers published in the City of Raleigh, and in such other papers published in the states of South Carolina, Georgia, Virginia and Tennessee, of the time and place of sale, as he might deem advisable; that it was further provided that such lands should be exposed at public sale, and sold to the highest bidder, under the superintendence of the State
Land Commissioner; that this defendant is informed and
61 believes, and upon such information and belief avers the fact to be, that the governor of the state of North Carolina pursuant to the authority of the general assembly above stated, gave notice by proclamation in papers published in the city of Raleigh, and in papers published in South Carolina, Virginia, and Tennessee, of the time and place of the sale of such lands.

9. That in 1852, the state of North Carolina by its general assembly, by act provided that the residue of the Cherokee Lands in Cher-

okee county, should be subject to entry by anyone at the price and within the time named therein; that after the acts above mentioned went into effect and after their provisions were complied with by the state authorities and from the year 1838 until 1883, the Cherokee lands were so sold to the highest bidders, without limit or restriction of any kind, on account of the residence or citizenship of the buyers.

10. That in 1854, the state of North Carolina, by its General Assembly, provided that the Cherokee lands were excepted from the provisions of the general law of the state concerning entries and grants, but that the said Cherokee lands were subject to be disposed of in accordance with the laws enacted with special reference thereto; and these provisions remained in force until on or about the 2nd day of March, 1883, when the disposition of the Cherokee lands was, for the first time, made subject to the general law relating to "entries and grants."

11. That during the year- 1853, 1854, 1855 and 1856, the lands involved in this suit, being then the corporate limits and jurisdiction of the state of North Carolina, were duly entered, and such proceedings were thereafter had and taken that the state of North Carolina, in keeping with the provisions of its law, and in harmony with its various interpretations thereof, and in recognition of the boundary line existing between it and the state of Tennessee granted said lands to Peet & Gilbert; that the original enterers were A. W. Colvard, Stephen Rhea, and others, who were citizens of Cherokee county, North Carolina, who caused the same to be duly surveyed, and gave their bonds, with good security for the purchase money of the same, as required by Chapter 119 of the Public Acts of 1852; that subsequently and for a valuable consideration, the original enterers duly assigned their entry rights and certificates of purchase to W. H. Peet and S. W. Gilbert, who were non-residents of the state of North Carolina, but citizens of one of the other states; that subsequently, said Peet and Gilbert, having paid to the state of North Carolina the amount due for said
62 lands, and thereby duly discharging the bonds of the original enterers' grants of the lands in question, together with other lands, were duly issued by the secretary of the state of North Carolina to them.

12. That this defendant claims title through certain mesne conveyances, which are not questioned, from said W. H. Peet and S. W. Gilbert; that those under whom she claims, and her cotenants, purchased the same under an order of the court, from the state of North Carolina exercising jurisdiction in the premises; that they purchased the same in good faith, paying therefor a valuable consideration, and without notice or knowledge of any claim on the part of the state of Tennessee, or anybody holding or assuming to hold any grants therefrom, that said lands were claimed as being within the territorial limits of Tennessee; that since the time said lands were respectively granted, this defendant, with other cotenants, and those under whom they claim, has been in the actual, open, notorious and visible possession thereof.

13. That the General Assembly of North Carolina authorized the governor of said state, to appoint a competent commission on the part of said state, to act with the surveyors or commissioners appointed or to be appointed by any of the contiguous states of Virginia, South Carolina, Georgia, or Tennessee, to re-run and re-mark by some permanent monument at convenient intervals, the boundary lines between the states of North Carolina and any of said states; that under and by virtue of such provisions, commissioners were appointed, and the boundary line between Tennessee and North Carolina was duly run by the commissioners so appointed by the state of North Carolina; that said line so run and located by said commissioners, was the original established line between North Carolina and Tennessee, and which placed the lands in controversy within the state of North Carolina.

14. That the boundary line between North Carolina and Tennessee, which constitutes the boundary line between complainant's land and the land of this defendant, and others, and which places the land in controversy within the state of North Carolina, has been recognized by both states as constituting the boundary line thereof for nearly one hundred years; that it is for this reason that the state of Tennessee did not survey or cause to be surveyed or granted, prior to 1883, the lands in controversy as belonging to the state of Tennessee.

15. That the lands in controversy are within the corporate limits and jurisdiction of the state of North Carolina, and that the state of North Carolina has exercised such jurisdiction since
63 the state of Tennessee was organized and admitted into the Union and that the state of Tennessee has acquiesced in such jurisdiction, as well as in the boundary lines which placed the lands in controversy within the jurisdiction of the state of North Carolina ever since the organization of the state of Tennessee, and its admission into the Union.

16. That the maps in the Land Department of the United States, and that the recognized and authorized maps of North Carolina and Tennessee, place the boundary line between Tennessee and North Carolina here in controversy, substantially as claimed by this defendant, and thereby locate the same land as being within the state of North Carolina, and not within the state of Tennessee.

17. And this defendant begs leave to refer, as substantiating the facts aforesaid, to—

(*a*) The original charter from Queen Elizabeth to Sir Walter Raleigh.

(*b*) The original grants of James I and Charles II to the London Company and its successors.

(*c*) The purchase of said lands from said London Co. by George II.

(*d*) The original treaty of Fort Stanwix and the reservations therein contained of the Cherokee lands.

(*e*) The diplomatic correspondence concerning said charters and grants, its locations and boundaries.

(*f*) The compact between the thirteen original colonies.

(*g*) The cession of the land to the General Government, its subsequent cession to the territory of Tennessee, the formation of that state, and the admission thereof into the Union.

(*h*) The action of each state in fixing the boundaries thereof between North Carolina and Tennessee.

(*i*) The reports of such surveyors or commissioners appointed to re-run and re-mark, as well as to run and mark the boundary line between North Carolina and Tennessee.

(*j*) The maps of each state, and the maps in the Land and War Departments, and the recognized official maps, plats, plans and diagrams, if any, relating to said boundary line.

(*k*) The exercise of corporate authority and jurisdiction by the state of North Carolina, over the lands in controversy, since the admission of Tennessee into the Union.

(*l*) The treaty with the Cherokee Indians and the correspondence relating thereto, the sequestration of the Cherokee
64 lands, and the other lands of the state of North Carolina, the special laws relating to the Cherokee lands, so-called, including the lands in controversy.

(*m*) The proclamation of the governor of North Carolina advertising said Cherokee lands in North Carolina for entry and sale.

(*n*) The granting and selling of such lands and issuing patents therefor, to actual enterers and bona fide purchasers.

(*o*) The acquiescence of Tennessee in the exercise of such jurisdiction, and their surveying, granting, and selling such lands, including the lands in controversy, as well as the long period of such acquiescence, the possession by this defendant and her co-tenants and those under whom they claim, since the lands were first open to entry and settlement, the long period of acquiescence in such ownership, and the exercise of such control.

(*p*) The payment of taxes upon such lands to the state of North Carolina by this defendant and her co-tenants, from the time said lands were originally sold, until the present time.

(*q*) The absence of any tax having been collected upon the lands in controversy by the state of Tennessee, during the long period of the exercise of jurisdiction by the state of North Carolina.

18. That after the title to said lands had become perfected, fixed and unalterable, except by the acts of the owners thereof, and after the General Assembly of North Carolina had provided that "from and after the first day of Nov., 1883, the Cherokee lands shall be subject to entry under the same rules and regulations as are prescribed in the chapter entitled 'entries and grants for the other public lands of the state,'" then the complainant's grantees, H. N. and T. E. H. McCroskery, entered upon the lands in the state of North Carolina, being the lands in controversy, and assumed to locate the same as citizens of Tennessee, and as lands belonging to the state of Tennessee; that the complainant claims title to the lands in controversy, by virtue only of conveyances from such unwarranted enterers.

19. That the state of Tennessee has no title to the lands in controversy; that the enterers of said lands as belonging to the state of

Tennessee, obtained no title thereto: that the complainant claiming through such enterers, obtained no title thereto.

20. That this defendant is informed and believes, and upon such information and belief avers the fact to be, that the solicitors
65 for the complainant are the original enterers of said land in the state of Tennessee, and that they were not good faith enterers and good faith purchasers and holders.

21. And further answering, this defendant says, that the title to the lands described in the bill is in her and others; that she, with her co-tenants, have been in peaceable, continuous adverse possession thereof, in person and by those through whom they claim, for more than twenty years before complainant's bill was filed, claiming title thereto in fee; and should the court hold the lands in dispute to lie in Tennessee, this defendant relies on and pleads said twenty years' possession; and also pleads that she and her co-tenants have had seven years' actual, continuous, adverse possession of said lands, before complainant's bill was filed; and should the court hold the lands in dispute to lie in Tennessee, she pleads the Statute of Limitations of Tennessee of seven years in bar of said bill.

22. And further answering, this defendant shows that she and her co-tenants have had in person and through those through whom they claim, actual, continuous and adverse possession of the land described in complainant's bill, holding by conveyances, devises, North Carolina grants, and other assurances of title, purporting to convey to this defendant and her co-tenants an estate in fee and this defendant shows that she has a good and indefeasible title in fee to the lands in question, in and through said deeds and other assurances of title; and in the event the court should hold the lands in dispute to lie in Tennessee, she also pleads and relies on the Statute of Limitation of Tennessee of seven years in bar of said suit.

23. That this defendant and her co-tenants, and those under whom they claim, have been in the actual possession of the lands involved in this suit, for more than twenty years, and hereby invokes the protection of the Statute of Limitations.

24. And this defendant further answering says, that she denies any and all other matters or things in said bill contained, material or necessary for her to make answer unto and not herein and hereby well or sufficiently answered unto, confessed and avoided, traversed or denied, either to the knowledge and belief of this defendant; all of which matters and things this defendant is ready to verify, maintain and prove as this honorable court shall direct, and humbly prays that said bill may be dismissed as to this defendant, with her reasonable costs and charges in this behalf most wrongfully sus-
66 tained; and that her title to the lands in controversy may be affirmatively adjudicated and determined.

MARY G. BRAGG.

F. F. McGARRY &
GEO. E. NICHOLS,
Solicitors for Defendant Mary Bragg.
LUCKY, SANFORD & TYSON,
Of Counsel.

(Endorsed:) The Circuit Court of the United States for the Eastern District of Tennessee, Northern Division, In Equity. Charles Hebbard, complainant, *vs.* D. W. Belding, et al., defendants. Answer of defendant, Mary Bragg. Filed Sept. 28, 1896. J. T. Carter, dep. clerk.

In the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee, at Knoxville.

CHAS. HEBARD
vs.
D. W. BELDING et al.

Replication of Chas. Hebard.

This repliant, saving and reserving unto himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answers of the defendant, for replication thereto saith that he doth and will aver, maintain and prove his said bill to be true, certain and sufficient in law to be answered unto by the said defendants and that the answers of the said defendants are very uncertain, evasive and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answers maintained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain and prove, as this honorable court shall direct, and humbly prays, as in and by his said bill he hath already prayed.

T. E. H. McCROSKEY,
CHAS. SEYMOUR,
WEBB & McCLUNG,
Sol's.

67 (Endorsed:) In the U. S. Circuit Court at Knoxville. Chas. Hebard against D. W. Belding, et al. Replication. Filed Sep. 29, 1896. J. T. Carter, deputy clerk.

And afterwards, to wit, on the 13th day of October, 1896, certain depositions of W. D. Hale, O. W. Muller and J. K. Wilson were filed in the clerk's office of said court, which said depositions are clothed in the words and Figures following, to wit:

In the United States Circuit Court, Knoxville, Tenn.

CHAS. HEBARD
vs.
D. W. BELDING et al.

The Depositions of W. D. Hale, O. W. Muller, and J. K. Wilson, Taken by Consent of Parties at the Office of Webb & McClung, Knoxville, Tenn., on the 12th and 13th Days of Oct., 1896, to be Used as Evidence for Compl't in the Above-styled Cause.

The witness, W. D. HALE, age 37 years, being duly sworn, says:

Question 1st, by Compl't: What is your age; where do you reside; what is your occupation; how long, and how much experience?

A. I am 37 years old, reside in Monroe county, Tenn., and am a surveyor of 17 years' experience.

Q. 2. State if you were called upon to locate the state line between Tennessee and North Carolina at Slick Rock creek, and near where Little Tennessee river crosses said state line: if so, by whom, when, and did you undertake to locate said line?

A. I was called upon by Charles Hebard, through his attorneys, to locate the North Carolina and Tennessee state line at Slick Rock creek and where it crossed Little Tennessee river, and in December, 1895, and Jan., Feb., and April, 1896, in company with O. W. Muller, of Polk county, and J. K. Wilson, of Blount county, both surveyors, I attempted to locate said line.

Q. 3. What method did you adopt to learn the true mark indicating the state line, and what is the mark?

68 A. I went something near three miles north of the river, where the line is undisputed, and followed the line southwest, tracing the marks to the river, finding the line marked with two hacks above a blaze. This, I had been informed, was the state line mark, and by such search, proved the information to be correct.

Q. 4. If you have a map or plat showing your work, please file the same as "Exhibit A," to your deposition; who made the map?

A. I made a map of the survey, and it is herewith filed as "Exhibit A," to my deposition.

Q. 5. Please state fully the distance you ran the state line north of Little Tennessee river, the amount of care taken in ascertaining the true line, about how many marked trees you found north of the river, and where did the line terminate at the river?

A. I ran the line 3 and ¼ miles north of the river taking great care to search the ridges, branching off on either side for line marks. I found 22 marked trees, marked with state line marks, and terminating at river ½ mile east of and above the mouth of Slick Rock creek, and opposite where the Hangover lead butts off to the river.

Q. 6. Had you any difficulty in locating the state line north of and to the river, and state how near the river you found the last marked tree, and the kind of tree?

A. I had very little difficulty in locating the line north of the

river, and found it plainly marked to within fifty yards of the river bank. The last marked tree is a hemlock, or spruce pine, the bark being well preserved, and the marks plain.

Q. 7. State if you ran other ridges north of the river to ascertain if they had state line marks on them; if so, are they located on the map? Describe or locate them on the map, and did you find state line marks on them?

A. I ran three other ridges and they are shown on the map, shaded with green; the state line is shaded with green and brown. The ridge west of the state line is called the Lester Ridge, and has been claimed to be the state line. This ridge I searched closely for marks, but found none. Those on the east of state line are prominent ridges or spurs, and were searched close but nothing found.

Q. 8. After locating the state line north of the river, what were the first steps taken to locate the south side and at the place in dispute—that is, what ridge or ridges did you first examine, and why?

A. I first examined the spurs of the Hangover Ridge where they bluff off to the river, because the butt of that ridge is directly
69 opposite the butt of the ridge on which I found the state line marks north of the river.

Q. 9. State whether or not there was anything in the topography of the country, the elevation and course of the ridges to cause you first to adopt the Hangover Ridge as being probably the state line; if so, describe fully?

A. I was governed to a great extent by the topography of the country south of the river. Looking southwest from the butt of the ridge, north of the river on which the line is marked, I first look for the main ridge and see two prominent ridges—the "Hangover" Ridge and the "Fodder Stack" ridge, of which the Hangover Ridge is decidedly the highest and most prominent. Second. I look for the route to the Hangover Ridge and see a large and continuous ridge reaching from the Hangover Peak to the river, directly opposite where the line is marked north of river. Third—I observe the course. The Hangover and the Ridge to it are a little west of south, while to reach the Fodder Stack Ridge, where it strikes the river, I would have to go northwest down the river one-half mile, and from there nearly due west more than three miles.

Q. 10. What ridge more generally follows the general course of the state line north of the river—the Hangover or Fodder Stack?

A. The Hangover Ridge.

Q. 11. Please state fully your survey up the Hangover Ridge and to where the Hangover and Fodder Stack ridges come together on the southwest, and if any trees were found showing state line mark or anything indicating the state line, give them their locality on the ridges or depressions—state fully all you found?

A. I surveyed the Hangover Ridge, commencing opposite the marks on the north side and running up the ridge. ¾ mile from the river I found a black oak marked as a corner, and some slight indications as of marks as if it had been marked as a line tree on the state line. At one mile from the river a double sourwood in a gap, plainly marked "fore and aft" state line marks. At 1 mile and 63

chains, a black oak marked as a corner. At 1 and ½ miles, a chestnut oak with indications of marks, the blaze is plain and one hack can be seen on close examination. Near the chestnut oak is a white oak that bears some indications of marks on the northeast side. At 1 mile and 98 chains (I used a 2 pole chain) a small hickory marked with the state line mark on the east side of the tree. At 1 mile 108 ch., is a Spanish oak marked as a North Carolina corner, and witnessed by six pines. At 1 and 7-8 miles, a white oak marked
70 with three hacks above a blaze and a very old blaze immediately below the 3 hacks and blaze. Find a marked line running from this point S. 15 W. into North Carolina. At 2 and ¼ miles a black oak on top of a high knob marked with three hacks above a blaze on the north side and two hacks above and one hack below a blaze on the west side. At 2 and ½ miles, a chestnut and two white oaks marked as a North Carolina corner. At 3 and ¼ miles a chestnut oak stump bearing a plain blaze and indistinct two hacks above the blaze; the lower hack is plainer than the upper one. At 3 and ½ miles a small black oak marked with two hacks and blaze, but the marks are too recent for state line marks. At 4 and ⅛ miles, a chestnut with slight indications of marks on the west side. The bark has been burned off of the east side. I found no other marks until after passing "Hangover Rock" 5 and ⅝ miles from the river, and the "Hao" or "Christies" peak, 6 miles from river. At 7 and ½ miles from river I found a small mountain oak marked "fore and aft" with 2 hacks and blaze, but by comparing with marks blocked, find the marks too recent for state line marks. At 7 and ¾ miles from river find a mountain oak 9 inches in diameter, marked "fore and aft" with 2 hacks and blaze. This tree was forked, but the eastern prong has split off, carrying with it the marks, but they still show on the wood and bark; by counting, find these marks too recent for state line marks. A little higher on the tree and deeper in the wood there are some other scars which very closely resemble the state line marks—the blaze plainly showing traces of the axe, but the hacks do not show the traces of the axe so clearly. The diameter of the tree when these scars were made was 2 and ½ inches; it is now 9 inches and of very slow growth. I found no other marks until after passing the junction of the Hangover and Fodder Stack ridges.

Q. 12. On your map, Exhibit "A," which is the Hangover and which the Fodder Stack Ridge, and what is the relative height of the two?

A. The eastern ridge, or the one on the right, looking north on the map, is the Hangover Ridge, and on it will be found, marked in red ink, "Hangover"—"Hao." The western or left hand ridge is the "Fodder Stack" Ridge, and on it is marked in red ink, "Rock Stack," "Big Fodder Stack," and "Little Fodder Stack." The Hangover Ridge is about 800 feet higher than the Fodder Stack Ridge.

Q. 13. Did you continue the State line beyond where the ridges come together, and going southwest, and if so, how far and to what point? Did you find state line marks and if so, how often, on what kind of ground and timber?

71 A. I continued the survey southwest more than 46 miles from Tenn. river to the Hiwassee river, finding the line marked in some of the low gaps, the marks becoming more plentiful and plainer as I descended into the lower ground near the Hiwassee river. The marks were found on trees that had well preserved bark.

Q. 14. From what you saw, continuing southwest of disputed line, have you now any doubt that you located the true line southwest of the disputed territory?

A. No.

Q. 15. Taking up the Fodder Stack Lead: State if you, with the other surveyors, Muller and Wilson, also run it throughout its entire course as claimed on the part of respondents to be the state line, and if so was your investigation made with as much care as the work done on the other lines?

A. I ran the Fodder Stack Ridge its entire length as so claimed by respondents. The work was done in connection with Muller and Wilson, and was given as much care and attention as any of the work.

Q. 16. State, if the state line had been attempted to be run by North Carolina surveyors, and if so about how long since, by what surveyor, and where did he locate the line at the place in dispute, and what kind of monuments or marks did he make?

A. There had been a line surveyed around the Fodder Stack lead or ridge, said to have been done by one McClelland in 1893: nearly all of the trees on top of the ridge are marked with three chops and stones set up at the end of his miles and marked N. C., and giving the distance to the Unaka Turnpike and to the Cataloochee Turnpike.

Q. 17. Beginning at Little Tennessee River and continuing southwest, same course as Hangover, does your map correctly locate the McClellan survey, and on which side of the Hangover Ridge is — located, and how do the two ridges bound or enclose Slick Rock creek.

A. Yes, the map correctly shows McClelland's line on the Fodder Stack lead. It is on the west side of the Hangover lead. The two ridges enclose Slick Rock creek in an oblong basin lying north and south.

Q. 18. Beginning at Little Tennessee and following the line in the general southwest course, state the character of the ridge or ridges you followed to their junction on the southwest? What interferences, if any, in the way of a continuous or leading ridge; where you found any marked trees, the character, if any, of the marks, the location and kind of trees, and give generally what you did find in the way of a state line mark?

72 A. From the river I ascended a steep, rocky butt onto a spur, and followed up the spur 1 and ¼ miles to a ridge called Slick Rock Ridge. Following Slick Rock Ridge to a high knob 1 and ¾ miles from the river, and then descending to "Stiff Knee" Gap, 3 miles 67 ch. from river. From Stiff Knee Gap I climbed Stiff Knee Knob 3 and ¾ miles from river, ascending 800 feet in 55 chains, then descending to the Little Stack Lead, to the

head of Bearden Shaft Lead, which is the continuation of the Fodder Stack Lead. Then ascending to the Little Fodder Stack 4 and ½ miles from the river. Then descending to Wildcat Gap and passing several little gaps and knobs to Big Stack Gap, 7 and ⅛ miles from the river. At 6 and ⅞ miles from river, found a meandering line marked with two hacks and a blaze. Upon searching, find these marks to follow trails regardless of the tops or ridges. On blocking find the marks to be 23 years old. From Big Stack Gap ascend to Big Fodder Stack and descending about ¼ mile from Big Fodder Stack and 8 miles from the river find a white oak marked on the north side with two hacks and a blaze. The marks are very old and look like the state line marks; cutting in, I find 69 growth of wood between the scars in the wood and the bark. At 8 and ⅛ miles find a chestnut oak with the same kind of marks on the south side of the tree. From the marks on the trees (if line trees) they are fore and aft and should have been marked on opposite side, but no marks were found, though the bark is well preserved. At 8 and ¾ miles find a Spanish oak marked with same kind of marks. This tree is marked as a quartering fore and aft; it stands 5 or 6 feet east of the summit of mountain. These with the McClelland chops and milestones are all the marks found on the Fodder Stack lead to indicate a state line. The McClelland line is not on a smooth, continuous ridge, but on two ridges divided by a deep gap, namely, "Slick Rock" Ridge, which I strike 1 and ¼ miles from river, and Fodder Stack lead which I strike about 4 miles from river. The Fodder Stack is a succession of high peaks and deep gaps, and does not branch off level from the Hangover lead, but from far down on the side of the Hangover lead.

Q. 19. You mention marks that look like state line marks between 8 and 9 miles from the river. Did you find any other trees with a like mark off the main top? If so, how many and where?

A. I found a spruce pine with the same kind of mark on a spur about ⅜ mile east of Big Fodder Stack.

Q. 20. Could this last mark — been made by any one running the main Fodder Stack Ridge as a state line, and if not, why?

73 A. No, for it is not on the Fodder Stack Ridge, but on a spur of the ridge.

Q. 21. After finding the three marked trees as above stated, about how far is it from the last of these marked trees to where the two ridges meet? And did you find any state line marks along that distance?

A. From the Spanish oak, fore and aft, the last tree found to top of Hangover lead above the junction of the two ridges is 2 and ⅞ miles and I found no indications of a state line along that distance, though there was much old timber with well preserved bark.

Q. 22. Running the 8 miles before finding the three trees with old marks, what was the character of the timber for holding old marks?

A. There were many old trees with well preserved bark and if the state line had ever been marked along that distance some of the trees would have shown the marks.

Q. 23. Describe the Fodder Stack Ridge. Where does it begin and where end? Is it a continuation of the main ridge or mountain dividing the states, or is it a branch or spur leading off from the main ridge? Give its general course?

A. It is not a continuation of the main ridge, but a branch of it, branching off from the side of the main ridge about 300 or 400 feet lower than the top of the main ridge and end- in the fork of Citico creek 5 or 6 miles west of Little Fodder Stack. Mt. From where it leaves the main ridge to its end at Citico creek, its general course is northwest.

Q. 24. Can you follow the main Fodder Stack Ridge and reach Tennessee river? And how do you reach the river if not by following the Fodder Stack Ridge?

A. The river can not be reached by following the Fodder Stack ridge. I would have to leave the said ridge at Stiff Knee Knob and descend into Stiff Knee Gap and then follow Slick Rock Ridge which would take me to the river more than two miles below the mouth of Slick Rock creek; but if I followed the McClelland's line to the river, I would have to leave the Slick Rock Ridge and go down a spur to the river below the mouth of Slick Rock creek about 150 or 200 yards.

Q. 25. Please explain more fully as to Slick Rock Ridge, as to its prominence and termination, and is it carried out on your map, Ex. "A."?

A. Slick Rock Ridge is a low ridge extending from Stiff Knee Gap to a bend in river opposite the mouth of Little Rabbit creek. It is not carried out to the river on the map marked Exhibit "A" to my deposition. It is not a very prominent ridge, but is much more prominent than the spur down which McClelland ran.

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Q. 26. If there is a bend in the river below mouth of Slick Rock Creek, describe it and state at what point in the bend Slick Rock ridge terminates?

A. There is a horseshoe bend in the river below the mouth of Slick Rock creek. The horseshoe is about 2 miles long from heel to toe, the toe pointing north and Slick Rock Ridge butts against the inside of the toe.

Q. 27. Please give general contour of Slick Rock creek basin, the respective height of ridges on either side, their names, the course and length of the creek, the area in acres?

A. The basin is oblong and is about 6 miles long by 3 miles wide, and traversed its entire length from south to north by Slick Rock Creek. The basin is very rough, being cut up by steep spurs and deep canons. It is bounded on the north by Slick Rock Ridge and Little Tennessee river; east by Hangover Ridge; south by Hangover and Fodder Stack Ridges, and west by Fodder Stack Ridge. The Hangover Ridge is about 800 feet higher than the Fodder Stack Ridge and about 1,300 feet higher than the Slick Rock Ridge. There is about 12,000 acres in said basin.

Q. 28. Explain if your map by its shading shows the relative ridges, and also explain how their relative height is shown?

A. The map is shaded in terraces or parallel rows of short dashes with the pen; each terrace represents 100 feet of elevation. There are eight more terraces around the Hangover and Hao peaks and Stratton Bald than around the peaks on the Fodder Stack Ridge, showing the Hangover peaks 800 feet higher than the Fodder Stack peaks. Where there are most terraces the shading is broadest on the map, so that the relative heights may be seen at a glance.

Q. 29. How many families are living in the Slick Rock basin, and where?

A. Five. Two in the north end of the basin on Little Slick Rock creek. One about the middle of the east side and two about two miles from the south end of basin and on the east side. There is one other in the north end and on Slick Rock whom I had forgotten. All of the families except those on Little Slick Rock live east of Slick Rock creek.

Q. 30. State, if the land in dispute is Tennessee, what land district it is in? Your means of knowing, and what experience you have had in surveying in the Ocoee land district, and what portion
75 of Monoe county, Tenn., the Ocoee district embraces

A. If in Tenn. it is in the Ocoee Land District. I have surveyed the lines between the Ocoee and Hiwassee Land Districts. Have been familiar with the Ocoee lines for more than ten years. The Ocoee Land District embraces the east and south sides of Monroe county.

Q. 31. State where and the distance Monroe county adjoins the state line of North Carolina?

A. From the Little Tennessee river on the northeast to the Unaka turnpike on the southwest—a distance of about 43 miles.

Q. 32. If you have copies of field notes made by you with Wilson and Miller when you ran the line, please file the same as Exhibit "B" to your deposition.

A. I herewith file a copy of said notes marked "Exhibit B" to my deposition.

Q. 33. Taking the actual survey of the lines as made by you with Muller and Wilson, the marks found, the topography of the country, your experience as a surveyor and also the calls of the commissioners locating the state line, that is "From Tennessee River to the main ridge and along the extreme height of the same to the place where it is called Unacoi or Unaka Mountain"—where, in your opinion, was the state line located by the commissioners when established in 1821?

A. On the Hangover lead.

Q. 34. What other surveyors were with you in making the survey, and how long at the work?

A. O. W. Muller, of Polk county, and Jas. K. Wilson, of Blount county. We were in all about five weeks doing the work.

Further saith not.

W. D. HALE.

Sworn to and subscribed before me this 13th day of Oct., 1896.

[SEAL OF CIRCUIT COURT.] J. T. CARTER, *Dep. Clerk.*

W. D. Hale, Madisonville, 2 days, 3.00; 90 miles, 4.50 $7.50; paid by Compt.

It is agreed by counsel that counsel for defendants shall have the right to cross-examine the above named witness on the — day of —, 189–, and to except to the questions and answers made in the foregoing examination in chief and to the deposition generally as fully as if said exceptions had been made at the time each question and answer was made, &c. October 13th, 1896.

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T. E. H. McCROSKEY,
Sol. for Compl't.
LUCKY, SANFORD & TYSON,
Sol. for Def'ts.

No. 1056. In the United States Circuit Court, at Knoxville. Charles Hebard against D. W. Belding, et al. Deposition of W. D. Hale. Filed Oct. 13, 1896. J. T. Carter, Deputy Clerk.

W. D. HALE, being duly sworn, deposed on cross-examination, as follows:

On Monday, Nov. 9th, '96.
By consent of all parties, at the office of Lucky, Sanford & Tyson, at Knoxville, Tenn.

By Mr. McGARRY:

Q. 1. What is a state line mark?
A. Two hacks above a blaze.
Q. 2. What is a North Carolina corner?
A. A cross on a tree, witnessed by two hacks above a blaze.
Q. 3. What is a Tennessee corner?
A. Three hacks on a tree, witnessed by either a blaze or three hacks.
Q. 4. How far north of the river did you run to ascertain the state line?
A. About three miles.
Q. 5. To what point?
A. We began north and run south.
Q. 6. What point did you begin at?
A. We began at a point supposed to be the 61st mile tree, on the state line, and ran southwest to the river.
Q. 7. What knowledge did you have that you were then on the state line?
A. Local traditions.
Q. 8. You ran two lines on the north side of the river?
A. Yes, sir; we ran two lines north of the river.
Q. 9. Which line did you run first?
A. The line marked on the map Lester ridge.
Q. 10. How many lines did you run south of the river?
A. Two.

Q. 11. They are known on the map as the Hangover lead and the Fodder Stack lead?

A. Yes, sir.

Q. 12. Which did you run first?

77 A. We ran parts of both first.

Q. 13. Which line did you complete first?

A. The Fodder Stack lead.

Q. 14. While running that line did you notice and observe any marks, monuments or trees indicating a state line?

A. We found some marks and some monuments.

Q. 15. Describe fully what you found?

A. The monuments we found—a stone set up at each mile or about each mile, marked N. C. on one side and figured, purporting to be the distance from the Unaka Turnpike and the Cataloochee Turnpike. In marks we found—trees marked, two hacks above a blaze, about 20 or 30 years old. These marks running with the trails, independent of ridges, and the mark on the tree, two hacks above a blaze, much older, also running independent of the main ridge.

Q. 16. Did you find any tree marked with the state line mark south of Big Stack Gap?

A. We found three trees marked as if with the state line mark, south of the Big Stack Gap.

Q. 17. Describe each of them, where located, and what was done, if anything, concerning them?

A. First was a white oak, the marks on the north side of the tree; that tree was blocked.

Q. 18. State what you mean by that?

A. We cut into the tree above and below the mark, and split out the block between the cuts, taking the mark out of the tree.

Q. 19. Will you kindly locate on this map, with black ink, the location of the blocked tree?

A. I have marked it "blocked white oak." It was already shown by a green dot.

Q. 20. Where is this block, that you took from this tree?

A. It is at Madisonville, at McCroskey's office.

Q. 21. Will you produce it and identify it, and have it marked by the stenographer?

A. I will identify it when produced, by marking it "white oak block." Major McCroskey is present and agreed to produce this block.

Q. 22. Describe the block.

A. The block is about 15 inches long, three wide and four thick.

Q. 23. Did you ascertain how many years' growth between the time the marks were originally made and the time that you took out the block?

A. No, I don't know how to ascertain that.

78 Q. 24. What, if anything, did you do for the purpose of ascertaining it?

A. I counted the growths between the scars in the wood and the bark.

Q. 25. How many did you find?

A. Sixty-nine.

Q. 26. What did that indicate, if anything?

A. Sixty-nine years' growth?

Q. 27. Between what periods?

A. Between the time the scars were made and the time it was blocked. But I don't know how long it would take for the scar to heal over. There was a sore made on the wood that must heal.

Q. 28. About how long, in your judgment, if you have any on the subject, would it require such scars that you found to heal over, as you term it?

A. It might heal in one year, and it might require ten, owing to the growth of the wood.

Q. 29. Why did you block this tree?

A. To ascertain as near as possible how long these scars had been there, or how long since the marks had been made.

Q. 30. Was this done in consultation with the other surveyors who were present at the time for the purpose you have indicated?

A. It was.

Q. 31. Was the result arrived at, viz: That there was 69 years' growth of wood between the scars and the bark?

A. We differed somewhat in our count. One counted 67, one 69 and one 72 growths. I gave the intermediate. I don't remember whose count that was.

Q. 32. After you gave the intermediate number, did the other two agree with you in that regard?

A. I don't know that there was any agreement made on it. I only adopted that as safe count. My recollection is that I counted the highest number. I adopted that as a safe count.

Q. 33. Who was it counted 72 years' growth?

A. I think that was my count.

Q. 34. After the others had counted you then adopted the 69 years' growth as your judgment?

A. I never adopted that until just now. I only gave that as a safe estimation in my answer to this deposition.

Q. 35. Then, the length of time between the date the tree was blocked and the date the scar was made would be the 69 years' growth, plus such a length of time as it would require the scar to heal?

A. That is correct.

79 Q. 36. Now, passing on to the next tree containing an old mark (you may refer to your notes if you desire to refresh your recollection), please describe the mark and the tree?

A. The tree is a chestnut oak, and the marks are similar to those on the white oak, but on the south side of the tree.

Q. 37. Is that all the description you can give to identify it?

A. That is all the description I can give, except the copy of the note.

Q. 38. Please mark on the map, Exhibit "A," the location of this chestnut oak, in black ink, marking it "marked Chestnut oak"?

A. I do mark it "marked chestnut oak."

Q. 39. You may read your notes taken on the spot and at the time, the description of the tree and the marks?

A. The course "was north 30 degrees west, 21 chains; at 15 chains a chestnut oak, marked two hacks above a blaze on the south side, very old, only in the bark."

Q. 40. Is that a correct description?

A. It is.

Q. 41. Further down on the line did you find a Spanish oak marked with the same kind of marks?

A. I did.

Q. 42. You may read your notes taken at the time, the description of that tree and the marks?

A. "North 25¼ degrees west, 4 6-10 chains. At 4 chains a large Spanish oak marked as 'Quarter Tree,' with two hacks above a blaze, very old. Also several sets of three hack marks. All very old. The tree stands about 5 feet east of the summit of the ridge."

Q. 43. Is that a correct description?

A. Yes, sir.

Q. 44. Please designate on the map in black ink the location of the tree you have just described?

A. I don't believe I can exactly locate that on the map.

Q. 45. Locate it generally?

A. It is about ¼ mile north of summit of Rock Stack Mountain, marked by a cross and the words "Spanish oak."

Q. 46. What marks, if any, did you find on the Hangover lead, so-called?

A. One mile from the river going south I found a sourwood marked with two hacks above a blaze, as the state line is marked.

Q. 47. Read your notes taken at the time, relative to this tree and the marks?

80 A. "South 30¾ degrees west, 7 7-10 chains, to a double sourwood, plainly marked with two hacks above a blaze, 'fore and aft.' Both prongs are marked, but there has been other cutting on the tree that to some extent disfigures the marks." On Jan. 27th, 1896, re-examined this tree and made the following note: "On east side of eastern prong of sourwood, find two hacks above a blaze, and above this two newer blazes, one run into the other thus, oo. On the south side of same prong are five hacks. On east side of western prong are two hacks above a blaze. The blaze nearly gone. On west side are two hacks above a blaze, the upper hack has been made with two strokes of the axe, and the blaze with two strokes. There is one new hack on the south side of this prong."

Q. 48. Are the hacks and blazes which indicate state line mark usually made with two strokes of the axe?

A. No, sir.

Q. 49. Did you cut into this tree or take any other means of ascertaining the number of years that had elapsed since the hack or blaze was made?

A. No, sir.

Q. 50. This sourwood tree was in Sourwood Gap as marked in your map, Exhibit "A."

A. It was.

Q. 51. In your direct examination you speak of a chestnut oak, 1½ miles, with indications of marks. You may read your notes, please, concerning this tree?

A. "South 17¼ degrees west, 19 2-10 chains, at 8-10 chains, a chestnut oak with indistinct indications of marks, one hack above a blaze. The blaze is plain and one hack can be dimly seen on close examination. If marked, it is a side line tree."

Q. 52. What do you mean by a side line tree?

A. I mean that the line passed one side of the tree instead of through the tree.

Q. 53. The blaze is made more recently than the hack is it not, in your judgment?

A. I can't say that it is. The blaze being larger would show plainer though made at the same time the hacks.

Q. 54. Can you say it is not?

A. I can not.

Q. 55. What do you mean when you say in your notes "if marked it is a side line," etc.?

A. I mean it is doubtful whether it is marked at all or not.

Q. 56. You also noticed a white oak near the chestnut oak we have been describing. Please read your notes concerning that tree?

81 A. Continuing the last quoted note: "At 6 chains a white oak, with indications of marks (that is, two hacks above a blaze) on the northeast side of tree. Both trees doubtful."

Q. 57. The notes that you have read and in the book which you hold in your hand marked Exhibit "B," W. D. Hale, when were they made?

A. These notes that I read from are copied from originals and compared, and are correct, which originals were made at the time of survey.

Q. 58. Now, we come to the hickory tree. Please read both your notes concerning that tree?

A. "South 9 degrees east, 13 chains, at 5 3-10 chains pass 1 chain west of a small hickory on a broad top, side line tree, marked with two hacks above a blaze on the east side of the tree; the upper hack and the blaze are plain; the lower hack indistinct but still discernible. This tree, shows age, but not enough." I have not the other note with me, but I could give the substance of my observations.

Q. 59. Who was with you the second time?

A. No one.

Q. 60. How did you happen to go the second time?

A. I had other business in that location, and for my own satisfaction made the last examination.

Q. 61. Next—take up the Spanish oak, south of the hickory just described, and read your notes, if you have them?

A. "South 32½ degrees west, 4 6-10 chains, at 5-10 chains a small Spanish oak marked with two hacks above and one below a blaze, on four sides of the tree, and six pines marked with two hacks above and one below a blaze, facing the Spanish oak."

Q. 62. What did these marks on the Spanish oak indicate?

A. A North Carolina corner.

Q. 63. What did the six pines marked as stated in your answer, indicate?

A. Witnesses to the corner tree.

Q. 64. How would that tree have been marked if it were a Tennessee corner?

A. Two hacks or three hacks on each of three or four sides, witnessed by three hacks on the pines, or a blaze on the pine.

Q. 65. How old were the marks you observed on the Spanish oak?

A. From 20 to 30 years old, is my recollection.

Q. 66. Take up the white oak. Read your notes concerning it?

82 A. "South 43 degrees west, 2 chains to a large white oak 'fore and aft,' marked with three hacks above a blaze on each side and on the east side two hacks plain and very old. A very old blaze below the three hacks, and a blaze on the north side." "Find other trees marked with two hacks running in a line, south 15 degrees west."

Q. 67. Into what state?

A. Into North Carolina.

Q. 68. What do these indicate, if anything?

A. A line running off from a corner.

Q. 69. Take the black oak on top of high knob; read the note?

A. "South 50½ degrees east, 10 1-10 chains to a black oak, marked with three hacks above a blaze on the north side, and two hacks above and one below a blaze on the west side. This tree stands at the head of Caney Branch Ridge."

Q. 70. About — old were those marks?

A. My notes don't state, but my recollection is that they are of different ages, and I don't remember which are the older of the two.

Q. 71. Give a period within which they were both made?

A. I believe both pair of marks were 30 years old, or over.

Q. 72. Next, take up the chestnut and two white oaks—read your notes concerning those?

A. "South 20¼ degrees west, 6 8-10 chains, at 6 5-10 chains a chestnut and two white oaks, marked two hacks above and one below a blaze."

Q. 73. What does that indicate?

A. A corner.

Q. 74. What state?

A. North Carolina.

Q. 75. What do you mean by a North Carolina corner?

A. I mean the corner of a tract of land granted by the state of North Carolina.

Q. 76. You mean a corner of a North Carolina survey?

A. That is what I mean.

Q. 77. Take up chestnut oak stump—read your notes concerning that, please?

A. "South 61¾ degrees west, 10 2-10 chains, at 8 5-10 chains a chestnut oak stump bearing a plain blaze and indistinct two hacks on the northeast side, the lower hack more distinct than the upper one. Can't be positive."

Q. 78. How was the tree cut down?

A. It had broken down.

Q. 79. Did you take any steps to ascertain the age of those hacks?

83 A. I did not. The stump was hollow. I looked on the inside of the stump to see if it were possible the marks had gone through, but could see no signs.

Q. 80. When you speak of an indistinct hack, what do you mean?

A. I mean an impression in the bark that resembles a hack, but can't be positively stated as a hack.

Q. 81. Take up the small black oak, and read your notes concerning it?

A. "South 3½ degrees west 24 4-10 chains—at 8 4-10 chains a small black oak marked two hacks above a blaze on the west side, very old, but not old enough for state line, and one hack above and one below a blaze above the other marks."

Q. 82. How old, in your judgment, were the last marks described?

A. From 8 to 12 years.

Q. 83. Now the chestnut. Read your notes concerning it?

A. "South 3¾ degrees west 6 chains to a gap, at 3 chains a small chestnut, two hacks above a blaze, rather new."

Q. 84. About how recently were they made, in your judgment?

A. Probably ten years ago.

Q. 85. Did you find any other chestnut tree, and if so, read your notes concerning it?

A. A short distance from the above described chestnut there is a chestnut about which I have the following note: "South 7½ degrees east, 23 5-10 chains. At 1 7-10 chains passed a large chestnut burned on the east side, some indications of mark on the west side."

Q. 86. Did you take any steps to ascertain how old those marks were?

A. I did not.

Q. 87. Did you take any steps to ascertain whether there were marks of the axe, or not?

A. No, sir; nothing more than we could discern in the bark.

Q. 88. You can not swear they were marked, can you?

A. No, sir.

Q. 89. I want to call your attention to the small mountain oak, 7½ miles from the river. You found no trees marked between the one last mentioned, and the one I now call your attention to, did you?

A. None.

Q. 90. Read your notes regarding this one?

A. "South 60 degrees west 7 1-10 chains to a small

84 mountain oak, 'fore and aft,' marked two hacks above a blaze. Marks closely resemble those heretofore blocked and found to be 23 years old."

Q. 91. The mountain oak 7¾ miles from river, 9 inches in diameter. Please read your notes concerning it?

A. My note made in the general survey reads: "South 63½ degrees west 5 8-10 chains to a small mountain oak, two hacks above a blaze. On blocking, find 22 growths from blaze in wood to bark. There are also two hacks above a blaze near the heart of the tree as if it had been marked when only a bush or small sapling. This tree is 8 or 10 inches in diameter and of very slow growth."

Q. 92. What did you do with the block?

A. I left it on the ground because I didn't consider it of any importance.

Q. 93. What did you do with the marks on the inside of the tree that you discovered?

A. I left them on the tree.

Q. 94. What would have been the diameter of the bush or sapling at the time those last mentioned marks were made if ever made?

A. 2½ inches. I measured the heart.

Q. 95. Is it customary to mark bushes 2½ inches in diameter as state line marks in a country as well wooded as this was?

A. From present indications in this locality there was nothing else at that time to mark. I don't know what the custom was.

Q. 96. What else, if anything, did you discover, relative to this tree or sapling?

A. Nothing else.

Q. 97. Is it not a fact that higher up in this tree and deeper in the wood there were some scars which merely resembled state line marks?

A. Those are the scars that are described as being on the heart where it was 2½ inches in diameter.

Q. 98. The hacks do not show traces of the axe?

A. No, sir, they do not. They are mere straight, dis-colored lines with a slight indenture, but don't show the cut of the axe. The blaze shows the cut of the axe.

Q. 99. Did you find any other marked trees until you struck the state line which is not questioned on the lead from the Fodder Stack lead to the Hiwassee River?

A. No, sir.

Q. 100. Did you have any trouble in following the state line to Hiwassee River after striking the Fodder Stack Lead?

85 A. We had no trouble following the divide said to be the state line; but sometimes for miles we would not find the marks.

Q. 101. Can you state whether or not you did find the state line, and run the state line to the Hiwassee River?

A. We were on the state line part of the time; I don't know whether we were all the time or not. We were on the divide.

Q. 102. Do you know whether or not you run the state line from the Hiwassee River to the Tennessee River?

A. I couldn't be positive that we ran the state line all the way.

Q. 103. How long have you been surveying?

A. About 17 years.

Q. 104. In what state and county?

A. In Tennessee, and in 3 or 4 counties. My location is in Monroe County.

Q. 105. Were you ever called on before the present instance to do any surveying between the line you ran Hangover Lead and the Fodder Stack Lead, so-called? That is, within this disputed territory?

A. This is the first work I ever did in that immediate locality.

Q. 106. Are the notes that you have read in evidence on cross-examination a correct description of that which you observed at the time?

A. They are.

The taking of depositions was here adjourned until 1:30 p. m.

1:30 p. m. Resumed.

Q. 107. In your direct examination you were asked direct question 33 as follows: "Taking the actual survey of the lines as made by you with Muller and Wilson, the marks found, the topography of the country, your experience as a surveyor, and also the calls of the Commissioners locating the state line, i. e.: 'From Tennessee River to the main ridge and along the extreme height of the same to the place where it is called Unacoi or Unaka Mountain,' where in your opinion was the state line located by the Commissioners when established in 1821," to which you answered: "On the Hangover Lead." Now I ask you, in view of your testimony given to-day on cross-examination whether you pay any attention whatever in forming your judgment, to the lines run by you, viz: The Hangover Lead, or the Fodder Stack Lead?

A. No. My running the lines didn't affect it.

86 Q. 108. Repeating the first part of the first question and in view of your testimony given on cross-examination, will you state what elements in the question asked you on direct examination, viz: No. 33, you relied upon in forming your opinion?

A. The Commissioners' report and the topography.

Q. 109. If it had not been for the commissioners' report would the topography have been of any service to you in forming your opinion?

A. It decidedly would.

Q. 110. Why?

A. Because it was the most natural boundary, most prominent ridge.

Q. 111. Does not the Hangover Lead at its highest points run east and west instead of north and south?

A. No, sir.

Q. 112. How far east on the Hangover Lead did you go?

A. Only to the Hangover.

Q. 113. How then?

A. Then we turned down the ridge to the river.

Q. 114. Then how do you know that the ridge extending further

east from the point where you turned north was not as high as the ridge you followed to the river, or higher?

A. It is as high for some distance, but I don't know that it is a continuous ridge.

Q. 115. Do you know that it is not?

A. No, sir, I don't know that it is not.

Q. 116. Is not this ridge or Hangover Lead running east and west from Hangover Mountain the source of the following streams: Gold Branch, Bear Creek, Barker's Creek, Deep Creek and Rock Creek, all emptying into the Cheoah River?

A. Some of those creeks rise out of this ridge, I don't know whether all do or not.

Q. 117. You never have been over that territory, then?

A. No, sir.

Q. 118. How then can you say that the Hangover Lead extending east and west is not higher than the lead you followed to the Tennessee River?

A. I can't say that, but the rise of the creeks from the ridge does not make or mar its elevation.

Q. 119. Is it not a fact that the different ridges between the creeks that I have named are as high and as continuous as the ridge you followed down to Tennessee River, all of which extend to foot hills from the Hangover Lead?

87 A. No; there are two large ridges, one running northeast, a general course from the Hangover, one nearly north from the Hangover; the others are not near so prominent or continuous.

Q. 120. You are now testifying as to ridges you never saw, are you not?

A. No, sir; I am not.

Q. 121. What ridges and between what two creeks did you see?

A. I saw two large continuous ridges, one of them between Slick Rock Creek, and the heads of the creeks you have named, I don't remember what creeks are divided by the other. If there had been other large continuous ridges in there, I would have seen them.

Q. 122. Are not the elevations of the Fodder Stack Lead as high as the elevations on the Hangover Lead between Hangover mountain and the river?

A. No.

Q. 123. What is the difference between the highest points?

A. From the Cold Spring Knob southward to the Hangover is higher than the highest peak of the Fodder Stack Lead. The Cold Spring Knob is about two miles north of the Hangover. And from the Cold Spring Knob to the Hangover, except one deep gap, the ground is continually rising.

Q. 124. What is the elevation of Cold Spring Knob?

A. It is about the same as the Big Fodder Stack. From the Cold Spring Knob to the river the ground is declining and gets lower than the general run of the Fodder Stack Lead.

Q. 125. Is not Big Fodder Stack of as great elevation as Cold Spring Knob?

A. About the same.

Q. 126. Are you at present the official surveyor of Monroe County, Tennessee?

A. I am.

Q. 127. Did you ever before hold that office?

A. Yes, sir.

Q. 128. When and for how long?

A. From 10 to 6 years ago—from 1886 to 1890.

Q. 129. And how long have you been serving this last term?

A. Two years approximating.

Q. 130. In what district is the land in question alleged to be in?

A. In Ocoee.

Q. 131. Where does the Ocoee Land District begin and terminate?

88 A. The Ocoee Land District in Tennessee extends from the Tennessee River to the Georgia Line.

Redirect examination by Major WEBB:

Q. 1. In your answer to C. E. 124 you say "from the Cold Spring Knob to the river the ground is declining, and gets lower than the general run of the Fodder Stack Lead." When you speak of the Fodder Stack Lead in that connection, do you mean to include the Slick Rock Ridge and the ridge that connects the Slick Rock Ridge with the Lester Ridge at the river?

A. No, sir; I do not.

Q. 2. How does the height of Hangover Lead from Cold Spring Knob to the river, compare with the height of Slick Rock Ridge and the little ridge that connects this Slick Rock Ridge with the Lester Ridge at the river?

A. It is higher. More prominent, i. e. The Hangover Ridge is.

Q. 3. About how high is the little ridge that connects the Slick Rock Ridge with the Lester Ridge at the river?

A. That is simply a large spur. It is not a continuous ridge. I can't give the elevation.

Q. 4. Is it a spur of the Slick Rock Ridge?

A. Yes, sir.

Q. 5. Does the shading on the map indicate the relative height of this little ridge with Hangover?

A. It does.

Q. 6. Does the shading of Slick Rock Ridge on the map indicate its relative height with Hangover?

A. It does.

Q. 7. You have been asked on Cross-examination about the ridge leading east from Hangover Mountain. Where does this ridge strike the Tennessee River, that is, how far above the state line as you run it coming south toward the Tennessee River?

A. There is no ridge running east from Hangover Mountain. There is a large ridge running (approximating) about north 60 degrees east, but it don't strike Tennessee River at all. It strikes Cheoah River, or I suppose it strikes Cheoah some 3 or 4 miles above the mouth of said river.

Q. 8. Then did the state line as you run it south to the river connect with this ridge on the Tennessee River, at any point on the Tennessee River?

A. No, except by this ridge that we run and call the Hangover Lead.

Q. 9. Then that would make the connection at the point
89 where this ridge leads off from Hangover Mountain?

A. It would.

Q. 10. When you ran the state line north of Tennessee River you found a spruce pine near the bank of the Tennessee River, north bank, marked as a state line, did you not?

A. I did.

Q. 11. As you run this line, how far was this spruce pine beyond where the Lester Ridge leads off from the main mountain?

A. Do you mean south of the Lester Ridge?

Q. 12. Yes.

A. I think it is about a mile; may be more.

Q. 13. When you ran the line on the Lester Ridge did you find any marks of any kind indicating a state line on that ridge?

A. I did not.

Q. 14. At what point did you begin to find the stone monument and the recent marks about which you have testified on the Fodder Stack Lead?

A. The first monument that we found was on the Slick Rock Ridge between Stiff Knee Gap and the river.

Q. 15. About how far from the river was it?

A. I think about two miles, I ain't positive, however, about that.

Q. 16. About how far is it along the line you ran from the river to the marked white oak on the Fodder Stack Lead which you blocked?

A. Eight miles.

Q. 17. Now, beginning at the river and running along the line as you ran it, up the small ridge to the Slick Rock Ridge, and then continuing along Slick Rock Ridge to Fodder Stack Mountain, then continuing along Fodder Stack Mountain to this white oak, state whether the timber along the line is abundant or scarce?

A. It is abundant.

Q. 18. You have stated that this white oak referred to above was marked with two hacks above a blaze on the north side of the tree. Was that meeting the line as you run it?

A. Yes, sir, we ran southward to the ridge.

Q. 19. If this white oak had been a "fore and aft" tree on the line would it have been marked on the south side also?

A. It should have been.

Q. 20. You have stated that the chestnut oak which you found still further south was marked with two hacks and a blaze
90 on the south side. If this had been a "fore and aft" tree on the line, would it have been marked on the north side, also?

A. It should have been.

Q. 21. You have stated that the Spanish oak which you found a

short distance from said chestnut oak was marked "Quartering." Was this mark on more than one side of the tree?

A. It was on two sides.

Q. 22. Which two sides?

A. On the south and west sides.

Q. 23. Were the two marks the same?

A. Yes, sir.

Q. 24. This Spanish oak tree you have stated was about 5 feet off the line as you ran it. On which side of the line was this tree?

A. On the east side.

Q. 25. Then did the mark on the south side of the tree indicate to you, as a surveyor, that the line ran through this tree?

A. The marks indicated that the line ran through the tree, but not through the center, but if the line did not run through the tree the marks would indicate that there were two lines cornering in the center of the tree, one entering from the west and one from the south.

Q. 26. Taking the direction from this tree as indicated by the mark on the south side, would that direction lead away from the top of Fodder Stack Lead or toward it?

A. It would cross the top and lead away from it.

Q. 27. I now call your attention to a marked spruce pine tree referred to in your direct examination as being on a ridge leading east from the Fodder Stack Lead. Please indicate by a cross mark on the map the position of this spruce pine tree and mark it "Marked Spruce Pine"?

A. I have done so.

Q. 28. How far is this spruce pine from the top of the Fodder Stack Lead where you run the line?

A. From 200 to 250 yards.

Q. 29. What marks was on this tree?

A. Two hacks above a blaze.

Q. 30. On which side was this mark?

A. It was on the west side. There were some faint marks on the east side, but I couldn't recognize them.

Q. 31. Did those marks indicate a line running along the top of that ridge from where it joins the Fodder Stack Mountain down to Slick Rock Creek?

91 A. I don't know whether it indicated a line or a trail. I found lots of trails indicated the same way.

Q. 32. How long is that ridge from the top of the Fodder Stack Mountain or lead down to where the ridge terminates at Slick Rock Creek? About how far?

A. It is about a mile, but I wouldn't call it a ridge.

Q. 33. What would you call it?

A. I would call it a spur.

Q. 34. As a surveyor, did you understand the mark on the white oak tree referred to and the chestnut oak tree referred to and the Spanish oak tree referred to and the spruce pine tree referred to, to indicate the state line or to indicate trails?

A. It might indicate either, I don't know which. I find trails

marked with that kind of marks all through the woods and I find the state line marked with that kind of marks.

Q. 35. Continuing your line from the Spanish oak above referred to along the Fodder Stack Lead to the Hangover Lead, state whether that line runs through an abundance of timber?

A. It does.

Q. 36. And you have found no marked trees after you passed that Spanish oak up to the Hangover Lead?

A. None.

Q. 37. Running the line as you ran it from the Tennessee River up the Hangover Lead, state whether the mountain top is well timbered up to the Hangover Mountain?

A. Except about a mile and a half it is reasonably well timbered.

Q. 38. Where is that mile and a half located which is not well timbered?

A. Immediately north of the Hangover.

Q. 39. State whether the state line marks on the double sourwood in Sourwood Gap were old or new marks?

A. Very old.

Q. 40. State whether the sourwood is a tree of slow or rapid growth?

A. Of slow growth.

Q. 41. Does it ever grow to be a large tree?

A. No.

Q. 42. You have referred in your cross-examination to a hickory tree on the Hangover Lead about a mile and a half from the river, and you have copied your notes made at the time of your survey. State whether or not you made a subsequent examination of this hickory tree?

A. I did.

92 Q. 43. Have you with you the notes made on that second examination?

A. I have not but can state the substance of those notes from memory.

Q. 44. State the result of that second examination and whether the result was different in any respect from your first examination?

A. In my second examination of this tree I decided that it is a "fore and aft" tree, and that it shows as much age as a great many trees that we accepted as state line trees without a question.

Q. 45. What caused you to conclude that it was a "fore and aft" tree?

A. The position of the marks on the tree with reference to the course of the ridge.

Q. 46. State what those marks were and their position on the tree?

A. The marks were two hacks above a blaze. The upper hack distinct, the lower hack not so plain, but still discernible; the blaze plain; and they were on the northeast side of the tree.

Q. 47. Was this tree on the top of the Hangover Lead?

A. Yes.

Q. 48. Was the position of these marks on the tree such as to meet a line run along the top of this mountain?

A. Yes, sir.

Q. 49. Was there any other mark on this tree?

A. None.

Q. 50. As you ran the state line north of the river, when you came down to the point above the river, could you look out in front of you and see the Hangover Lead and the Fodder Stack Lead and the Slick Rock Creek basin?

A. Yes, sir.

Q. 51. Which mountain lying south of the river appeared to the eye to be the main leading ridge going in the direction that you were running on the north side?

A. The Hangover Ridge.

Q. 52. Did the Hangover Lead as you run it, lead off from the river just opposite the marked spruce pine on the north bank?

A. Yes, sir.

Q. 53. To get from that spruce pine to the ridge which leads up to the Fodder Stack Mountain, how far would you have to drop down the river?

A. It is a little over half a mile.

Q. 54. At what angle would this be from the line that you were running when you got to the river?

93 A. Nearly right angles, not quite. It would be obtuse, not quite a right angle.

Q. 55. In your cross-examination you have spoken of several trees marked as North Carolina corner on the top of the Hangover Lead. State whether this indicated that the North Carolina grants or surveys stopped at the top of that ridge?

A. Yes; the corner indicates the terminus of the line.

Q. 56. You spoke of a line running off from one of those corners about south 15 west; would this direction carry that line to the east of the top of Hangover?

A. Yes, sir.

Recross-examination by Mr. McGARRY:

Q. 1. Might not all the marks that you observed on the Hangover Lead be made to indicate North Carolina corners and mere trails?

A. They might be made to indicate corners and trails.

Q. 2. Would not the continuation of a state line where your lines run up the Fodder Stack Lead join with the lines you run as the Hangover Lead in a southern direction be a continuation of the Fodder Stack Lead?

A. No, sir.

Q. 3. What is the next highest mountain south of the Fodder Stack?

A. Rock Stack.

Q. 4. What is the next highest one on the state line south of Rock Stack?

A. Stratton Bald on the state line.

Q. 5. What is the next highest one after that, south?

A. The next highest that I know the name of is Sassafras Knob, at the head of Sassafras Mountain.

Q. 6. Have you got your notes relative to the spruce pine that was marked on the north side of the river?

A. Yes, sir.

Q. 7. You might read your notes concerning that tree?

A. "South 43½ west, 6 3-10 chains, to a hemlock 'fore and aft' marked with two hacks above a blaze. The bark is well preserved and the marks show plain. This tree stands between two branches that are 25 or 30 feet apart, and near a large sweet gum, the gum not marked."

Q. 8. Did you take any steps to ascertain the age of those marks?

A. I did not.

Q. 9. Might they be trail marks merely?

94 A. I think not.

Q. 10. Will you answer the question?

A. I think not.

Q. 11. How old were those marks?

A. I don't know.

Q. 12. And you don't know who made them, do you?

A. No, sir; I was not there when they were made.

Q. 13. If that was a state line mark, would not those other trees have been made as witness trees?

A. Not necessarily.

Q. 14. Would it have been usual and customary to do so?

A. I think it would.

Q. 15. Did you take any pains to ascertain the age of the marks on the spruce pine standing alone on the ridge or spur south of the river?

A. No, sir.

Q. 16. Do you ever know of a sourwood tree being marked as a state line mark?

A. No; unless the one described in my deposition is such.

Q. 17. And that you don't know?

A. And that I don't know.

Redirect examination by Major WEBB:

Q. 1. Did the marks on the spruce pine north of the river appear to be old marks?

A. Yes, sir; very old.

Q. 2. Did you and the other two surveyors agree at the time that that spruce pine was a state line tree?

A. We did.

Q. 3. Is the line running from the point where the Fodder Stack Lead and the Hangover Lead come together on a continuation of Hangover, or a continuation of Fodder Stack?

A. It is on a continuation of the Hangover Lead.

Q. 4. At the point where the Fodder Stack and the Hangover come together, how much higher is the Hangover than the Fodder Stack.

A. From the top of the Hangover Lead we would have to descend

some 200 or 300 feet before we could tell that the Fodder Stack Ridge branched off from the Hangover Mountain. Then some 200 feet further before you could properly say you was on the Fodder Stack Ridge. I don't know how better to answer that.

Q. 5. Then the Fodder Stack Ridge does not reach as high as the Hangover Ridge at that point by about 400 feet—is that correct?

95 A. Somewhere from 400 to 600 feet.

And further deponent saith not.

W. D. HALE.

Formal Caption and Certificate waived.

WEBB & McCLUNG, *Sols.*
LUCKY, SANFORD & TYSON, *Sols.*

Subscribed and sworn to before me this 10 day of November, 1896.

[Seal of the Circuit Court.]

J. T. CARTER,
Dep. Clerk.

W. D. Hale's fees, $9.00 paid by Lucky, Sanford and Tyson.

The witness, O. W. MULLER, being duly sworn, says:

(Questions by COMPLAINANT:)

Q. 1. What is your age, where do you reside, what is your occupation, how long and what experience?

A. My age is sixty-two years. I reside in Polk county, Tennessee. My occupation is farming and land surveying. I have been surveying for twenty years in Tennessee and Georgia.

Q. 2. State if you were called upon to locate the state line between North Carolina and Tennessee at Slick Rock creek and near where Little Tennessee river crosses said line, and if so by whom; what other surveyors were with you—and did you undertake to locate said line?

A. I was called upon to do the above named work by Seymour and McCroskey in connection with Hale of Monroe, and Wilson of Blount Co., Tenn.

Q. 3. What method did you adopt to learn the true mark indicating the state line mark, and what is the mark?

A. We went to the north side of Little Tennessee river and examined the line for a considerable distance, and found the state line marked with two hacks above a blaze.

Q. 4. Examine the map of Exhibit "A" to deposition *to* W. D. Hale, and state if it correctly outlines and shows the lines run, and work done by you with Wilson and Hale?

A. I consider it substantially correct.

Q. 5. Please state the distance you ran the state line north of the river, what care you took to locate the same, about how many

96 trees marked with state line mark did you find, and at what point on the river did said line terminate?

A. We began about two miles north of the river, examined all ridges running in the direction of probable state line carefully, and found about fifteen trees marked with state line marks, the last tree being a large spruce pine near the river, marked plain as fore and aft. We also found two hack and three hack lines and corner pointers evidently designating land lines and corners belonging to North Carolina and Tennessee, along the state line.

Q. 6. Had you any difficulty in finding the true line north of the river? Where did it terminate at the river and how near to the river on the north did you find the last tree, and the kind of tree?

A. We had no difficulty in finding and determining the marked tree line north of the river; the rest of the question is answered above.

Q. 7. State if you ran other ridges north of the river to ascertain if they had state line marks? If so, are those ridges located on the map filed? Locate them, giving their names if they have any, and did you find any state line marks on them?

A. We ran other ridges; they are located on the map, showing the track of the compass by a single green line; the line having the state line marks on it is shown by a green line bordered with brown. We found no state line marks on the ridges marked by a green line only. I can not give the names of the ridges.

Q. 8. After locating the state line north of the river what steps did you first take to locate the state line south of the river; the place; what ridge or ridges did you first examine and run, and why?

A. We crossed the river, examined all the ridges that could possibly be called a continuance of the main ridge on the north side of the river, and all spurs leading to the prominent ridges on the south side. We found no old state line marks on any of these near the river, and ran our line on the most prominent—running to what is called "Slick Rock Gap," because it fills the description of the report of the commissioners as recorded in the Code of Tennessee.

Q. 9. What is this ridge called? Was it leading to the Hangover or Fodder Stack Ridge?

A. It is the ridge leading to the Hangover, and the whole length is called the Hangover lead.

Q. 10. Was there anything in the topography of the country, the elevation and course of surrounding ridges to cause you to
97 adopt this? If so, describe fully, giving general topography, elevation and course of this ridge with others?

A. The topography of the country determined our selection of this "lead." Standing on the summit of this ridge and looking back over the ground we had traversed, the continuance of the leading ridge seemed so plain that there seemed no possibility of mistaking the identity of the formation. It looks as though the river, impeded in its course, had burst through the mountain, worn down the rocky chasm, leaving the same configuration of its sides on both sides of the river; the course is southwesterly, the general elevation greater than the surrounding ridges. None of the other ridges look like a continuation of the ridge on the north side of the river on which the "marked state line" is found.

Q. 11. Please state in detail the course of your survey up the Hangover, not giving the many calls but the course, distances, the trees if any found with state line mark, their locality on ridges or depressions, the trees, their kind, etc., and continuing on said ridge to where the two lines come together on the south west?

A. We surveyed along the top of this leading ridge, which runs in a direction a little west of south to the top of the Hangover, a very high and prominent peak; thence its trend is more west, being nearly southwest from the Hangover, passing the "Hao," the highest point in that region, the "Strutton Bald," and continuing in the same general direction toward the Strutton meadows. Several depressions in the leading ridge, commonly called gaps, are passed. There are many marked trees on this line, made at different periods; some very old so as to be almost extinct; some recent, apparently only twelve or fifteen years old; also many indications of corners. Some of these marked trees are so indistinct as to be scarcely discernible, the bark having sloughed off sometimes, leaving merely an ax sign. These we did not note.

At a depression—Sourwood Gap—about one mile from the river, we found a double sourwood very plainly marked with the characteristic state line mark as a fore and aft tree. This tree is old, and the tooth of time will soon obliterate the marks, as part of the bark is beginning to loosen and decay. Passing "Slick Rock Gap," and ascending about one-fourth of a mile from the sourwood, is a small scrubby hickory with a plain state line mark as a side line. A little farther on, an old chestnut oak stump, with the same marks that bear the stamp of age. From this place on as we ascend to
98 higher ground we find no more state line marks that we consider distinct enough to note—and the land marks and corner indications seem to show more age as we ascend—until on the highest ground the marked trees of all kinds disappear, the timber becomes more scrubby and of such a nature that it would preserve a mark in the bark but a short time.

Descending from the Strutton Bald we strike Laurel and somewhat lower ground. Here a low flat ridge runs off in a nearly north direction, leading to what is called the Fodder Stack lead.

Q. 12. About how much higher is the Hangover Ridge than the Fodder Stack Ridge, and what means did — adopt to ascertain the relative height?

A. I took barometric heights and found the difference in the mercury to be about one inch. Leveling the compass on top of Hangover Lead, the sight across went much above; doing the same on the Fodder Stack lead, on the highest points the level sight went far below, making at least six hundred feet difference in favor of the Hangover lead.

Q. 13. State if continuing south west beyond where the two ridges come together you ran and located the state line, and if so how far and to what point? How far beyond the junction of the ridge did you run before you found the state line marks, and how frequent, and generally on what kind of ground and timber?

A. We ran about one mile south west of the junction of the ridges, descending to lower ground when we found the first tree

marked with state line marks—a mountain oak. This is on a low, smooth ridge—we found several well marked trees, satisfactory for state line. We ran the state line to Hiwassee river, following the main divide, sometimes finding the characteristic state line marks quite frequent, and sometimes running for several miles without finding anything satisfactory. On ascending to high ground we generally lost the marks to find them again as we descended to lower ground. This state of affairs continued when, having passed the turnpike where the line leaves the main ridge, we ran a direct line to Hiwassee river, being about thirty-five miles from the junction of the Fodder Stack lead, and the Hangover lead.

Q. 14. State if you also ran out the Fodder Stack Ridge to ascertain if state line marks were on said ridge, and if so did you use as much care in running that line and searching for marks as on other lines run by you?

A. We did run out the Fodder Stack Lead and bestowed and were as careful and particular to find everything in the way of
99 marks as we were on the Hangover ridge or any other portion of our work.

Q. 15. On the Fodder Stack lead state if the line had been run by a North Carolina surveyor, and if so about how long since and by whom? Did you find any marks or monuments made by him, and if so what were they, and where was the terminus at both ends of disputed territory?

A. We found milestones set up from Little Tennessee river to the Unaka Turnpike. Beginning at the turnpike there is a stone marked—1893—N. C.—101—and this series runs on to near Little Tennessee river, where a rock is marked N. C.—39-62—two hundred and eighty-three poles from the river. These monuments are on the Fodder Stack lead, and this line is heavily marked with three heavy ax cuts fore and aft and side line, and looks to be about two or three years old; but as to when, and by whom it was made, I have nothing but the report of the mountaineers.

Q. 16. Beginning at the Little Tennessee river and running southwest general course with the Fodder Stack ridge line as claimed, please give the ridge or ridges followed, whether it is a continuous ridge or not, the courses followed, the character of the ground and timber, and what trees if any you found indicating the true state line, their location and kind of tree?

A. Beginning at the Tennessee river and following the line indicated by the marked trees and milestones, we ascend a spur running nearly south, then a little south of west striking a leading ridge running from near the mouth of Rabbit Creek to Stiff Knee Gap; thence running in a nearly a western direction to Stiff Knee and striking the Salt Spring mountain nearly at right angles; thence running in a southerly direction to the Little Fodder Stack; thence in the same general direction, passing Big Fodder Stack and striking the Hangover lead in the place heretofore indicated. From the Little Fodder Stack to this junction it may be called a continuous ridge, broken by several gaps and points. The timber is not as scrubby as on the Hangover Lead, except on the highest points. We found many

marks besides those indicating the recent line. About eighty poles south of the top of the Big Fodder Stack we find a large white oak marked with an old mark—two hacks above a blaze—on the north side. This we blocked and found sixty-nine growths between the bark and blaze. This is near the stone monument marked 32-69.

About twenty poles farther we find a chestnut oak marked
100 with this mark on the south side; a little farther we pass a spotted oak marked quartering with the trail; also several sets of three hack marks. These are all the marks of this kind, I think, have any claim to age.

North of this about one mile, we find a great many marks of this kind—(two hacks above a blaze)—of recent origin, meandering with trails, and evidently made for trail marks.

Q. 17. You mention old marks—two hacks and a blaze—beyond Big Fodder Stack. Did you find like marked trees off the main ridge, and if so where and how many?

A. We did. We found a great many, appearing to be about twenty-three years old, about one mile north of the Big Fodder Stack, running across the leading ridge and around on the sides of the ridge, following a trail. We found the same marks on several spurs of this leading ridge, running off towards Slick Rock Creek, all however wanting in the show of age except one on a spruce pine or hemlock standing on a cliff on a spur near the top of the mountain, running from the Big Fodder Stack into the fork of two small tributaries of Slick Rock Creek. This is marked in the bark, and appears older than the ones above mentioned.

Q. 18. This last marked tree—did it bear the same indications and age as the three trees "old marks" on the ridge, and could it have been made by surveyors locating the state line on the Fodder Stack Ridge—and if not, why?

A. It bears the marks of age as much as the above mentioned three trees. But the tree is isolated; I searched the ridge or spur diligently, examined every tree and while there were many trees capable of holding a mark, found no other. I never attach much importance to a single marked tree as indicating a surveyor's work, if it has nothing else to corroborate it. It is not in line with the Fodder Stack Ridge; it is on a spur that runs off at right angles, and could not have been marked as indicaing a line running with the Fodder Stack lead.

Q. 19. Between this and where the two ridges come together, did you find any marked trees, state line; what was the character of timber for holding old marks? Also, what was the character of timber for the first 7 or 8 miles of the line for holding old marks?

A. The character of the timber on the whole distance from the river to the junction of the ridges is such as to hold marks except on the highest points.

Q. 20. Is the Fodder Stack or Hangover the main ridge? Explain the difference, their respective courses and terminations. Explain fully.

101 A. The Hangover ridge or lead is undoubtedly the main ridge in this section of country. If traveling northerly we

begin on the main top of the Unaka's on the state line of Tennessee and North Carolina and follow this line to the junction of the Hangover and Fodder Stack leads, we see before us towering above all the neighboring points, and in the direction we are going, the Strutton Bald, the Hao or Christies Peak, and the Hangover, all connected by narrow ridges. From the Hangover, tending a little more west, this ridge gradually descends to the river having but few gaps, mostly high until it bluffs at the river gorge. On the north side of the river on about an equal elevation with bluffs rising from the river, the almost exact counterpart of the bluff on the south side of the ridge continues in the same general direction to the Smokeys. The connecting ridges between the high points overlook the highest points of the surrounding country. The lowest Gap between the Strutton Bald and Hao appearing to be about four hundred feet above Big Fodder Stack, the highest point of that ridge. The prominence is unmistakable.

The Fodder Stack Ridge at the junction drops off in a wide flat descent, nearly at right angles from the general direction of the leading ridge we have been following, the principal points being the Rock Stack, Big Fodder Stack and Little Fodder Stack. This lead has several prominent prongs. At Big Fodder Stack Pine Mountain breaks off westwardly, on the east spurs run towards Slick Rock Creek at Stiff Knee—one spur turns to the east, dropping down about one thousand feet, dividing into Tallassee mountain which terminates at Little Tennessee River near the mouth of Tallassee creek, and Slick Rock Ridge, the most prominent prong of which terminates at Tennessee River in the bend about the mouth of Rabbit creek: the most prominent trends to the west has the local name of Salt Springs mountain, and terminates about Citico creek. From the general configuration of the country, and the difference of elevation, this could not be considered the leading ridge.

Q. 21. Have you heretofore had experience in locating state lines, and if so, where and the extent of your experience?

A. I have at different times surveyed portions of the state line between Tennessee and Georgia—all amounting to about fifteen miles.

Q. 22. If the land in dispute is in Tennessee, in what land district is it located, and what knowledge have you and experience in surveying in said land district. What portion of Monroe county does said district embrace?

102 A. It would be in the Ocoee Land District—at least the greater portion. I do not know the line between the Ocoee and Hiwassee District in Monroe Co. I have surveyed most of the mountain land in the Ocoee District in Polk county—but little in Monroe.

Q. 23. Taking the actual surveys of the lines, &c., made by you with Wilson and Hale, the marks found, the topography of the country, your experience as a surveyor, and also the calls of the commissioners locating the state line; that is "From Tennessee river to the main ridge and along the extreme height of the same to the place where it is called Unicoi or Unaka mountain"—where, in your

opinion, was the state line located — the commissioners when established in 1821?

A. Crossing the river from the spruce pine marked above the mouth of Slick Rock Creek, running to the top of the bluff on the south side of the river; thence with the top of this leading ridge, passing the marked sourwood in Sourwood Gap, through Slick Rock Gap, passing the marked hickory and chestnut oak stump; thence along this ridge over the top of the Hangover, Hao, Strutton Bald and continuing on this same leading ridge.

Q. 24. State if J. K. Wilson and W. D. Hale were with you in locating the line, and how long were you at work?

A. J. K. Wilson, W. D. Hale and myself made the survey jointly. We were at work a little over six weeks.

And further saith not.

O. W. MULLER.

Sworn to and subscribed before me this Oct. 13, 1896.

J. T. CARTER,
Dep. Clerk.

O. W. Muller, Fetzerton:

2 days	3.00
192 miles	9.60
	12.60

Paid by compl't.

It is agreed between counsel that counsel for defendants shall have the right to cross-examine the above named witness on the — day of ——, 189–, and to except to the questions and answers made in the foregoing examination in chief, as fully as if such exceptions had been made at the time each question and answer was made, and to except generally. Oct. 13, 1896.

T. E. H. McCROSKEY,
Sol. for Compl't.
LUCKY, SANFORD & TYSON,
Solicitors for Def'ts.

No. 1056. Filed Oct. 13, 1896. J. T. Carter, deputy clerk.

103 The witness J. K. Wilson, being duly sworn, says:

(Questions by complainant:)

Q. 1. What is your age, where do you reside, what is your occupation, how long and what experience? State if you were called upon to locate the line between North Carolina and Tenn., near Slick Rock Creek, and near where Little Tennessee river crosses said line, and if so, by whom, and did you undertake to locate the line?

A. 45 years. Maryville, Blount County, Tenn. Land surveyor and real estate. I have been in the field surveying for 11 years—and in that time have done a great deal of surveying in the moun-

tains of Blount county. Yes; by T. E. H. McCroskey, att'y, of Madisonville, Tenn., and I undertook the work.

Q. 2. What previous experience had you in locating the state line between North Carolina and Tennessee, and if so, how far from the line in dispute, and what is the true state line mark?

A. My previous experience in running the state line between North Carolina and Tennessee has been in surveying lands along said state line, where there is no dispute as to where said state line is. In doing so, I have run the state line some 32 to 34 miles eastward from line in dispute. The state line mark is two hacks, one above the other, and then a blaze immediately under the lower hack, thus: ⁝.

Q. 3. Had you any difficulty in locating the state line north of the river? Where did it terminate at the river? How near to the river, and the kind of tree?

A. I had no difficulty in locating the state line north of the Little Tennessee river. It terminates a little over one-half of a mile above, and on opposite side of the river, the mouth of Slick Rock creek. The last marked tree found, descending toward the river is a hemlock, locally called spruce pine, five chains or 10 poles from the edge of the water.

Q. 4. State if you ran other ridges north of the river to ascertain if the state line marks were on them. If so, are said ridges located on the map Exhibit "A" to deposition of W. D. Hale? Locate the ridges thereon, and did you find state line marks on them? If the ridges thus run had local names, give them?

A. I ran two other ridges north of the river. The first one is marked on Exhibit "A" to W. D. Hale deposition as the "Lester Ridges." The other one is south of the line going toward the river. We found no state line marks on either of these ridges.

104 Q. 5. After locating the line north of the river what were the first steps taken by you with Muller and Hale in locating the state line south of the river; the state line in dispute? What ridge or ridges did you first run, and why?

A. The first ridge that we ran after crossing to the south side of the river was the ridge dividing the waters of Slick Rock Creek from Bear Creek—leading directly up to the Hangover mt. This ridge butt off at the river immediately opposite where the state line strikes the river on the north side—and the natural supposition would be that the state line would go straight across the river.

Q. 6. Describe the general topography of the country, the elevation and course of this ridge with others in the neighborhood. Please do so fully?

A. From the Tennessee River this ridge rises sharply for some 40 to 60 chains; then comes small knobs, small gaps and level places, until we reach the gap called Slick Rock Gap. Then the ridge rises fast with only a small gap or two, until we come to Big Fat Gap, the only really deep depression in said ridge. From Big Fat Gap it rises sharply again without hardly an intermission until it tops the Big Hangover, one of the highest points in this section. The course

87

of this ridge is southwestern, and agrees well with the course of the state line on the north side of the river.

Q. 7. Do the surrounding ridges or spurs correspond in course, and are they as high as the Hangover?

A. The highest and most prominent ridge or mountain in this section is the ridge or mountain from the Hangover to the Strutton Bald—and no other surrounding ridge corresponds as well in course with the Hangover, as the one we first run up from the river.

Q. 8. State fully your survey up to the Hangover and on to where it and the Fodder Stack come together on the southwest; what trees if any you found showing state line or indicating said line; the location of these trees, in depression or on the ridge; the kind of trees; also if you found trees showing corners of tracts surveyed, state how many as near as you can, and whether the tracts were surveyed east or west of this ridge?

A. The best way to answer this question is to quote from my individual field notes. At station 94 I have "to stake by black oak, has plain evidence of old state line marks = blaze and one hack plain; other hack not so plain; on the south side not plain and can't say it has them on that side." At station 100, "to double
105 sourwood standing 1 and 2-10 chains west of the center of the Sourwood Gap. This sourwood has the old state line plain large one fore and aft—smaller one only on the northeast side." On re-examining this double sourwood on Jan. 29th, I have the following note: "The smallest tree has on the east side the two hacks and blaze, that I think is the old state line. Then it has two blazes above the two hacks and a blaze, but they are more recent. It also has five irregular hacks on south side. The largest one has the old state line, two hacks and a blaze on the east side, blaze nearly gone and also the two hacks and blaze, state line marks on west, but the upper hack is made with two licks of axe. It also has one recent on the south side." On station 106 "passing black oak fore and aft has two blazes plain, hacks not plain." At station 114 "to stk. S. 9, W. 38 links from this station stands a black oak with North Carolina Corner. Three hacks on east, three hacks on south, no cross." The above station is 4 and 4-10 chains south from Slick Rock Gap. Station 113, "passing chestnut oak indications state line (side line) mark, blaze plain, but marks not so plain." "Also passing white oak shows evidence of two hacks on northeast side; no evidence of marks on the other side." Under station 114, "face of the ridge broad, at 5 and 3-10 chains, passing a side line hickory, two hacks and blaze on east side. Hickory stands one chain east of our line. Think too young." Under station 116 "To stake on first high top from Slick Rock Gap near pine marked —M. W. H.— and a Spanish oak and lot of pines marked two hacks, blaze under and then a hack under blaze, thus ÷ supposed to be a North Carolina corner." Under station 120 to large white oak with three hacks above a blaze fore and aft, rather new; on the north side has a very old blaze below the younger blaze, and looks like new blaze had cut out hacks. There is also on the east side two very old hacks—line marks—and line runs S. 15 and ½ W." Station 128

"to black oak on high knob at the head of Cain branch ridge. The black oak has three hacks above blaze or north and south, and two hacks above a blaze and one hack below the blaze on southwest." Station No. 132, "to near large chestnut with two hacks above a blaze and one hack below same blaze—seems to be North Carolina corner." Under station 148 "passing an old chestnut oak stump with plain blaze like state line and indication of two hacks above on east side—west side burnt off." Station 152, "passing small black oak, two hacks and blaze under on west side, and above it a hack, a blaze and hack," thus: $\frac{\cdot}{106}$ Under station 163, "passing small chestnut at 3 chains with two hacks above a blaze but rather new." Under Station 165, "passing half burnt chestnut with indications of state line marks." I have no more trees noted until after passing the top of Hangover peak, and only two small mountain oaks between the Hangover and the place where the Stack lead strikes the same, except two small mountain oaks, one of which was split open and we counted 22 years' growth; also the other was too young for the state line. The marked trees that we supposed to be North Carolina corners, were marked as though the land lay on the east side of the ridge—I will state that some half a mile before getting to the Hangover peak the laurel set in, and found no trees old enough to hold marks; also after passing the Hangover peak, there is hardly any trees of a character to hold very old marks, being scrubby beech, buckeye and birch, and in fact for a great part of the way the comb of the mountain is bare of timber.

Q. 9. Did you continue to run and locate the state line southwest of where the two ridges come together, and if so did you find and locate the line satisfactorily; what kind of ground did you find marked trees on, how many, and how far did you continue the line?

A. We continued to run the line to the Hiwassee River, some 35 to 37 miles beyond where the two ridges comes together; some three-quarters of a mile beyond their junction we descend rapidly, and then we find the marks on large old mountain oaks, and generally when we find old mountain oaks, hickories, chestnut oaks and a few chestnuts we find the state line marks. The trees are mostly on the lower ground; when we climb to higher ground where the beech, buckeye and birch grow, we find no marks. Especially do we find plenty of marks after passing the turnpike where the line runs south across hollows and branches.

Q. 10. Had you any difficulty in finding the line after you passed the junction of the two ridges, and are you now satisfied you found the true line and marks?

A. I am satisfied that we found the true marks and state line.

Q. 11. Did you also run the Fodder Stack ridge to ascertain if it had state line marks on it, and with what care?

A. We run the Fodder Stack ridge with a great deal of care, looking the timber closely for all marks.

Q. 12. State if you found on this ridge that it had recently been run out as the state line, and if so by whom, how long ago and what kind of marks and monuments did he make?

107 A. We found a new line marked with three hacks one above the other, (thus ≡), it looked to be two or three years old; also found stones set up at about every mile. The one nearest the river is marked 62-39 and one number increases and the other decreases as you follow the ridge toward the Hangover lead. I understood from parties in the neighborhood that an engineer by the name of McClelland, from Murphy, North Carolina, run it, and so we gave it the name of the McClelland line.

Q. 13. Beginning at Tennessee River and following the same, southwest course as to state line, give the ridge or ridges followed, their course and distances approximately, whether it is a continuous ridge or not, the kind of marked trees you found indicating the true state line, their location, kind of trees, &c.?

A. We began on the west or south bank of the Little Tennessee River about eighteen chains below the mouth of Slick Rock, where McClellin's line strikes the river; then up a spur of the ridge, known as the Slick Rock lead, about a mile and quarter to its top, then along its top nearly west to the top of the Stiff Knee Knob, in all about 3 and ½ miles from the river; then generally a south course along the Fodder Stack lead about 7 to 8 miles to where it joins the Hangover lead. We found no marks along these ridges that were old enough for the state line until we come to the southeast descent of the Big Fodder Stack, some 7 and ½ miles from the river. Here we found a large white oak with two hacks above a blaze on the north side—don't show on the south. They are very old and like state line marks; we cut in the blaze and I counted 66 and then 69 years' growth. The tree stands about center, on the ridge. A little further on we passed an old scrubby chestnut oak with two hacks above a blaze on the south side—don't show on the north. Very old, shows only in the bark. About ¾ of a mile further on we passed a large mountain oak; it has three old marks on north, 3 on east, 3 on south and 3 on west, and also has below the above marks two hacks above a blaze, fore and aft, rather quartering on west edge. The two hacks and blaze are plain on the south side—two hacks plain on north but blaze about gone. The tree stands about five feet east of the summit of the divide—like state line—but never saw one marked quartering before the state line. These were all the marks noted on the main Fodder Stack Ridge that are like and old enough for state line. On our second trip in April we went out to the Big Fodder Stack and searched down to a ridge that runs an eastward course

108 from the east end of the Big Fodder Stack down to Big Slick Rock Creek. On this ridge some 635 feet from the east end of the Big Stack we find a hemlock or spruce pine marked with two hacks above a blaze, plain on east side and very much like state line marks. On west side the two hacks are plain, but blaze not very plain. We searched on down this ridge to the Slick Rock Creek, but found no marks like the state line.

Q. 14. This last marked tree; could it have been made by surveyors in locating state line on Fodder Stack ridge and if not, why?

A. It could not as it is over 19 chains east from the main top of the Fodder Stack ridge.

Q. 15. From the place or locality where you found these old marks, how far is it to where the ridges come together, and did you find any state line marks along that distance? What is the character of the timber for holding old marks?

A. From the white oak about three and one-fourth miles and 2 and ½ miles from the large mountain oak. We found no marks like and old enough for the state line along the balance of the distance. Though we pass through for a mile or more, some very old hemlocks or spruce pines and also wild cherries, and these ought to have held the marks if they had ever been put on them.

Q. 16. What is the character of timber for the first 7 or 8 miles after leaving the river, on this line? I mean for holding marks?

A. From the river up to the Stiff Knee, some 3 to 3 and ½ miles there are many old trees of white oak, chestnut oak, hickory, etc., that hold marks well; from Stiff Knee on the timber is not so good, or rather there are not so many immediately on top.

Q. 17. Which is the main ridge; the Fodder Stack or the Hangover? Please explain the difference; how they diverge; their respective courses, and where each terminates? Explain fully.

A. There is no doubt but what the Hangover lead from the Hangover peak southwestward is the highest most prominent and the main ridge in all that immediate section; especially is this noticeable at the point where they diverge. At this point, one has to descend rapidly for a quarter of a mile or more, the side of the Hangover lead before he can tell that he is actually on a divide, or the Fodder Stack lead, and if one was going along the Hangover lead he could hardly tell where the Fodder Stack lead joined it, without a pilot or guide. Starting at the point they diverge,
109 the Hangover lead runs north of east to the Hangover peak, say 3 to 3 and ½ miles; there it turns nearly north, and for a mile curves a little west of north and then more eastwardly until it strikes the river, directly opposite where the state line comes to said river. The Fodder Stack lead after leaving the Hangover lead has a general course of nearly north, if anything a little west of north, for some 7 to 8 miles to Stiff Knee Knob; here there is a division of this ridge, and Fodder Stack lead loses its name; one ridge runs westward and is known as the Salt Spring mountain, and I understand runs into the fork of Citico Creek; the other ridge turns almost due east, and becomes the Slick Rock lead, and for two miles runs almost east and then turns more north and strikes the Little Tennessee River some 3 to 4 miles below the mouth of Slick Rock Creek.

Q. 18. At the divide of Fodder Stack at Stiff Knee, which is the more prominent ridge—the Salt Spring which terminates at Citico Creek, or the other Slick Rock Ridge, which terminates at the river?

A. We only run out the Salt Spring mountain about one-half mile for this distance and there, judging by the eye as to its con-

tinuation, the Salt Spring is the highest and most prominent. At this point the Slick Rock Lead descends very rapidly into Slick Rock Gap, and while it has many gaps and knobs on it, it never rises as high as Stiff Knee again.

Q. 19. Please give general contour of Slick Rock Basin; the names of surrounding ridges; their relative height, and about the area in acres of its basin?

A. From what I have seen of the Slick Rock Basin, it is hardly anything but ridges and hollows, and the level places along the creek being narrow and not so many of them. These ridges run in toward the creek from all sides. On the south and east it — bounded by the Hangover lead; on the west by the Fodder Stack lead, and on the north by Slick Rock Lead and one of its spurs. The Hangover lead is the highest; the Fodder Stack lead is the next in height, and then the Slick Rock Lead. I think there are some 9,000 to 10,000 acres in the basin.

Q. 20. Have you had any experience in surveying in Ocoee Land District, and do you know what district the land in dispute would be if in Tennessee?

A. I have never surveyed any in the Ocoee District and do not know its boundaries from personal knowledge.

Q. 21. Taking the actual surveys as made by you with Muller and Hale, the marks found, the topography of the Country, your experience as a surveyor, and also the calls of the commis-
110 sioners locating the state line, that is: "From Tennessee River to the main ridge and along the extreme height of the same to where it is called Unicoi or Unaka mountain." Where, in your opinion, was the State line located by the commissioners when established in 1821?

A. I think they run up the Hangover lead.

Q. 22. What other surveyors were assisting you in locating the line, and how long were you at the work?

A. O. W. Muller and W. D. Hale. We made two trips; 1st in Jan. and Feb., 1896. In going and coming and field work, 24 days. 2d in April, 1896—12 days.

Further saith not.

J. K. WILSON.

Sworn to and subscribed before me this 13 Oct., 1896.

J. T. CARTER, *Dep. Clerk.*

2 days..... 3.00
Maryville, 32 miles..... 1.60
Pd. by Compl't.

It is agreed by counsel that counsel for defendant- shall have the right to cross-examine the above named witness on the — day of ——, 189–, and to except to the questions and answers made in the foregoing examination-in-chief, and to the deposition generally

as fully as if such exception had been made at the time each question and answer was made, &c.

Oct. 13, 1896.

T. E. H. McCROSKEY,
Sol. for Compl't.
LUCKY, SANFORD & TYSON,
For Def'ts.

Deposition of J. K. Wilson (Cause No. 1056), filed Oct. 13, 1896.
J. T. CARTER, *Deputy Clerk.*

And afterwards, to wit, on the 12th day of December, 1896, certain depositions of James Farr, Emerson Debity, Richard Stratton, S. R. Nicholas, A. D. Cline, Samuel Blair and John Debity were filed in the Clerk's Office of said court, which said depositions are clothed in the words and figures following, to wit:

KNOXVILLE, TENNESSEE, *Dec.* 4, 1896.

J. W. Cooper, Esq., Murphy, N. C.

DEAR SIR: On the 11th and 12th days of December, 1896, at the residence of Virgil Grant, in the 17th Civil District, Monroe
111 County, Tennessee, we will take the depositions of John Debity, Wm. Debity, Emerson Debity, Dick Stratton, Dick Nichols, James Farr, Sam Blair, Boyd McMurray, Ab Cline —— to be used as evidence for complt. in case of Charles Hebard vs. D. W. Belding, et al., in the United States Court at Knoxville, Tennessee.

Very truly,

T. E. H. McCROSKEY,
Sol. for Charles Hebard.

(Copy.)

T. E. H. McCroskey, sol. for Charles Hebard, makes oath that he mailed the original letter of which this is a copy to J. W. Cooper, addressed to Murphy, on Dec. 5th, and that the distance from Murphy, N. C., to the place of taking said depositions is about sixty miles.

T. E. H. McCROSKEY.

Sworn and subscribed before me Dec. 11, 1896.

V. E. GRANT,
J. P. and Commissioner.

UNITED STATES OF AMERICA,
Eastern District of Tennessee:

The President of the United States of America to Virgil Grant, Greeting:

Know ye, that we, in confidence of your prudence and fidelity, have appointed you commissioner, and by these presents do give you full power and authority diligently to examine upon their cor-

poral oaths or affirmations, before you to be taken, at your residence in the 17th Civil District, Monroe County, Tenn., James Farr, Emerson Debity, Richard Stratton, B. R. Nichols, A. D. Cline, Samuel Blair, as witnesses on the part of the complt. in a certain cause now pending undetermined in the Circuit Court of the United States for the Eastern District of Tennessee, in the Sixth Circuit, wherein Charles Hebard, — plaintiff, and D. W. Belding, et al., — defendant-.

And we do hereby require you before whom such testimony is taken, to reduce the same to writing, and to close it up under your hand and seal, directed to the clerk of our said court at Knoxville, and that you return the same when executed as above directed, annexed to this writ, with the title of the cause endorsed upon the envelope thereof, into the said Circuit Court before the judges thereof, with all convenient speed.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Knoxville, in the
112 said District, this 7 day of December, in the year of our Lord one thousand eight hundred and ninety-six.

[The Seal of the Circuit Court.]

HENRY O. EWING, *Clerk*,
By J. T. CARTER, *Deputy Clerk*,
U. S. Circuit C., East. Dist. Tenn.

In the United States Circuit Court, Eastern District, Northern Division.

No. —. In Equity.

CHARLES HEBARD
vs.
D. W. BELDING et al.

The depositions of James Farr, Emerson Debity, Richard Stratton, B. R. Nichols, A. D. Cline, Samuel Blair, John Debity, witnesses for the complainant in the above entitled cause, taken by consent as to all of the defendants except J. W. Cooper, and pursuant to notice to said Cooper, at the residence of Virgil Grant, Esq., in the 17th Civil District of Monroe County, Tennessee, in the presence of said Virgil Grant, Commissioner, duly authorized to take said depositions, and in presence of the solicitor for complt. and the solicitor for all of the defts. except said Cooper.

Said witness JAMES FARR, being by said Commissioner duly sworn, deposed and said:

I live about a mile from the lands in dispute. I live on the Fodder Stack Lead. I have lived on the lands in dispute in the Slick Rock Basin. I first lived on them about fifteen years ago, living then on the head of Little Slick Creek, on the west of main Slick

Rock Creek. I lived there five or six years; maybe longer.
113 That is where Ditmon now lives. Then I moved onto the old Cove on the same tract, where I now live. That is not on the land in dispute. I stayed there a year or two, perhaps two or three. Then I went back and lived east of the main Slick Rock Creek, in the Nicholas Cove. I lived there about nine years, and still keep my stock there, and my sister-in-law lives there. I have always understood that I have lived in Tennessee since I come over. I was raised in North Carolina, and moved over about fifteen years ago. Since I came to what I regard as Tennessee, I have voted at Mulberry, in the 17th Civil District of Monroe County, Tennessee, and have worked roads down by Boyd McMurray's in the same district, and have paid taxes in Tennessee and nowhere else. I have always understood the State Line to be on the divide East of Slick Rock, from here on the Hangover Lead. I always heard and understood that when you crossed over through the Slick Rock Gap, in the divide that runs to the Hangover, then you got into Tennessee. I understood this before I moved over. Whenever there was any trouble and any one had to get into Tennessee, I understood that when you had passed this point you was in Tennessee.

R. N. Archer began to cut timber in that basin over a year ago. They cut timber right around my possessions there. That was east of the main Slick Rock Creek. About the same time they were building a road and built some cabins on Little Slick Rock creek, at the mouth but west of main Slick Rock creek. A man came to me to get me to slide some logs for these cabins, and this was at the same time they built the road. I saw some timber that had been cut on the west side of main Slick Rock creek.

The Leadbetters, Henry and John, moved into the place at the head of Little Slick Rock after I left. They were tenants of Mr. T. E. H. McCroskey, who was the agent for Hebard, I think. McClung owned the land before Hebard. I don't remember the names of other owners. The Leadbetters also voted at Mulberry, and worked the roads down here with me and paid taxes in Tennessee. They lived there seven or eight years. Henry Ditmon lives there now. Ab Klein lives about 100 yards away. They are living on what is said to be the land in dispute.

Just after I moved over to the Cove, about 10 years ago, I had gone over to Leadbetters to sow some wheat, and saw a party of surveyors. I knew one of them—Pose Hyde, a North Carolina man—with whom I had gone to school. He said they were running the state
114 line. The way they were running it would take in the head waters of Little Slick Rock. I told him I didn't think he would find the line there. He said he didn't think they would either, but that they were running a sort of conditional line.

Cross-examination:

I don't know who the Leadbetters were tenants of except what they told me, and they moved on the same property I left. I understand the whole Slick Rock basin to be in dispute. I don't live on what I understand to be the land in dispute. I heard Marion Can-

ger say the state line ran along on the Hangover lead, and old Mr. Nelson; I believe I have also heard Andy Canger say it. I don't remember the names of anybody else in particular I heard say this.

And further deponent saith not.

JAMES FARR.

Sworn to and subscribed before me, this 11th day of Dec. 1896.

V. E. GRANT,
J. P. & Commissioner.

The said witness, EMERSON DEBITY, being duly sworn, deposed as follows:

I am a son of John Debity. I moved into the Slick Rock basin. When father moved into the Slick Rock basin, we moved into the fork of the creek on the east side of both creeks, and 8 or 10 miles above the mouth of the creek. Father is not living there now, though I understand part of his things are still there. I lived there with father for 17 or 20 years; that is, on the land in dispute. After I came of age I voted at Mulberry, in the 17th Civil District of Monroe county, Tennessee, and paid taxes there. I didn't work any roads until after I moved out of the mountains down here. I moved out last spring. I always understood that the state line ran up the Hangover divide east of Slick Rock creek. My father voted at the same place. My brother-in-law, Russ Hardin, also lived in the Slick Rock basin. Also Jordon Hicks, the Leadbetters on Little Slick Rock, and Jim Farr used to live there. They all voted in Tennessee, paid taxes there, and worked the roads so far as I know.

Cross-examination:

I am twenty-nine years old. I have a brother named John and a brother named Bill. James Farr who has testified just before
115 me is somewhere near forty. I have voted at Mulberry three or four times. The first time was the August election, when I was 22 years old.

E. E. DEBITY.

Sworn to and subscribed before me 11th day of Dec., 1896.

V. E. GRANT,
J. P. & Commissioner.

Said witness, RICHARD STRATTON, being duly sworn, deposed as follows:

I have lived on the lands in dispute, on the headwaters of Little Slick Rock creek, where Henry Ditmon and perhaps a fellow named Blair now lives. I moved there about 1879. I staid there about two years, and then moved again about three-quarters of a mile westward, staid there about 2 years and then moved about ½ or ¾ of a mile still further west; on the same property, but not on the land in dispute, though I understood it was the same owners. When I lived on the disputed land I understood I was living in Tennessee. I voted

at Mulberry, Monroe county, paid taxes there, and worked the roads in that county.

Cross-examination:

I am a farmer. The second place I moved to was not on the land in dispute. Only the first place.

And further saith not.

his
RICHARD x STRATTON.
mark

Attest:
EDWARD T. SANFORD.

Sworn to and subscribed before me, this 11th day of Dec., 1896.
V. E. GRANT,
J. P. & Commissioner.

Said witness, B. R. NICHOLS, being duly sworn, deposed as follows: I moved on the disputed land about 12 years ago, where Hugh Blair now lives on Little Slick Rock creek; that is called the Leadbetter place. I lived about a year the first time, then moved back and off about three times, and stayed about a year each time. I voted at Mulberry, in Monroe county, Tennessee, paid taxes in this county, and worked the roads here. The line was said to be east of Slick Rock creek and I so understood it.

116

Cross-examination:

I am 30 years old. I am a farmer. I live on Hebard's land now. I don't think either Emerson Debity or Richard Stratton live on his land now.

And further deponent saith not.

B. R. NICHOLS.

Sworn to and subscribed before me, this 11th day of Dec., 1896.
V. E. GRANT,
J. P. & Commissioner.

The said witness, A. D. CLINE, being duly sworn, deposed as follows:

I live on Little Slick Rock creek on the land in dispute. I have lived there three years. I am renting from Mr. Hebard. I vote at Mulberry, in Monroe county, Tennessee, pay my taxes there and work the road down in Monroe county, Tennessee.

There was some timber cut last spring a year ago; I understood it was done by Mr. Archer. Part of it was cut at the mouth of Little Slick Rock creek, west of Big Slick Rock, but the biggest part was cut east of Big Slick Rock, in Nicholas Cove, and between the mouth of the big creek, the mouth of Little Slick Rock.

They also built part of a road up Little Slick Rock creek from the mouth up past my place to near Hugh Blair's at the head of the creek. They started through my fields, but I wouldn't let them go through. They stopped work when Mr. Barrs, the sheriff of Monroe Co., notified them to quit. They also built a cabin at the mouth of Little Slick Rock, west of Big Slick Rock.

Cross-examination:

I am 36 years old

And further deponent saith not.

A. D. CLINE, his X mark.

Attest:
EDWARD T. SANFORD.

Sworn to and subscribed before me, this 11th day of Dec., 1896.
V. E. GRANT,
J. P. & Commissioner.

117 The said witness, SAMUEL BLAIR, being duly sworn, deposed as follows:

I live about 4 miles from the land in dispute, and have lived there about 16 years. I have been generally acquainted with the parties who have lived on the land in dispute. They have voted in the 17th Civil District of Monroe county, Tennessee, and worked the road in that district. I have considered that land as lying in Tennessee. I have herded cattle over there.

Cross-examination:

I am 49 years old. I do not live on Hebard's land.

And further deponent saith not.

SAMUEL BLAIR, his X mark.

Attest:
EDWARD T. SANFORD.

Sworn to and subscribed before me, this 11th day of Dec., 1896.
V. E. GRANT,
J. P. & Commissioner.

Said witness, JOHN DEBITY, being duly sworn, deposed as follows:

I have lived at the fork of Slick Rock at the left hand prong about 9 miles above the mouth of the creek with the run of the creek. I have lived there 18 years the first day of next June. I have always claimed it was in Tennessee. I went to North Carolina once to vote and they wouldn't let me vote unless I swore I was in North Carolina, and I wouldn't do it. I understand the state line between North Carolina and Tennessee to be the Hangover lead. That is the forked lead which is the state line. There are three forked leads; the left hand prong in the state line; one of the other forks runs to the Cheowah river, and the other runs to the Sarvice Branch. These

other two forks run into North Carolina. Old George Young and old Squire Bill Burriss showed me this line and said it would be the proper place for the state line, but it had never been run.

I vote at Mulberry, in Monroe county, Tennessee. I have paid taxes in Tennessee, but never paid taxes in North Carolina.

Cross-examination:

I was not living on these lands under Belding and others until very recently. I went there under myself. I did not take a lease either by myself or with my son, John Debity, Jr., on Nov. 16th, 1882, or about that time, from Thomas B. Reynolds, agent of D. W. Belding, M. M. Belding, Henry Stix, Nathan Stix, Louis Koulin, J. W. Cooper and others on their 14,800 acre tract, grant No. 1035; I did not take such a lease from them for any land whatsoever at any time. D. W. Belding once promised to send me a lease but didn't do it. The time was out and I didn't consider I held it for anybody but for myself. Mr. D. W. Belding stayed all night at my son John's house some years ago, and his men stayed at my house, and the next day Mr. Belding and I went to Dave Orr's house, and Belding told me to take charge of their property east of the Hangover lead and protect it for them and keep off trespassers, and I promised to do so, but he did not put me in possession of any land on this side of the Hangover lead, and I did not promise to take care of any land on this side of the Hangover lead, either before or after 1882.

118

I have not admitted to R. Carver or any other person in the presence either of R. Carver or David Orr, at any other person that I held the land on which I was living as a tenant of the Beldings and others. I told Carver once that the land across the mountain was the Beldings, and the land on this side was mine. If you have anything to the contrary it's forged.

I did not sell out my possession a little while ago for $50.00 to anybody, and nobody has proposed to buy it. I have claimed my mineral interest, which is $\frac{1}{8}$. The Govt. owns the rest. The whole mineral is worth two millions and a half dollars. I haven't traded about it with anybody though a man named Sheridan asked me what I would take for it, and I told him it would take a right smart pile.

I am now living on government land at the head of Slick Rock creek. I live by myself. I live southeast of the Widow Crowder, about two miles and a half. My son John was alive the last time I heard from him.

And further deponent saith not.

His
JOHN x DEBITY.
mark.

Attest:
EDWARD T. SANFORD.

Sworn to and subscribed before me, this 11th day of Dec., 1896.

V. E. GRANT,
J. P. & Commissioner.

119 STATE OF TENNESSEE,
Monroe County, ss:

The foregoing depositions were taken before me as stated in the caption, and reduced to writing by consent, by Edward T. Sanford. And I certify that I am not interested in the cause nor kin or counsel to either of the parties. And I certify that I sealed up said depositions after they were taken, without being out of my possession after they were taken, and delivered the same to Edward T. Sanford, of counsel for the defts., for delivery to the clerk at Knoxville, Tennessee.

Witness my hand and seal this Dec., 11th, 1896.

V. E. GRANT,
J. P. & Commissioner.

Filed Dec. 12, 1896. J. T. Carter, Dept. Clerk.

In the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

No. 1056.

CHAS. HEBARD
vs.
D. W. BELDING et al.

The deposition of T. E. H. McCroskey, witness for the complainant, taken by consent of parties, except the defendant, J. W. Cooper, & upon notice as to him, before J. T. Carter, Deputy Clerk of said court at his office in Knoxville, Tennessee, on this the 8th day of January, 1897, in the presence of T. S. Webb, Sol. for Complt., and E. T. Sanford, Sol. for Defendants, except J. W. Cooper.

The said witness, T. E. H. MCCROSKEY, being duly sworn, deposed as follows:

I am 53 years of age, am a lawyer and reside at Madisonville, Monroe county, Tenn. I have lived in said county all my life, except about two years, 1867 & '8, when I lived in Kingston, Tenn. My home is about 30 miles from the land in dispute. I have been acquainted with the lands for 20 years or more and with the title. I have been attorney for parties owning the lands west of Slick Rock creek for at least 20 years, being what is known as the White & Bearden tract of 30,000 acres, and have been looking after the lands, clearing up title, removing squatters, paying taxes, &c. I have been upon and over the lands very often during that time, and think I am familiar with the lands and boundaries. After I had
120 been looking after the White & Bearden land for perhaps 4 or 5 years the question of the state line between North Carolina & Tenn. came up, and I found from the best information I could get that the Hangover lead was the state line. I further found, on investigation, that the White & Beardon tract did not reach the

state line as the deeds called for Slick Rock creek, and that there was a part of the land east of Slick Rock creek unsurveyed in the Ocoee district.

Prior to 1836 the Cherokee Indians occupied the mountain lands including what is known as the Ocoee land district. Their rights were extinguished in 1835 by U. S. Govt., and the land ceded to Tennessee by the government. In 1836 the legislature of Tennessee passed an act authorizing the survey of said lands into ranges, townships, sections & fractions, John B. Tipton being the general surveyor. The lands were surveyed, as I understand, in 1836 & 1837, by Tipton and his assistants. Thomas Calloway was one of his deputies. A Mr. Brannum and T. G. Harvey were on the survey. I have frequently talked with Brannum and Harvey about the survey and in fact when I wanted any information about the lands or the survey I always called on Mr. Harvey and always found his statements correct by subsequent information. Tipton, Calloway, Brannum and Harvey are all dead. I knew these parties personally and know that they are dead. T. G. Harvey, the last survivor, died in December, 1895, and before his death informed me that he was the last survivor of those who assisted in the survey of the Ocoee land district. I know that Tipton, Calloway and Brannum died before Harvey.

After finding that the lands in the Ocoee district was surveyed to Slick Rock creek, I asked Mr. Harvey why the survey stopped there. He told me that the Hangover lead was the state line, but the surveyors, when they got to Slick Rock creek stopped there, because the lands east of the creek was very rough and steep and they were worn out with and tired of the work.

In surveying the lands, each township or fraction was mapped in a book on separate pages and I herewith file as exhibit "A" to my deposition a certified copy of the fractional township covering that part of the land in dispute lying west of Slick Rock creek, and which shows that the survey extended to Slick Rock creek, but did not include the lands east of the creek. T. J. Knox, who certifies to the map filed is now register of the Ocoee land office and has his office in Cleveland, Tennessee, where the office has been ever since I knew anything about it, for 20 years or more.

121 Complainant Charles Hebard has title to all the land in dispute lying west of Slick Rock creek by grants from the state of Tennessee, and mere conveyance to himself through the various and many parties who have owned the lands or interested in them, under the title papers in this case, and this land has always, since I have had anything to do with them, been assessed for taxes in Tennessee, and I have been paying the taxes for the owners under complainant's title since 1875 or '6.

After being employed as attorney to look after the land I did not go on it in person until 2 or 3 years or about 1880, when I found parties or squatters scattered about over the White & Bearden tract of 30,000 acres. They did not claim title but said they understood they were living on the White & Bearden land and were willing to take leases. The tenants in common owning the land were scattered

over various states and some of them minors, and as it was mountainous and unproductive no one had been looking after it until I took charge. The parties living on the lands readily took leases, or the most of them, some were living on the land in dispute west of Slick Rock and on Little Slick Rock creek, where Henry Ditmore, Huse Blair and Ab Cline now live; they took leases from me, and these possessions and leases have been kept up continuously since 1880, on the lands in dispute west of Slick Rock creek as well as the balance of the 30,000 acres. During all this time there has been no one in possession of this land under parties claiming title from North Carolina nor did any one living on the land claim to live in North Carolina. They all claimed to live in Tennessee.

I have been on these lands frequently since 1880 for the purpose of looking after the land and keeping up the possession. I never heard of any claim on the part of claimants from North Carolina until within the last 4 or 5 years.

As to the lands east of Slick Rock Creek. After I had become more familiar with that section, the titles and boundaries, and about 1883 I found that the lands east of Slick Rock Creek and between that and the Hangover Lead the state line had never been surveyed or granted, and in 1883 I obtained an entry and had the land surveyed, and in 1892 I got another entry and a grant in the name of H. M. McCroskey & myself. I file said original grant as exhibit "B" to my deposition. I also file as exhibit "C" to my deposition the deed from H. M. Croskey and myself to Charles Hebard, the Complt., covering the same land.

This grant and deed covers all the land lying east of Slick Rock creek and the White & Bearden land and west of the Hangover Lead, which I understand to be the State Line.

122 This entry and grant was obtained in good faith because I found the land unsurveyed and ungranted and lying in Tennessee, and was open for entry and grant.

At the time I got the entry in 1883 one John Debity was living in a cabin within the boundary, and claimed to live in Tennessee. He is still living there and has always claimed to live in Tennessee. At that time James Farr also lived on the land, but I was not aware of it; they are now both tenants of Complt. I never heard of any one living on the land east of Slick Rock Creek and west of Hangover who claimed to live in North Carolina or to be tenants of those having title from North Carolina.

The bill filed in the Chancery Court at Madisonville, Tenn., and removed to this court, being No. 1055 on the docket, does not cover or describe lands east of Slick Rock Creek, but only lands west of the creek, as complainant at the time said bill was filed did not own the land east of the creek, the title still being in H. M. McCroskey & myself, as the date of the deed shows. Afterwards we sold to Mr. Hebard and he filed the bill No. 1056, which includes the land on both sides of the creek.

The entire boundary in dispute is very rough and mountainous, almost entirely worthless as farming lands and valuable only for its timber and possibly the minerals.

I have been on both the Hangover and Fodder Stack lead, and also on the State ridge north of Tennessee River, and standing on the ridge (the state line north of the river), looking southwest over the river and the ridge on the south side of the river, the natural conclusion is that the Hangover lead is the continuation of the state line. It is immediately in front of one looking southwest, is the highest ridge in sight, in fact, the only one visible that could be considered the state line. It stands in bold relief directly opposite and looks as if the river had cut the mountain in two; I have been on the mountain where the Hangover and Fodder Stack leads join at the Stratton bald. Standing on the main ridge it was impossible to see where the Fodder Stack lead left the main ridge; we had to go down the side of the mountain along a trail 400 or 500 feet until we reached the Fodder Stack lead, which branched off at right angles from the main ridge like the limb of a tree from the main trunk. The Hangover ridge coming from the southwest is a continuous main ridge and of the same height and general course of the mountains beyond where the two ridges come together and where the state line is not disputed.

123 Prior to Dec'r 21, 1896, I mailed a letter to J. W. Cooper, one of the respondents, asking him to fix a time to take my deposition. I file his answer thereto, dated Dec'r 21, 1896, as exhibit "D" to my deposition. I then mailed to him on Dec'r 23, 1896, a letter, a copy of which is herewith filed as exhibit "E," and my deposition not being taken at the date fixed because of absence of opposite counsel. I, on Dec. 31, 1896, mailed him another letter, a copy of which is filed as exhibit "F," the letters as shown by copies E & F were placed in the postoffice the day they bore date, duly stamped, and by due course of mail would reach him the next day, being directed to him at his home in Murphy, North Carolina.

Cross-examination by EDWARD T. SANFORD, Sol. for all Defts. except J. W. Cooper:

I do not know of my own knowledge what territory the Cherokee Indians occupied prior to 1836, that was before my day; neither do I know of my own knowledge how their rights were extinguished and the land vested in Tennessee; nor do I know of my own knowledge who was the general surveyor of the Ocoee District, nor who surveyed the lands in that district, nor what persons assisted in or were on the survey, nor how far the survey extended. The various leases to which I have referred in my examination in chief *or* in writing. All the people that I talked with living on this White & Bearden land claimed to live in Tennessee, as I have testified. I think I talked with all of them.

Complts.' leases to James Farr and John Debity are in writing. When I speak in my direct examination of standing on the state line ridge north of the river I mean the ridge found marked by the surveyors and shown on Hale's map, filed in this cause. John Debity is a very old man; I suppose he is seventy-five years old, probably older. And further deponent saith not.

T. E. H. McCROSKEY.

It is hereby agreed that formal caption and certificate to this deposition is waived, and that each and every exception or right of defendants to except to any or all parts of the foregoing deposition on any matter of competency, relevancy, materiality or admissibility as evidence are hereby reserved until the hearing, and may be
124 made at that time with the same force and effect as if made and set down at the time of taking the deposition. This Jan'y 8th, 1896.

T. S. WEBB,
Sol. for Compl't.
LUCKY, SANFORD & TYSON,
Sols. for All Def'ts Except J. W. Cooper.

EXHIBIT "B" to T. E. H. McCROSKEY'S DEPOSITION.

No. 8970.

THE STATE OF TENNESSEE:

To all to whom these presents shall come, Greeting:

Know ye, that in consideration of an entry made in the county surveyor's office of Monroe county, Tennessee, July 28, 1883, and of an entry made in the entry taker's office of the Ocoee District No. 9613 dated April 29, 1892, in conformity with an act passed by the legislature of said state Feb'y 25, 1854 to H. M. McCroskey and T. E. H. McCroskey, said entries having been made upon unsectioned lands in said Ocoee District in conformity with said act of the legislature there is granted by the said state of Tennessee, unto H. M. McCroskey and T. E. H. McCroskey a certain tract or parcel of land containing five thousand (5,000) acres, more or less, lying in Monroe county, in said district:

Beginning at the mouth of Slick Rock creek, where it empties into Tennessee river, thence up the said Slick Rock Creek with the line of the White & Bearden lands to the point where the said White & Bearden's line leaves the creek; thence following the White & Bearden line to where it intersects the North Carolina line on top of the mountain southwest of the Hangover; thence with the North Carolina line to the Tennessee river; thence down the Tennessee river to the beginning.

With the hereditaments and appurtenances. To have and to hold the said tract or parcel of land, with its appurtenances, to the said H. M. & T. E. H. McCroskey and their heirs forever.

In witness whereof, James P. Buchanan, governor of the state of Tennessee, hath hereunto set his hand, and caused the Great Seal of the state to be affixed at Nashville, on the 14th day of May in the year of our Lord, 1892, and of the Independence of the United States, the one hundred and sixteenth.

[SEAL.] By the Governor, JOHN P. BUCHANAN.

C. A. MILLER, *Secretary.*

125 H. M. McCroskey & T. E. H. McCroskey have title to the above described land.

A. J. WHITE,
Register of the Ocoee District.

Recorded in office of register of the Ocoee District in Book "P," page 244 on this the 16th day of May, 1892.

A. J. WHITE,
Register of the Ocoee District.

(Endorsed:) Grant No. 8970. State of Tennessee to H. M. & T. E. H. McCroskey. Exhibit "B" to deposition of T. E. H. McCroskey, Charles Hebard vs. D. W. Belding, et al. Filed Jan. 8, 1897. J. T. Carter, deputy Clerk.

EXHIBIT "C" TO DEPOSITION OF T. E. H. MCCROSKEY.

This indenture, made this 28th day of Nov. A. D. eighteen hundred and ninety-five, by and between H. M. McCroskey and T. E. H. McCroskey, of Monroe county, Tennessee, of the first part, and Chas. Hebard, of Baraga county, Michigan, of the second part;

Witnesseth: That the parties of the first part for and in consideration of the sum of one thousand dollars in hand paid, have this day bargained and sold, and do hereby grant and convey unto the party of the second part, the following described real estate situated in the seventeenth civil district of Monroe county, Tennessee, bounded as follows, to wit:

Beginning in the centre of Little Tennessee River, opposite the mouth of Slick Rock Creek;

Thence up the centre of said river, with its meanders, when reduced to a straight line, south 68 degrees east 162 poles to a point in said river bearing south 2 degrees east from a spruce pine and a rock corner on the north bank of the Tennessee River—the southeasterly corner of what is known as the Sanford tract in Blount County, Tennessee;

Thence south with the state line to stake and pointers and sweet gum tree on south bank of said river at the foot of ridge forming the easterly divide and boundary of the waters of Slick Rock Creek;

Thence up this leading ridge, giving approximately the bearings as follows, but the line to be with the main crest of said ridge, leading up the Hangover Mountain and the state line between Tennessee and North Carolina:

126 South 31 west 11 poles; south 51 west 2½ poles; south 65 west 18 poles; south 72 west 14 poles to a stake on point of ridge; south 86 west 7 poles to a point on ridge; south 19 west 5 poles to a blazed pine; S. 53¼ W. 12 poles to a point on ridge; S. 63 W. 11 poles to a point on ridge; S. 85¾ W. 11 and ½ poles to a chestnut; N. 81 and ¾ W. 8 poles, S. 69 and ½ W. 21¾ poles to a chestnut; S. 9 and ½ W. 21 poles to a black oak; S. 40 and ¼ W. 14 poles; S. 62 W. 4 and ½ poles to a hickory; S. 3 and ½ E. 5 and

9-25 poles; S. 58 W. 15 and 1-5 poles; S. 10 W. 15 and 17-25 poles to a dead tree; S. 82 and 2-3 W. 10 poles; S. 12 W. 15 and ¼ poles to a pine; S. 2 W. 12 poles, passing a depression at 2 poles, to a point; S. 29 W. 3 and 1-5 poles; S. 45 E. 8 poles; S. 30 E. 22 poles, passing a depression at 10 poles to a point at turn; S. 7½ W. 8 poles; S. 45 and ½ W. 7 poles; S. 68 W. 10 and 9-25 poles to a small black oak; N. 86 and ¾ W. 3 and 17-25 poles to a point near a stone corner; S. 28 and ¾ W. 16 and 1-5 poles, passing Sourwood Gap at 14 poles to a small sourwood; S. 15¼ W. 17 and 3-5 poles to a black oak; S. 35 E. 6 and 6-25 poles to a point at turn; S. 47 W. 12 and 18-25 poles to a black oak; S. 76 and ½ W. 20 and 1-10 poles, passing an oak at two poles to a chestnut oak; S. 2 and ¾ W. 20 poles; S. 15 E. 8 poles; S. 28 W. 12 and 2-25 poles; S. 46 W. 4 and 22-25 poles; S. 15 W. 12 poles to a stake in Slick Rock Gap;

Thence on, southwestwardly, continuing with the state line on the leading ridge forming the easterly water shed of Slick Rock Creek, and dividing the waters of Slick Rock from those of Cheowah, including all lands on the waters of Slick Rock Creek, to the point in the State Line between North Carolina and Tennessee where the land conveyed to said Hebard by deed of Fleming and Simonson, registered in said Monroe County in Book "Z" at page 162 joins to said state line;

Thence with the said Hebard's land to the beginning.

The intent of this conveyance being to convey all the lands lying between the land conveyed to said Hebard as aforesaid by Fleming and Simonson, and the state line above described, including the places where John Debity and Emerson Debity now live; containing, by estimation, 5,000 acres, be the same more or less, and being the same land granted to the parties of the first part by the State of Tennessee under entry dated 28th July, 1883, and Grant Number 8970, dated May 14th, 1892. Which said land, together with all rights, reversions and remainders thereto belonging or in anywise appertaining is conveyed, to have and to hold to the said Hebard, his heirs and assigns, in fee simple forever.

127 And the parties of the first part covenant with the party of the second part that they are lawfully seized of said land, have a good right to convey it, and that the same is unincumbered, and they do hereby forever warrant the title to said land to party of the second part, his heirs and assigns, against the lawful claims of all persons whomsoever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals on the date first above written.

H. M. McCROSKEY. [SEAL.]
T. E. H. McCROSKEY. [SEAL.]

STATE OF TENNESSEE,
Monroe County:

Personally appeared before me, L. A. Robinson, Dep. Clerk of County Court of said County, the within named T. E. H. McCroskey & H. M. McCroskey, the bargainors, with whom I am personally

acquainted, and who acknowledged that they executed the within instrument for the purpose therein contained.

Witness my hand, at office, this 4th day of Dec., 1895.

L. A. HUNT, *Clerk*,
By L. A. ROBINSON,
Dep. Clerk.

STATE OF TENNESSEE,
Monroe County:

I certify that the foregoing is a true and perfect copy of deed and certificate thereon as found of record in my office this Sept. 10, 1896.

THOMAS McCLELLAN, *Register.*

(Endorsed:) H. M. McCroskey et al. to Chas. Hebard. Deed. Exhibit "C" to deposition of T. E. H. McCroskey. Chas. Hebard vs. D. W. Belding et al. Filed Jan. 8, 1897. J. T. Carter, Deputy Clerk.

EXHIBIT "D" TO T. E. H. McCROSKEY'S DEPOSITION.

MURPHY, N. C., *Dec. 21st*, 1896.

Mr. T. E. H. McCroskey, Madisonville, Tenn.

DEAR SIR: I have your letter of — inst. saying that you desire to have your deposition taken, and asking my consent, and that I set a time for the taking the same. I must decline to set any
128 time or to make any consent agreement, as I propose to insist on my objections to the jurisdiction of the Court to try the action on the grounds set out in my answer to the complainant's bill.

Yours truly,

J. W. COOPER.

Filed Jan. 8, 1897. J. T. Carter, Deputy Clerk.

EXHIBIT "E" TO T. E. H. McCROSKEY'S DEPOSITION.

Copy.

MADISONVILLE, TENN., *Dec.* 23, 1896.

J. W. Cooper, Esq., Murphy, N. C.

DEAR SIR: In the suit of Charles Hebard vs. D. W. Belding et al. in the U. S. Circuit Court at Knoxville, Tennessee, on Thursday, the 31st day of December, 1896, at the Clerk's office of said Court, in Knoxville, Tenn., we will take the deposition of T. E. H. McCroskey to be used as evidence for Complainant in said cause.

CHARLES HEBARD,
By T. E. H. McCROSKEY, *Sol.*

Filed Jan. 8, 1897. J. T. Carter, Deputy Clerk.

EXHIBIT "F" TO T. E. H. MCCROSKEY'S DEPOSITION.

Copy.

KNOXVILLE, TENN., *Dec.* 31, 1896.

J. W. Cooper, Esq., Murphy, N. C.

DEAR SIR: On Friday, the 8th day of January, 1897, at the office of Clerk of United States Circuit Court, at Knoxville, Tennessee, we will take the deposition of T. E. H. McCroskey to be used
129 as evidence for Complt. in case of Charles Hebard vs. D. W. Belding et al. now pending in said Court.

CHARLES HEBARD,
By T. E. H. McCROSKEY, *Sol.*

We did not take the deposition to-day because Lucky, Sanford and Tyson were all out of the city.

McCROSKEY.

Filed Jan. 8, 1897. J. T. Carter, Deputy Clerk.

(Endorsed:) No. 1056. In the U. S. Circuit Court at Knoxville. Chas. Hebard against D. W. Belding et al. Deposition of T. E. H. McCroskey and Exhibits D, E, F. Filed Jan. 8, 1897. J. T. Carter, Deputy Clerk.

In the Circuit Court of the United States for the Eastern District of Tennessee, Northern Division, at Knoxville.

CHAS. HEBARD
vs.
D. W. BELDING et als.

In this cause it is hereby stipulated that where the acts of the Legislature or Code of Tennessee or North Carolina have been published by authority of the state, such published matter may be used by any party to the cause upon the hearing without exception, save as to the relevancy or competency thereof. This stipulation is made to save expense, and is intended to give such published matter such force and effect as properly certified copies would have, but no further.

Witness our hands this January 8th, 1897.

T. S. WEBB, *Sol. for Compl't.*
LUCKY, SANFORD & TYSON,
Sols. for Defts. Except J. W. Cooper.

(Endorsed:) No. 1056. Chas. Hebard vs. D. W. Belding et als. Stipulation as to use of printed acts. Filed Jan. 8, 1897. J. T. Carter, Deputy Clerk.

130 U. S. Circuit Court at Knoxville.

CHARLES HEBARD
vs.
D. W. BELDING et al.

Both Cases.

Notice to J. W. Cooper, Defendant in Above Two Cases.

You will take notice that on Friday, the 2d day of April, A. D. 1897, at 10 a. m., at the office of the Clerk of the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee, at the Post-office building in Knoxville, Tennessee, I will take the deposition of T. E. H. McCroskey, witness in behalf of complainant, to be read in evidence in above styled cases.

CHARLES HEBARD.

(Endorsed:) Ex. 2. Notice to take proof. Charles Hebard vs. D. W. Belding et al. Before me personally appeared T. E. H. McCroskey, who makes oath that he delivered a copy of the within notice to J. W. Cooper on the 27th day of March, 1897. T. E. H. McCroskey. Sworn to before me this Apl. 2, 1897. J. T. Carter, Dep. Clerk. Filed Apr. 2, 1897. J. T. Carter, Deputy Clerk.

And afterwards, to wit, on the 17th day of July, 1897, certain depositions of H. S. Hayes and J. C. M. Bogle were filed in the Clerk's office of said Court, which said depositions are clothed in the words and figures following, to wit:

In the United States Circuit Court at Knoxville, Tennessee.

No. 1056. In Equity.

CHAS. HEBARD
vs.
D. W. BELDING et al.

The depositions of H. S. Hayes and J. C. M. Bogle, witnesses for all the defendants except J. W. Cooper in the above entitled cause, taken by consent, at the office of Lucky, Sanford & Tyson,
131 Knoxville, Tennessee, in the presence of T. E. H. McCroskey, solicitor for complainant, and C. E. Lucky and Edw. T. Sanford, solicitors for all the defendants except J. W. Cooper.

The said witness, H. S. HAYES, being duly sworn, deposed as follows:

Examined by Mr. SANFORD:

Q. 1. State where you live?
A. At Murphy, N. C.

Q. 2. What is your occupation?

A. I am a surveyor.

Q. How old are you and how long have you been surveying?

A. 54 years of age. Have been following surveying as a business for twelve years.

Q. What has been your experience with reference to surveying mountain land?

A. I have had a great deal of experience in that. The greater portion of the work that I have done in the twelve years has been that.

Q. Have you been recently employed to make a survey of the lands involved in this dispute? If so, state by whom you have been employed, and what instructions were given you as to the object of your survey?

A. I was employed by the defendants in this case, Belding & Co. My instructions was to use all the energies I could to locate the state line. To get the state line in the region of dispute.

Q. Were you instructed to search along one line, or to search along all lines claimed, to get the true line?

A. To search along all lines claimed.

Q. When did you go and who went with you?

A. My recollection now is that I got there on the 16th of Feb. last, but I think we went to work on the 18th. Mr. Bogle was with me. Mr. J. C. M. Bogle, J. R. McClellan, R. Carver, John Hayes and Henry Ditmore were with me, also Sam Hughes.

Q. Which were the surveyors and which assistants?

A. Mr. Bogle and me were the surveyors, and the others assisted us.

Q. How long were you engaged in the work, and how carefully did you proceed?

A. We were there on the ground 17 days. We did all we knew to do. We traced up each of the lines there of Mr. Hale and Mr. Wilson and Muller.

Q. Did you have with you a blue print and also a tracing
132 of the map filed as Exhibit "A" to the deposition of W. D. Hale in this case?

A. I had a blue print and Mr. Bogle had a tracing.

(The blue print and tracing are here shown to counsel for the plaintiff.)

They are correct copies of the original map. I have both copies and the original before me.

Q. Did you have any notes of the depositions of Hale, Wilson and Muller in this case?

A. I had the deposition of Mr. Wilson. Mr. Bogle had parts of the notes of Mr. Hale's deposition.

Q. Now, taking up the different lines in succession, please state what investigation you made along the line beginning at the Tennessee River and extending westwardly along the ridge shown on Hale's map as Slick Rock Ridge, to determine whether there were any marked trees?

A. I examined that ridge closely for about two miles and a half

from the river. Then up to the point Little Fodder Stack, I did not examine it, but from there to Big Stack I did examine it closely. I find no state line mark there, no old ones.

Q. Did you go north of the Little Tennessee at all, if not, why not?

A. No, sir; on account of high water.

Q. Did you trace the line shown on Hale's map as the Hangover Lead, or any part thereof? And if so, state whether you found any marked trees showing state line marks?

A. Yes, sir; I traced part of that from Slick Rock Gap down to near the river. And from what is called Big Fat Gap on Mr. Hale's map, to the junction of what is called Hangover and Fodder Stack Leads. I found nothing there that I think was state line marks.

Q. Did you examine the various trees referred to by Hale and Wilson, in the portion on which you went?

A. I examined the first black oak that they called for there, not located on their map, but called for in their deposition.

Q. Is that the black oak spoken of by Hale in answer to question II on direct, and described as being a black oak three-quarters of a mile from the river?

A. Yes, sir; that is the tree.

Q. Please describe the marks, if any, on this black oak, and state whether or not there were any state line marks on that black oak?

A. There was three hacks on the north side and three on the southwest side, is my recollection. I made no notes on the hacks.

133 Q. What would that indicate?

A. I took it to be a North Carolina corner, as it is marked as a North Carolina corner.

Q. What is the mark of a corner in North Carolina?

A. Three hacks on the side of the tree as you approach it, and three hacks on the side as you leave the tree in the direction you leave.

Q. Were the marks on the tree old enough to have been made in 1821?

A. I think not, sir.

Q. What is the mark of the State Line, as run by the commission in 1821?

A. A blaze with two hacks over it, on fore and aft trees, and three chops on side lines.

Q. Was this tree marked in either of said ways?

A. No, sir. I think not.

Q. Did you examine the double sourwood referred to by Hale in the same answer, and described as a double sourwood in a gap, one mile from the river?

A. Yes, sir; I examined it, but took no notes of the hacks on it. There was too many hacks on it for a corner tree or a state line tree, and too close together. It looks as though some person had just been hacking with an axe for no particular purpose.

Q. Were the marks old enough to have been made in 1821?

A. I think not. I think one or two of the cuts looked new.

Q. Did it have any marks showing that it was a state line tree, either fore and aft or side line?

A. I think not.

Q. From the Big Flat to the junction of the Hangover Lead and the Fodder Stack Lead did you examine for state line trees, and did you find any trees showing such marks?

A. Yes, sir; I examined it, found none.

Q. I call your attention to the point on Hale's map marked "Hao" on the Hangover Lead. Please state whether from that point the main lead of the Hangover runs to Little Tennessee as shown on his map? If not, which way does the main lead of Hangover run from that point?

A. The main lead from that point runs off northeast and goes to Neoah River. The one shown on Hale's map I do not think is the main lead.

Q. Have you made a map or your survey?

A. Yes, sir.

Q. Please file the same as "Exhibit No. 1" to your deposition?

134 A. I so mark it, and file it as such exhibit.

Q. Have you shown on said map Hangover Lead as traced by Hale?

A. Yes, sir; copied it from Hale's map. There is a discrepancy in our measurements, from the river to Big Fodder Stack, of about 30 poles.

Q. Was this map made by you and Mr. Bogle jointly?

A. Yes, sir.

Q. Please mark on your map in black ink the approximate course of the main Hangover Lead. Mark it "Main Hangover Lead?"

A. I do so.

Q. Did you then run any other line?

A. I run a line up Slick Rock Creek to the mouth of what is called the Big Fodder Stack Gap Branch, thence up the ridge to the east end of the Big Fodder Stack, thence with the mountain to the junction of the Big Fodder Stack Lead and the Hangover Lead.

Q. Did you find on said line any trees with old state line marks? If so, how many together, how many fore and aft trees, and how many side line trees?

A. Yes, sir; I found 41 marked trees on the line, marked as old state line marks. I found ten fore and aft trees and 31 side line trees.

Q. Does the Hangover Lead, so called, as marked on Hale's map, come down to the river gently or abruptly?

A. It comes down very abruptly at the river. It is precipitous.

Q. Referring again to the Slick Rock Creek line, please take up first that portion of the line lying between Slick Rock Creek, and the mouth of Big Fodder Stack Gap Branch, and state how many old state line trees you found on this portion of the line, how many were fore and aft, and how many were side line?

A. Two fore and aft trees and ten side line trees, making twelve altogether.

Q. Are all of these shown on your map?
A. Yes, sir; all shown on my map.
Q. Are they indicated by name of the tree and by number?
A. By name of the tree in black ink and number in red ink.
Q. Please take up this portion of the line in detail and describe each of these trees? Giving the name of the tree, its number on the map, and the character of marks and their age?
A. The first tree we come to is Number 1, cucumber, fore
135 and aft tree. Marked with two hacks above a blaze, on the north and south sides of it—that is, two hacks above blaze on the north side, and two hacks above a blaze on the south side.
Q. How old are those marks?
A. We blocked this one and it counts 76 growths from the cut.
Q. What do you mean by blocking?
A. Chopping into the tree and splitting out so as to include the old marks in the tree in the timber.
Q. State whether or not it was possible to ascertain accurately the age of the marks without blocking it?
A. No other method that I know of.
Q. Did the outside marks indicate great age?
A. They did.
Q. How old would you say they indicated?
A. I could not tell; they looked old.
Q. You cut out a block, as I understand, on one side?
A. Yes, sir.
Q. If you have that block, please file it marked as "Exhibit A" to your deposition?
A. The bark shows the two hacks and a little of the blaze. I file this block as "Exhibit A" to my deposition. This block is in two pieces.
Q. Have you planed down one side of the block so as to count the growth more accurately?
A. I planed the end of that one.
Q. With this method, how close can you come to it?
A. I think I can come within a growth or two of it on that timber there.
Q. That is, you can come within a year or two of telling the number of years since it has been marked?
A. Yes, sir.
Q. Does the accuracy with which this can be done depend on the kind of timber and its condition?
A. Yes, sir.
Q. State whether or not the apparent time would vary at all according to the season of the year in which the marks were made?
A. Yes, sir; it might vary a year according to whether it was made before or after the growth.
Q. In the way in which you have blocked the tree and counted the growth, does anything have to be added for growing over of the scar? If not, why not?
A. I think not. I count from the growth, tracing the growth

out from the axe mark. I commence where the cut has entered the wood, and count from that out to the bark.

Q. Then, what does this block indicate as to the age of the mark?

136 A. That they were made 76 years ago.

Q. Now take up the other trees?

A. The second tree is a birch, a side line. Third was a poplar, fore and aft. The birch is marked with three hacks on the side.

Q. Were they apparently the same age as the marks on the cucumber?

A. Yes, sir; but better preserved. The trees were leaning and the hacks were on the leaning side, and preserved from the weather.

Q. Did those marks correspond with the marks on the tree that was marked 76 years ago?

A. Yes, sir; they looked old, very old, and looked like they would correspond with the ones referred to.

Q. What would those marks mean on the tree?

A. They would indicate a side line tree, a tree that stood off to one side of the state line.

Q. Would they correspond with marks that would have been made on a side line tree by the commissioners who ran the line in 1821?

A. I think they would.

Q. On what side was this tree marked?

A. The tree stood on the west side of the creek, and was marked on the east side or facing the creek.

Q. Please give a brief description of the other trees up to the mouth of the branch?

A. Third tree was a poplar marked as a fore and aft tree. Two hacks above a blaze on the northwest side and southeast side. The marks were of the same apparent age of the others. The fourth, fifth and sixth trees are birches, stand on the east side of the creek, and marked with three hacks on the west side of the trees. They looked to be old, very old. They (the marks) looked to be of the same age as the others. The seventh, a lynn on the east bank of the creek, marked on the west, with three hacks on the west side facing the creek. The eighth one was a spruce pine, marked with three hacks. It was standing on the east side of the creek. Marked on the east side, with three hacks. That tree was blocked. Here is the block from it.

Q. Have you prepared this block in a similar manner, and please file it as Exhibit "B" to your deposition?

A. Yes, sir; and I do so file it.

Q. In blocking that, did you have to cut the bark containing the hack?

A. I cut the bark of the lower hack, but left the original mark on the wood on the inside.

Q. How many growths are on that block after the marks were made?

137 A. I have counted it as 75 and 76 both, one time as 75 and one time as 76. Nos. 9, 10, 11, 12 are spruce pines

standing on the east of the creek, and all marked with three hacks as side lines. The marks of the same apparent age as the other.

Q. Did you go up Slick Rock Creek any further beyond the mouth of the branch up the main creek, to see if you could find any marked trees?

A. I went about a quarter of a mile. I found nothing on the creek above Big Fodder Stack Branch.

Q. After you passed the mouth of Big Fodder Stack Branch, did you find any state line marks leading away from Slick Rock Creek, and up the ridge to the top of Fodder Stack?

A. Yes, sir. I found fifteen from where we left the creek at the mouth of that branch to the top of the Big Fodder Stack.

Q. How many fore and aft, and how many side lines?

A. I find five fore and aft trees, and eight side line trees.

Q. Please describe them?

A. The first one, No. 14 on the map, is a spruce pine, and stands south 13 west 12 poles from the mouth of the creek, and marked as with three hacks. The second one, No. 15 on the map, is a spruce pine, marked as a side line.

Q. How close was No. 14 to Slick Rock Creek?

A. About ten poles from the creek, from Slick Rock Creek. No. 16 is a spruce pine marked as a side line, three hacks.

Q. As you approach and come to the mouth of Big Fodder Stack Branch, going up Slick Rock Creek, which continues the line more directly to go up Slick Rock Creek, or on up to the Fodder Stack?

A. The general course would carry us up the ridge to the Big Fodder Stack. The creek here at this point bends to the southeast. No. 17 is a spruce pine stump, fore and aft, but only showed the marks in the bark on the north side. It was a dead pine stump, and the bark had fallen off the south side of it. No. 18 spruce pine, fore and aft, marked with two hacks and a blaze on both sides. No. 19, a spruce pine marked as a side line with three hacks. That tree was blocked, but it was wind shaken so, and the growth come out in little slivers and so very fine, and we could not count them and get any sense out of them.

No. 20 was a spruce pine side line. 21 is two spruce pines and a dead birch, side lines. 22 is a spruce pine marked as a fore and aft tree. 23 is a holly marked as a side line. 24 is a spruce pine,
138 marked as a side line. 25 is a spruce pine marked as a side line. It is blocked and is marked. I here file it as Exhibit "C" to my deposition.

Q. How many years ago since the mark was made, as that block shows?

A. I count 75 on it. 26 is a maple marked as a side line. In cutting out block of No. 25 we had to cut out a portion of the bark, showing the lower hack, but the mark is shown in the wood below. 28 is a fallen chestnut oak; I have the bark here, showing the hacks on them. I file these pieces of bark as Exhibit "D" to this my deposition. No. 29 is a chestnut oak marked as fore and aft. Each of the three pieces marked as Exhibit "D" have a piece of paper on them marked as Exhibit "D" to deposition of H. S. Hayes. The

cuts on No. 29 look plain on the southeast side, and not so plain on the northwest side. The northwest side is more exposed side. No. 30 is a spruce marked as fore and aft. On the east shows two hacks and a blaze plainly. On the west side only one hack shows. The west side of this would be the most exposed.

Q. Is that the spruce pine referred to by Hale and Wilson in their deposition?

A. I think this is the spruce pine they referred to, and as they described it in their deposition. 31 is a mile stone set up by McClellan. 32 is a white oak blocked by Mr. Hale and Miller I think. We are now on top of the mountain, and started out on the Fodder Stack Lead towards the Hangover Junction.

Q. From the point where the ridge strikes the main lead to the ridge strikes the main lead up to the Junction between Fodder Stack and Hangover Lead, how many state line trees did you find of each kind?

A. Seven altogether, including the white oak. Two fore and aft trees and five side lines.

Q. Passing the white oak, describe these other trees in detail?

A. After passing the white oak about forty poles, we passed a mountain oak marked as fore and aft (this tree is often called Spanish oak.) Marks show on the north side of this tree, but not on the south side.

Q. Which was the exposed side?

A. I don't remember. This tree looks too young. No. 36, a spruce pine side line, blocked. I have the block and file it as Exhibit "E" to this deposition. This block was taken of a spruce pine near Glen Gap.

Q. How many years does this show since it was cut?

A. 75, but it is wind shaken, which may make a difference
139 of one or two years. I counted 75 on it. No. 39, spruce pine, marked as a side line. No. 40 is a spruce pine marked as a side line, three hacks. On the block Exhibit "E," the third hack mark does not show on the outside of the block as cut. It has been taken to pieces as shown and nailed together, and on the inside the third hack shows. No. 41 is two spruce pines, one marked as a side line, one marked as a fore and aft. 42 is a spruce pine marked as a side line. From there on to the junction of the two mountains I did not look for any marked trees. There was a storm raging and I did not look any further.

Q. In the 41 trees that you have spoken about as state line trees from the mouth of Slick Rock Creek to the last trees mentioned, please state whether all of them were old enough trees to have been marked in 1821?

A. Yes, sir.

Q. Please state whether the marks on all these trees seemed to correspond in age to the ones blocked out?

A. Yes, sir, they all seemed to be the same age as the ones brought and blocked.

Q. Please state whether or not in speaking of each of these trees as fore and aft trees that you meant that they were marked with

two hacks above a blaze on each side in the direction the line was running, and in speaking of them as marked as side line trees you meant with three hacks on the side towards the line?

A. Most all of the fore and aft trees showed two hacks and a blaze on both sides, but the spruce pine on the ridge, and the spruce pine stump near the creek only shows it on one side. All the side line trees are marked with three hacks, every one named there.

Q. What kind of an axe or instrument did they seem to have been marked with?

A. About a three-inch blade.

Q. Were they all marked with the same kind of an instrument?

A. I think so.

Q. The marks that you noticed on the Hangover Lead, were they marked with the same?

A. No, sir, the black oak seemed to have been marked with a narrower axe, about two inches, and the sourwood with a wider one, what is called *as* a felling axe, making a broader mark than the trees marked on the state line referred to.

Q. Do you know in that part of North Carolina any lines that have been marked with a small axe like the one on the black oak?

A. Our old County Surveyor, Mr. Piercy, used a narrow
140 axe like a tomahawk. His lines are all marked with that sort of axe, about the same kind of mark as the one on the black oak. Occasionally they show a little wider when the mark spreads.

Q. When was the first official survey ever made of this part of the country under North Carolina laws?

A. None up to 1851 that I know of.

Q. Do any of the marks on any of the trees on the Hangover Lead that you examined, indicate any marking earlier than that date?

A. None that I saw.

Q. What is the principal body of trees along the Fodder Stack Lead?

A. Mostly chestnut and oak. The timber is small, most of it near where you get to the junction, and consists principally in buckeye and beech. It mainly consists of chestnut on the Fodder Stack Lead.

Q. Does chestnut hold marks as well as the other timber?

A. I think not, sir; the bark is soft and wears off.

Q. Did you discover any corner trees indicating private line trees, along the top of the Fodder Stack?

A. Yes, one mountain oak, North Carolina corner, numbered on the map as 36. It seems to be about like the marks on the Hangover Ridge; the black oak, on the Hangover Lead, about the same age, looks about like that.

Q. Is there three hacks on two sides?

A. Yes, sir.

Q. About how old does it seem to be?

A. Tolerably old, about forty or fifty years old. I would suppose about forty years old. That is my best judgment.

Q. Did you run across any mile stones set up by McClellan on the Fodder Stack?

A. Yes, sir, I indicated all of them on the map, between the Fodder Stack and the junction of the Fodder Stack and Hangover Lead. No. 44 on my map is McClellan's mile stone marked 29-72.

Q. What McClellan is that, and when did he run that line?

A. J. R. McClellan, of Murphy, N. C., The line was run in Sept. and Oct., 1893; four years ago this fall.

Q. I wish you would examine a map of Range 6 E. F. T. 2 N. in the Ocoee District, filed as Exhibit "A" to the deposition of T. E. H. McCroskey in this cause, and, assuming that the Range lines in said district were run at an angle North 20 degrees East, state whether or not on comparing said map with your map, making due allowance for difference in scale, the eastern line of said township shown on said map corresponds approximately in its
141 general features with the state line run by you up Slick Rock Creek, and up the ridge and along Fodder Stack Lead?

A. Approximately, I think it does. The creek is not so crooked as ours is laid down on our map. (The creek is not so crooked as ours), but, approximately, it seems to correspond with ours.

Q. Please measure the distance on each of said maps from the mouth of Slick Rock Creek to the point where the line leaves the creek, and state how nearly they correspond?

A. On the map of the Ocoee District the distance from the mouth of the creek to the point where the line leaves the creek is 1,160 poles, and on our map is 1,120. Now, there is a difference in that scale there, 120 poles to the inch is as near as I can get it.

Q. Please state whether or not, near the point on the Big Fodder Stack, where your line intersects the same, two creeks run down?

A. Two creeks head near the Big Stack Gap, one runs off in a westwardly direction, and the other northeast into Slick Rock Creek.

Q. The last one you referred to, is it a branch of the Big Fodder Stack Branch?

A. Yes, sir.

Q. I read you from Section 61 of the Code of Tennessee of 1858, describing the boundary line between Tennessee and North Carolina, as run by Commissioners in 1821. According to said section, the line as run begins at a stone on the north side of Cataloochee Turnpike road, and runs thence in a southwestwardly course to where it strikes the Tennessee River, about seven miles above the old Indian town of Talassee, and as stated in said section "crossing Tennessee River at the distance of 65 miles from the beginning; from Tennessee River to the main ridge and along the extreme height of the same to the place where it is called Unicoi or Unaka Mountain," etc., I ask you whether or not the line as run by you up Slick Rock Creek and up the ridge, and thence along the top of the Fodder Stack lead answers the description of said Section as a line running "From Tennessee River to the main ridge?"

A. I think that it does, sir. While you might have gone up the other lead and answered the description too.

Q. You think that going up either this way or the Hangover

Lead would answer the description from the river to the main ridge?

A. I think so.

142 Q. How close to the river's edge does the precipitous descent of the Hangover Lead come?

A. Right down close to the water's edge, with just room enough in some places to pass.

Q. I show you two maps, both marked "U. S. Geological Survey, J. W. Powell, Director"—one marked "North Carolina Nantahala Sheet" and the other marked "Tennessee, North Carolina, Murphy Sheet"—I ask you to file the same as Exhibits "F" and "G" to your deposition, respectively?

A. I so file them.

Q. Please state whether or not said maps are official maps published by the Department of the Interior of the U. S. Government, and based on U. S. Surveys?

A. I think so. They are similar to ones I got.

Q. Please state whether the north west corner of Exhibit "F" and the north east corner of Exhibit "G" show the lands in dispute?

A. They do.

Q. Please state whether or not the line between Tennessee and North Carolina as marked on said Exhibits "F" and "G" of the aforesaid government maps show the line as you have shown it on your map and as you found the marked trees, viz: running up Slick Rock creek to the ridge; thence up the ridge to the top of the Big Fodder Stack; thence along the Big Fodder Stack lead to its junction with the Hangover lead?

A. Approximately, sir, I think it is the same line that we have on our map.

Q. Please mark on your map the point where the township line on the south of the fractional township shown on Exhibit "A" to T. E. H. McCroskey's deposition would cross the state line, plotting the same on the scale of Exhibit "A," and mark the same in red ink, "Township line"?

A. I do so.

Q. Mr. Hayes, in the light of the section of the Tennessee Code No. 61, of 1858, which is here shown you and from which extracts have been made as above describing the line run by commissioners, and in view of all the circumstances, the topography of the ground, and in view of all the circumstances, the topography of the ground, the marked trees on the ground, what is your opinion, as a surveyor, as to the location of the state line in the land in dispute?

A. I think it is with our line. The line along which I found the marked trees and described in the margin of my map.

Q. Have you any doubt about it?

A. None whatever.

143 Cross-examination by T. E. H. McCroskey:

Q. In the survey and location of the state line by yourself and J. C. M. Bogle, where did you first begin your work?

A. The first work I did was to hunt what was marked on the map as Fork Ridge.

Q. That ridge leads from Little Fodder Stack to the forks of Big Slick Rock and Little Slick Rock creek, does it not?

A. Yes, sir.

Q. Was Mr. Bogle with you on this?

A. No, sir, he wasn't with me on that.

Q. What was your reason for hunting out that ridge?

A. There is a kind of a traditional understanding in our state that the line went up that ridge.

Q. Several years ago you as a surveyor run a line down that ridge trying to locate it as a state line, did you not?

A. No, sir; my son did run a line down there.

Q. The people of North Carolina, including yourself, had claimed the Fodder Stack Ridge, and Slick Rock Ridge as the state line?

A. No, sir; I don't remember of ever hearing any person say it went down there.

Q. Where did they claim that the state line is?

A. The only claim that I know of was from Little Fodder Stack down Fork Ridge here to the mouth.

Q. Where did you and Mr. Bogle together do the first work?

A. Over there at the mouth of Slick Rock creek.

Q. Then how did you run?

A. We ran up the creek to the mouth of Little Slick Rock.

Q. Before you began the survey, had not you and Mr. Bogle made up your mind that the state line ran up Slick Rock Creek?

A. To some extent I had.

Q. Which is the highest ridge, the Hangover Ridge or the Fodder Stack Ridge?

A. That is something that I don't know what I can answer correctly. From the Little Stack out to the junction is higher, would average higher than the Hangover Lead; the average height of it would be a little greater until you start on the Hangover.

Q. Is not the Hangover Peak higher than the Big Stack?

A. I don't know; I had no barometer. The Hao is higher than either of them, I think.

144 Q. Does not the government maps which you have filed as exhibit to your deposition show the Hangover to be 800 feet higher than the Fodder Stack?

A. I could not answer it. I have never examined them in that particular.

Q. Why is it called the Hangover Lead?

A. On account of a sudden drop off there, I could not tell the height of the rock, called the Hangover.

Q. Does not that cliff give name to that entire lead or ridge?

A. I think it does, sir; that has been my understanding of it.

Q. Taking the marks as state line shown by you on your map, beginning with No. one marked fore and aft, / how far is it from the creek?

A. About 1 pole, I think, west of the creek. I did not take the distance.

Q. How far from the creek is the next, No. 2, marked as a side line?

A. About the same distance; something near one pole.

Q. The next, No. 3, marked fore and aft?

A. I think it is about ten feet from the bank of the creek.

Q. I notice that Nos. 1, 2, and 3 are on the west side of the creek and Nos. 5, 6 and 7 are on the east side of the creek. How did you explain that?

A. They cross the creek there, is the only explanation I can give of it. I searched both sides of the creek but found nothing on the west side.

Q. How far is it from No. 3 to No. 4?

A. 53 poles, I think, sir.

Q. How far from the creek are Nos. 4, 5, 6 and 7?

A. They all stand near the bank of the creek near the water's edge, one of them, I don't remember which, stand- next to water.

Q. On which side marked?

A. Side next to creek.

Q. All marked next to creek?

A. Yes, sir, all that you named.

Q. On which side was No. 8 marked?

A. It was marked on the east side, opposite from the creek?

Q. Nos. 9, 10, 11 and 12—how far were they from the creek?

A. One of them was a little over a rod but I could not designate which one it was. The others are all near the bank of the creek.

145 Q. Did you make an actual survey of the creek from its mouth up to *where* Big Fodder Stack branch?

A. Yes, sir, but from the mouth of Little Slick Rock in several places we had to offset to get away from the creek, it was so rough we could not go it.

Q. From No. 12, spruce pine side line tree, below the mouth of Little Slick Rock Creek to the mouth of Big Fodder Stack Branch, how far is it?

A. Three miles, 228 poles.

Q. So that you found no marked trees between No. 12 and No. 14 at the mouth of said branch to indicate a state line?

A. No, sir, we found nothing there to indicate where the state line was.

Q. Did you ever run the state line north of the Tennessee river?

A. No, sir.

Q. Did you ever survey the state line south of the land in dispute?

A. Only a part of it.

Q. What part of it?

A. I have run from what is known as the John Strutton place to near where we came together.

Q. When did you make that survey and why did you make it?

A. I don't remember whether it was 1889, 1890, or 1890; I think my recollection is that it was in 1890, I was surveying for D. W. Belding & Co.

Q. How many marked state line trees between the Strutton meadows and the land in dispute?

A. I noticed two or three. There was no dispute about the state line there. I don't remember now but two or three. I think I saw probably three there with the state line marks.

Q. Were they marked two hacks and blaze?

A. I think two of them was marked two hacks and a blaze and one with three hacks, two fore and aft trees I think, and one side line.

Q. Had you any other experience than that of locating the state line.

A. I followed the state line about 15 miles from the mile stone at Cattalooche turnpike to the top of Mount Guylott.

Q. Why were you following that line?

A. I was running land for the Love heirs in Haywood county, and they called for with the state line.

Q. Were you then giving particular attention to the location of the state line?

146 A. More to distance than to line. I was on the summit there and could not get off the line.

Q. How many marked trees did you see along there?

A. There are a good many after you get into the Balsam. The Balsam shows the marks very well. I have no idea how many I did see.

Q. Did you find private corners.

A. No, sir, no private corners there. All owned by the Love estate only where they had sold and made the corners.

Q. Why do you state that the true state line is two hacks and a blaze with three hacks as a side line? Did you ever see lines so marked at any other place except Big Slick Rock Creek as you claim, and if so, where did you see such side line marks, and particularly designate them so that they may be again located?

A. I say that from the Code of North Carolina, adopted in 1822, by the legislature on the commissioners' report, adopting the commissioners' report. Yes, sir, on the state line from the Unaka Turnpike where the turnpike crosses the Unacoi Mountain going to Madisonville, from there to Hiwassee river, about 2 miles, on the bank of the Taylor's ferry road, you will find a marked oak with three hacks for a side line. There are several other trees there, showing the three hacks, but I can't locate any of them definitely, but that one.

Q. How do you know that that is a side line mark?

A. I have run the line there.

Q. Is that all the evidence you have that it is a side line mark?

A. The only evidence I have is that it is directly on the side of line with other trees there, the one that is called for.

Q. Going back to your survey up Slick Rock Creek, the marked trees Nos. 1, 2 and 3 are, as I understand you, about the same distance from the creek?

A. Yes, sir.

Q. If they are all about the same distance from the creek, how

can you explain that some are marked as a side line and some fore and aft?

A. The only explanation I can give is they took a bearing there up the general course of the creek and struck these trees. They happened to be on the line.

Q. From No. 4 to No. 12 all marked side lines and some of them you say are very near the creek. How do you explain that none of them are marked fore and aft?

A. I suppose that they did not hit any of them. It is only supposition with me.

Q. Trees are quite numerous with that creek?

147 A. Tolerably so.

Q. Isn't it probable that they would strike some trees in that distance?

A. Yes, sir, they might have done so. It is laurelly and rough.

Q. As a matter of fact, is it not very laurelly and rought up Slick Rock Creek?

A. Yes, sir.

Q. Would it not have been much easier for the commissioners locating the state line to have gone up the Hangover Lead to the Hangover, and thence along to where it was undisputed, thence along to Big Fodder Stack and thence along said ridge to where it is undisputed?

A. I think it would, sir, have been easier on them.

Q. Recalling from the river to the main ridge, would it not be more natural to follow up the ridge than to follow up the creek when no creek is mentioned in the report of the commissioners?

A. I think it would have been, sir.

Q. If the state line coming from the northeast strikes the river at ½ mile or more above Slick Rock Creek, would it not still be more natural to follow up the ridge leading to Hangover?

A. Yes, sir.

Q. In Section 61 of Tennessee Code, read to you in examination-in-chief, continuing further to where it strikes Hiwassee river, it says—thence up said river the same course about one mile and crossing the same to maple. There it follows up the river and mentions the fact in the report. From your experience as a surveyor, if they had run up Slick Rock Creek some six miles or more, why would they have not said up the creek, instead of saying thence to the main ridge?

A. I think I would have noted it running up that creek, had I been the surveyor.

Q. As from your experience as a surveyor, is it not a fact that they almost invariably note creeks or water courses when they follow up them?

A. Yes, sir, I think as a rule it is generally done. I do myself.

Q. Is it not a fact that the Fodder Stack lead is a spur of the main mountain, and is it not considerably lower where it leaves the main mountain than the ridge itself?

A. It is lower going northeast for two miles. There is very little difference after the first two miles.

Q. Have you ever been on the mountain north of the river?

A. Only at the turnpike road and a little distance down the ridge towards the river?

148 Q. Then you can't speak as to the general appearance of the ridges south of the river on approaching the river from the north side?

A. No, sir.

Q. And you can not tell what the natural course for the commissioners to take would be if they were approaching from the north side?

A. No, sir, I can not tell what course they would have taken.

Q. You can't tell either why the commissioners, if they did adopt Slick Rock Creek, would first start up on the west side and after running a distance cross to the east side?

A. I can account for that. It got so rough they had to cross. It was impassable. We had to change sides several times.

Q. If you had to change sides several times, then why could you not find marked trees on either side of the creek several times?

A. After we crossed the creek at No. 4 we only run on the west side a short distance until we passed the rock cliff on the east side.

Q. Then did you look out for marks on that west side?

A. Yes, sir, we examined both sides of the creek carefully.

Q. About how many times do you suppose you crossed the creek on account of its being so rough?

A. About six or seven times until we got to the mouth of Little Slick Rock. Then we kept on the west side all the way up. I don't remember crossing the creek with the survey above Little Slick Rock, though we hunted on both sides for state line marks.

Q. From No. 12, to the mouth of Little Slick Rock is about a mile, is it not?

A. Yes, sir, between three-quarters and a mile.

Q. You found no marks in that distance?

A. No, sir, we found no marks.

Q. Why did you keep on the west side of Slick Rock Creek after you passed the mouth of Little Slick Rock?

A. It was not so rough on that side, but we had to offset on that in a good many places.

Re-examination:

Q. Did the fact that before you made your survey you thought the line ran up Slick Rock influence you in making your survey, and your judgment about the marks on the trees?

A. Oh, no, sir; that did not have any influence with me at all.

149 Q. I wish you would look at the government maps filed as Exhibits "F" and "G" to your deposition, and state whether they correctly show the general topography of this section of the country, and the general lay of the mountains?

A. Yes, sir; I think they do on the North Carolina side. I am not acquainted on the Tennessee side.

Q. Are you acquainted with that scope of the territory between the Hangover and the Cheoah river?

A. Yes, sir, I have been over it surveying several times.

Q. Where has most of your work as surveyor been done?

A. The most of it has been done in Cherokee and Graham counties, North Carolina.

Q. This topographical map indicates that going eastwardly from the junction of the Hangover Lead and the Fodder Stack, after you pass the Stratton Bald the ridge divides in four directions, one going eastward to the Santeecla creek, one running between this creek and Deep creek to the Cheoah river, one running between Deep creek and Bear creek to the Cheoah river, and one running northward to the Little Tennessee river as shown on Hale's map? Is that the way the ridge does divide?

A. Yes, sir.

Q. Which one is the main ridge?

A. The one running between the Little Santeecla creek and the Deep creek to the Cheoah is the main ridge.

Q. Are the marks on the state line trees on land in dispute to which you have testified on direct examination the same as other marks on the state line at other places you have surveyed as testified to on cross-examination?

A. Yes, sir.

Q. The same in their character, apparent age and general appearance?

A. Yes, sir. They look to be the same. I never have cut any of them out only what are here to see how they are.

Q. State whether it would be customary for a surveyor in running a line up a creek in a rough country as this was to take bearings ahead for general courses along the creek for some distance and then in running that line to mark trees as side line trees according as they fall on one side or the other of this general bearing?

A. I think it is.

Q. Please examine original North Carolina Grant No. 2336, here shown you, to L. W. Gilbert and Wm. H. Peet, dated Dec.
150 19th, 1860, and recorded in the register's office of Graham county, North Carolina, in Book H at page 455, together with annexed plat, and please plot on your map in broken red lines the boundaries of said grant so far as they are contained in space of your map, on theory that the state line is as shown on your map; where the line of the grant coincides with the state line plotting it just on the east of the state line mark, so as to distinguish it from the state line and mark same Gilbert and Peet Grant, and please file said original grant, marked Exhibit "H" to your deposition.

A. I do so as requested and mark said grant Exhibit "H," to my deposition.

Q. Do you know the beech beginning corner of said grant; if so, please state where it is located?

A. Yes, sir, it is located on the Fodder Stack Lead about 4 poles north of its junction with the Hangover Lead.

Redirect examination:

Q. Is it not a fact that the U. S. Geological Maps filed by you as exhibits to your deposition were made and issued within the last few years?

A. Yes, sir.

Q. Is it not a fact also that the survey upon which said maps are based were made within the last few years? State when said survey and maps were made as nearly as you can?

A. Yes, sir; in 1892, as my recollection now. I could not be positive as to the date of it.

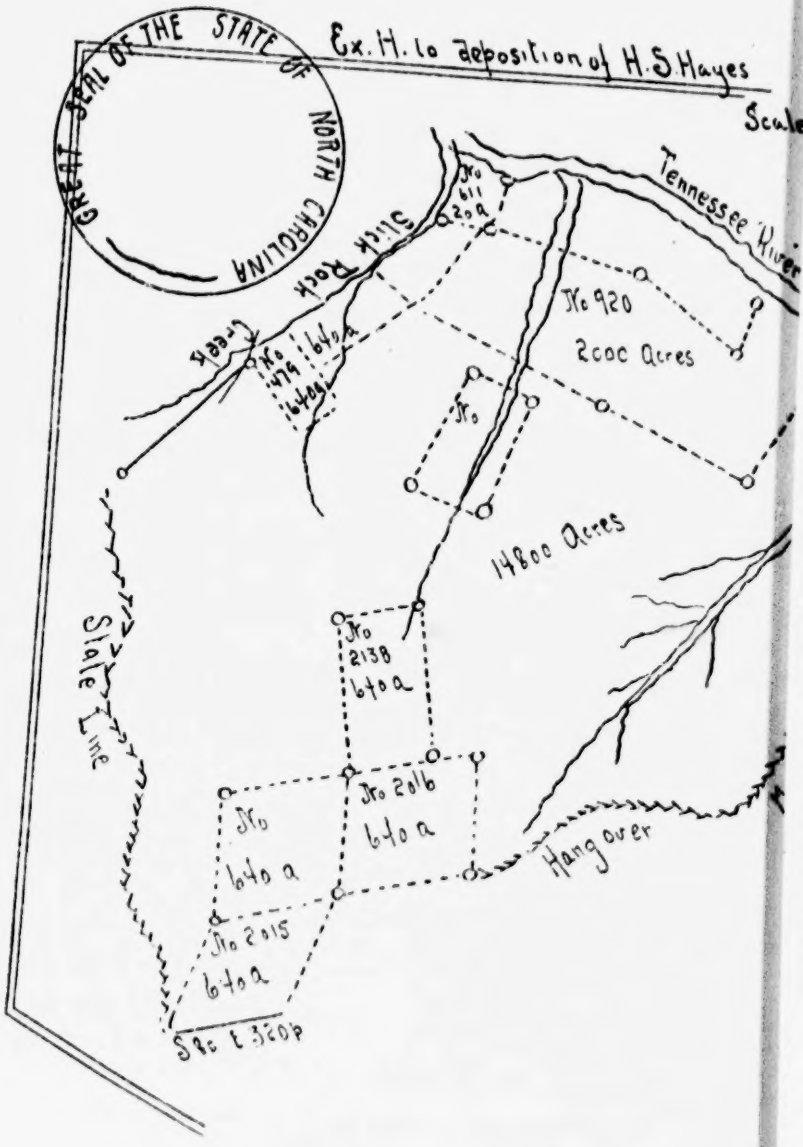
Q. Is it not a fact also that both said survey and map were made with reference to the geological and topographical features of the country, and not with reference to fixing state lines?

A. Yes, sir.

And further saith not.

H. S. HAYES.

(Here follows diagram marked page 151.)


GREAT SEAL OF THE STATE OF NORTH CAROLINA
Ex. H. to deposition of H. S. Hayes
Scale
Tennessee River
Stick Rock
Creek
Jr. 920
2000 Acres
14800 Acres
State Line
Jr. 2138
640 a
Jr. 2016
640 a
Hangover
Jr. 2015
640 a
Sec. 5 320 a

152 STATE OF NORTH CAROLINA,
Cherokee County:

By virtue of a warrant, No. 1035, issuing from the Entry Taker of said county, I have surveyed for A. H. Colvard, a certain tract of land lying in said county in district No. 10. Beginning on a beech tree on the state line where the Hangover Mountain strikes said —, near a corner of No. 5051, and runs with said line S. 80 E. 320 poles to a mountain oak, then with the line of No. 4455 N. 40 E. 320 poles to a Spanish oak; then N. 45 E. 28 poles to two water oaks; then E. 92 poles to a large rock on the top of the second high peak of the Hangover; then down the ridge with its meanders to a service tree on the bank of Cheoah river; then down said river and its meanders to the Tennessee river; then down said river and its meanders to a corner of No. 611 at the mouth of Slick Rock Creek and the state line; then up said creek with said line to the top of the mountain to a locust on said line; then with said line & its meanders to the beginning; containing fourteen thousand & eight hundred acres more or less, with eight several tracts platted out as doth appear on the plat.
Surveyed April 17th, 1856.

C. B., JASPER ROGERS.
WM. CARINGER.

J. W. C. PIERCY, *S.*

F. N. MOSS, *M.*

STATE OF NORTH CAROLINA:

No. 2336.

Know ye, that we, for and in consideration of the sum of three thousand two hundred and twenty-three and 85-100 dollars, paid into our treasury by L. W. Gilbert and Wm. H. Peet, have given and granted and by these presents do give and grant unto L. W. Gilbert and William H. Peet, a tract of land containing fourteen thousand and eight hundred acres, lying and being in the county of Cherokee, Section No. 1035, in District No. 10, it being part of the land acquired by treaty from the Cherokee Indians, and sold in obedience to an act of the general assembly of this state, bounded as follows, viz.:

Beginning on a beech tree on the state line where the Hangover Mountain strikes said — near a corner of No. 5051 and runs with said line south 80 east three hundred and twenty poles to a mountain oak;

Then with the line of No. 4455 north forty, east three hundred and twenty poles to a Spanish oak;

Then north forty-five east twenty-eight poles to two water oaks;

153 Then east ninety-two poles to a large rock on the top of the second high peak of the Hangover;

Then down the ridge with its meanders to a service tree on the bank of Cheoah river;

Then down said river and its meanders to the Tennessee river;
Then down said river and its meanders to a corner of No. 611 at the mouth of Slick Rock creek and the state line;
Then up said creek with said line to the top of the mountain to a locust on said line;
Then with said line and its meanders to the beginning.
Entered the 1st day of June, 1853.

As by the plat hereto annexed doth appear, together with all woods, waters, mines, minerals, hereditaments and appurtenances, to the said land belonging or appertaining, to hold to the said L. W. Gilbert and William H. Peets, their heirs and assigns forever: Yielding and paying to us such sums of money yearly or otherwise, as our general assembly from time to time may direct. Provided, always, that the said grantee shall cause this grant to be registered in the register's office of our said county of Cherokee, within twelve months from the date hereof, otherwise the same shall be void.

In testimony whereof, we have caused these our letters to be made patent, and our great seal to be hereunto affixed.

Witness, John W. Ellis, Esq., our governor captain-general and commander-in-chief, at Raleigh, the 19th day of December, in the 85th year of our independence, and in the year of our Lord one thousand eight hundred and sixty.

JOHN W. ELLIS.

By Command:
RUFUS H. PAGE,
Secretary of State.

No. 1035.

No. 2336.

L. W. Gilbert & William H. Peet—1480.

Cherokee County.

Recorded in the secretary's office, page 10. Rufus H. Page, Secretary.

The within grant was duly registered in the register's office of Graham county, N. C., in book "H," on page 455, this November 16th, 1896.

W. F. MAUNEY,
Register of Deeds.

Exhibit "H" to deposition of H. S. Hayes.

Filed Nov. 23, 1897. J. T. Carter, Deputy Clerk.

154 The next witness, J. C. M. BOGLE, being duly sworn, deposed as follows:

Examined by Mr. SANFORD:

Q. What is your age; where do you live, and what is your occupation?

A. I am a surveyor; I live in Loudoun county; am 66 years old.

Q. How many years have you been a surveyor?

A. I was elected county surveyor of Blount county, Tennessee, in 1856.

Q. Have you been county surveyor of any other county besides Blount?

A. I am now surveyor of Loudoun county, Tennessee.

Q. And have you been in the business practically ever since 1856?

A. Yes, sir.

Q. Have you surveyed any in mountain lands?

A. Yes, sir.

Q. What experience have you had in surveying mountain lands?

A. I have surveyed mountain lands in Blount county, Tennessee, and some in North Carolina.

Q. Were you employed in connection with Mr. Hayes by the defendants in this case, to ascertain or endeavor to ascertain the true location of the state line?

A. Yes, sir.

Q. Did you go with Mr. Hayes on the trip that he made for that purpose, and about which he has testified in this case?

A. Yes, sir; I did.

Q. And with the party which he names in said testimony?

A. I did.

Q. Was that a careful search that was made by your party?

A. Yes, sir; we made a very careful search; that was my instructions.

Q. Did you go up the so-called Slick Rock Ridge shown on Hale's map?

A. No, sir.

Q. Did you go up the ridge marked on the map filed as "Exhibit A" to Mr. Hayes' deposition as Fork Ridge?

A. I did.

Q. Did you find any marks on the trees on that ridge?

A. Yes, sir; some old ones but not as old as they ought to be, to be state line marks. The most that we found were Ocoee District marks.

155 Q. Did you find any state line marks?

A. I don't know that we did.

Q. Did you make any search along any portion of the Hangover Lead?

A. Yes, sir.

Q. Did you have a copy of Mr. Wilson's deposition given in this case, and of Mr. Hale's notes with you?

A. I had a copy of Mr. Wilson's deposition with me. I read over Mr. Hale's notes before we went, and took down such as I thought we would need in locating the line.

Q. On what portion of that Hangover lead did you go?

A. I went back north from the Slick Rock Gap to near the Tennessee river, and went south to what they say was Big Fat Gap.

Q. Then you went the entire distance from Big Foot Gap to within a short distance of the river?

A. Yes, sir; in going from Slick Rock Gap north we turned off down so as to strike the mouth of Slick Rock Creek.

Q. Did you go to the trees that Mr. Hale and Mr. Wilson testified about?

A. Yes, sir; I think we found them; I am satisfied we found them.

Q. Did any of those trees on that portion of Hangover lead have marks showing them to be state line marks?

A. Not according to what I understand the state line marks to be.

Q. What do you understand the state line marks to be?

A. I understand them to be two hacks and a blaze for fore and aft, and three hacks for side lines.

Q. When did you understand this line to have been run?

A. According to the Code, in 1821.

Q. How old did these marks which you found seem to be?

A. That would be only a matter of conjecture; they were perhaps 30 or 40 years old.

Q. Did you go to the black oak which Mr. Hale described as being ¾ of a mile from the river?

A. Yes, sir; I think we did.

Q. Did you find a black oak with marks on it that distance from the river?

A. Yes, sir; I suppose it was that distance; we didn't measure it.

Q. What were the marks on that oak?

A. I believe them to have been N. C. land marks, because they would suit for that, and they were not old enough to be state line marks.

156 Q. What do you understand to be N. C. land marks?

A. Three hacks as you approach and three going from the tree.

Q. And this tree was marked with three hacks and in that way?

A. Yes, sir; that is the way it was marked.

Q. And the marks were not old enough for state line marks?

A. Not old enough for state line marks.

Q. Were they made with a wide axe?

A. No, sir; an ordinary axe, maybe a little narrower than the ordinary axe.

Q. Did you go to the sourwood in the Gap?

A. Yes, sir.

Q. Did that have any state line marks on it?

A. No, sir; it had several marks on it, but I don't think they were state line marks.

Q. Why?

A. They were irregular and were made by a broader axe than a tomahawk. The state line marks all seem to be regular, but these marks on the sourwood seemed to be irregular.

Q. Was there any marks on that sourwood of sufficient age to have been made in 1821, and of the proper kind for state line marks?

A. Well, we did not block it, but I don't think they are old enough for state line marks.

Q. What is your judgment as to their age?

A. Perhaps 40 years, they might have been as much as 50 years old, but I would guess them to be 40 years.

Q. Did it have any regular state line marks on it?

A. No, sir; there were too many marks on the large tree, and as I told you they were irregular. It would be marked like men standing in different places had made them.

Q. Does that sourwood stand near a trail?

A. Yes, sir.

Q. Do you know what the gap has been used for?

A. Only by hearsay. There is an old trail that men say was an Indian trail. I never was there before.

Q. Did you go to the black oak that Mr. Hale next speaks of, as being one mile and sixty-three chains, and marked as a corner?

A. I think we were there. We found a tree that I think corresponded with Mr. Hale's notes. Of course we didn't measure the distance.

Q. How was it marked?

A. It was marked with hacks like a North Carolina corner.

157 Q. Old or new?

A. If I remember right they were about 15 or 18 years old. I don't remember well about this. I remember distinctly about the sourwood because I took notes about it at the time.

Q. Which way did the piece of land lie in North Carolina as indicated by the marks?

A. Eastwardly.

Q. How did the North Carolina land lie as indicated by the marks on the black oak?

A. Eastwardly; on the west side was towards Tennessee, line not far distant.

Q. Did you go to the chestnut oak at one and a half miles that Mr. Hale speaks of?

A. I think we did. I think we found that but concluded that it was not marked; that it was a path and that some fellow had just hacked it. I am not so sure about that. There was one tree that we thought was just a path mark, and another that we thought was a North Carolina corner.

Q. From whom did you get your information as to the location of the Hangover lead, and of the names of the different places up there?

A. From Rube Carver, Mr. Hayes, and I think also from Henry Ditmere.

Q. Did you go with Mr. Hayes in the survey up the Slick Rock creek, and up the Big Fodder Stack Ridge?

A. I was in the survey from the mouth of Slick Rock creek to the ridge leading from the mouth of Big Stone Branch to the east end of Big Fodder Stack, and little way up the ridge. We went up that ridge searching for marks, and then the next day we moved camp, and I didn't go up the ridge on the survey. That is to say, I didn't go with them all the way.

Q. Taking the survey as far as you went up that creek with him,

describe the marks on the different trees as you found them, and state what they indicated?

A. We had our notes and we made that map, which is as exact as we could make it. The marks are very old on this line, and the blocks which we cut out show that they are at least 75 years old. At one place where we left the creek and branch they are very thick for a few chains; a few are 'fore and aft' and considerable numbers more are side lines. Mr. Hayes and I both made memoranda in our books showing how they were. There were a good many more side lines than there were fore and aft.

Q. Were you with him on all the survey beginning at Slick Rock creek to the maple marked 26 on map and from spruce pine
158 No. 30 on the map to the junction of the Hangover lead and the Fodder Stack lead?

A. No, I was not. I was with him from the mouth of the Slick Rock creek to the maple marked No. 26 on the ridge, and then I went off and moved the camp. Then we came back on this line near Glen Gap and it was stormy and I didn't go any further.

Q. Then, as shown by this map, you left the survey at the maple marked 26. What was the first tree you came to when you came back?

A. We first struck McClellan's mile stone up there, No. 31-70 on the map, being marked in red ink, No. 37.

Q. And you continued with him until you passed what point?

A. I didn't go with him more than a little piece. I went with him until we passed the two spruce pines marked side line and 'fore and aft' No. 41, on the map.

Q. I ask you this question: In all of the survey in which you were with Mr. Hayes, does his map correctly indicate the trees and the marks on them?

A. Yes, sir.

Q. Did you see all of them?

A. Yes, sir.

Q. Did each of them have marks on them as shown on his map?

A. They did.

Q. Were these marks sufficiently old to have been made in 1821?

A. Yes, sir; I think they were.

Q. They were marked with two hacks and a blaze on both sides for fore and aft tree?

A. Yes, sir; one or two, like spruce, pine stump, the marked part had fallen off on one side.

Q. And with three hacks for side lines?

A. Yes, sir.

Q. And you think they were of sufficient age to have been made in 1821?

A. Yes, sir.

Q. Did you examine the blocks which he has filed as exhibits to his deposition?

A. Yes, sir.

Q. Did you count the growth on those blocks?

A. Yes, sir.

Q. Did you and he agree as to the number of growths on the blocks?

A. Not exactly. I found exhibit "A" 75 years old; I
159 counted exhibit "B" 76 years old; exhibit "C" 75 years old, and exhibit "E" 75 years old.

Q. What do those figures indicate in each case?

A. They indicate so many years since the cut had been made on the tree.

Q. The way you count them do you have to add anything for growth for healing over the scar?

A. No, sir; I start from the year's growth in which the hack was made.

Q. Would the season of the year in which they were cut make any difference in the apparent growth?

A. I think it would. I don't know exactly how nature makes it. I count one hard streak and soft streak for a year's growth. I suppose the soft streak grows in the spring and the hard streak in the fall.

Q. Would there be any slight difference owing to the condition of the tree?

A. You might very easily make a mistake by counting two years' growth for one; I don't think you would be likely to make a mistake the other way. The rings grow very close together in some places, and it sometimes is very hard to count them.

Q. Is there a discrepancy between you and Mr. Hayes of more than one year's growth in any instance?

A. I think not; I have forgotten exactly how that is.

Q. Now, the other trees which were not blocked on that portion of the survey on which you were, did they look different with respect to the manner in which they were marked and the age of the marks, or were they the same as those you blocked?

A. I think they were the same age; they looked just like them.

Q. Did they seem to be the same, or made by a different instrument?

A. By the same tomahawk.

Q. What do you mean by tomahawk?

A. A little marking axe with a blade two and a half or three inches wide.

Q. Was it a common hack for old marks of that kind?

A. I suppose it was. Where I first surveyed, they used a tomahawk, and I suppose that the surveyors that laid off the state line did the same.

Q. When was the Ocoee district first surveyed?

A. I understand that it was surveyed in 1837, somewhere along there; I don't just know the date. The act was passed in 1836.

160 Q. Were there ever any Tennessee grants on that section of the country before that date?

A. Not that I know of.

Q. Have you surveyed the range lines of the Ocoee district?

A. Yes, sir.

Q. At what angle are they run?

A. They are run 20 degrees off. From north and south, and from east and west they run with a variation of 20 degrees from the compass. That is the way they are run.

Q. Please compare the map of your survey with the map of the township of Ocoee district which is filed as Exhibit "A" to the deposition of T. E. H. McCroskey, and state whether the east Ocoee line, shown on said map, Exhibit "A," corresponds substantially with the state line shown on your map?

A. I examined that and I thought it did fit very well, though the plots were made on a different scale.

Q. Does the state line as shown on the government maps filed as exhibits "F" and "G" to the deposition of Mr. Hayes, correspond with the state line as shown on your map?

A. It is just like the other: it is on a smaller scale than the Ocoee or our map, but it looks the same.

Q. Does the state line run up creek and ridge and then on the Fodder Stack lead to the junction, as the same is shown on that map?

A. That is the way it seems to show.

Q. In section 61 of the Code of Tennessee of 1858, it is stated that the boundary line of the state of Tennessee and North Carolina runs southwestwardly from Cataloochee Turnpike, crossing the Tennessee river at 65 miles, and from the Tennessee to the main ridge, and along the extreme height of same to Unacoi or Unaka Mountain. Please state whether the line run by you and Mr. Hayes would answer the description so given as running from the river to the main ridge?

A. I think it would fill the bill perhaps as well as any other.

Q. In running up a creek where the country is rough would it be usual and customary for surveyors to take a general course of the creek for some distance and then mark trees along the course as side lines on either side according to which side of the tree the line passed on?

A. If they did that that is the way they would mark them. Some might take the meanders of the creek, and some might do as you suggest.

Q. Which way did the commissioners in this case apparently do?

A. I think they would make corners. They would, per-
161 haps, take a straight shoot, keeping close to the creek some places a little further off than others.

Q. Taking into consideration the section of the code above referred to and which is here shown to you, the marks on the trees on the Hangover lead and up the creek and other places that you searched and considered the general topography of the country and the marks on the trees, what in your opinion is the line run by the commissioners of the state of Tennessee in 1821, as the state line?

A. I would base my judgment on the state line marks more than the topography of the country. Taking that in connection with the

Ocoee map, I think the line runs up the creek as we ran it, and as shown on our map.

Q. Have you any doubt about that?

A. No, sir.

Q. From your experience as a surveyor, and your experience in running marked lines in connection with trees that you blocked, have you any doubt that these were the state line trees marked by the commissioners in 1821?

A. I have no doubt of it.

Q. Did you make a careful examination of the trees?

A. I did.

Q. And you have carefully counted the growths on the blocks?

A. Yes, sir. We counted them out there. We couldn't do it out there as well as here, but I was satisfied that they showed that the marks were about 75 years old, and after we had planed them off and counted them here, it convinced me of it.

Q. After you leave the junction of the Fodder Stack and Hangover going eastwardly, which is the main branch of the Hangover?

A. All I know about it is what I could see from the top of Fork Ridge; I never was on that part of the Hangover.

Cross-examination.

By T. E. H. McCroskey:

Q. Before you went to make the survey, you had made up your mind that the state line run up the Slick Rock Creek?

A. I thought it did, judging from a copy of a map of the Ocoee District line.

Q. Some of the trees that are marked on the Slick Rock Creek show 'fore and aft' and some side lines?

A. Yes, sir.

Q. And they are all about the same distance from the Creek. How would you explain why some of the trees are side lines
162 and some are 'fore and aft'; why they are not all side lines or are not all fore and aft?

A. They couldn't possibly be so if they run a straight line. You would have to make them on different sides; some would be on one side and some on the other.

Q. From No. 1 at the mouth of the Creek to No. 12 you noted 12 marked trees, two only of this number being fore and aft, the balance being all side line trees; how can you explain how that happened?

A. There may be some fore and aft trees that have fallen. We found some dead ones.

Q. Do you think it probable that the fore and aft trees would fall and that those marked as side lines would not?

A. Perhaps some of the side lines are gone. My experience is that you make ten or fifteen side lines to one fore and aft in surveying, and sometimes more than that.

Q. You blocked No. 8, marked side line, opposite the creek; how do you explain that?

A. They ran further away from the creek than anywhere else.

Q. Do you think the creek is the line?

A. Virtually so; I think they run their line outside of the creek. Well, you might call it the creek.

Q. How do you explain the fact that they marked trees sometimes on one side of the creek and sometimes on the other?

A. In some places there is laurel and in some places bluffs that made it almost impossible to pass on that side. They may have dodged off to get around these. The fact remains to my satisfaction that they did it.

Q. It seems that the first three are on one side, and the others on the other?

A. I think that is so, or about all the rest of them are on one side. There was a bluff coming back, and perhaps they crossed on that account.

Q. You crossed backward and forward several times?

A. Yes, sir.

Q. And yet only found the marked line on one side?

A. Yes, sir.

Q. And then after you reach No. 12, probably a mile and a half from the river, you found no marked line for four miles?

A. No, sir.

Q. Why did they not put up some marks along there?

A. I don't know.

Q. As a surveyor, if you had been locating that line, would you have marked it?

163 A. Yes, sir.

Q. Any other ordinary surveyor would have done so, wouldn't they?

A. I think they would now.

Q. Had you been marking the state line up the creek, if you had been on one side, would you have not continued on that side of the creek?

A. That would depend on the topography of the country.

Q. Is it rough?

A. Very rough.

Q. How long did it take to run from the mouth of the Creek to the Fodder Stack branch?

A. Four days, I think.

Q. The calls of the state line says, to the crossing of the Tennessee River about 65 miles; thence to the main ridge. Now if they had struck the river one-half mile about the mouth of Slick Rock Creek, what would have been the most natural route to go?

A. They are all rough. The most direct would have been up that ridge, if they crossed the river there; but I don't think they did that.

Q. What ridge?

A. Hangover Ridge.

Q. Why do you not think that they crossed at that point?

A. It has been measured and is only 64½ miles, and if you go

down one-half mile, you get 65 miles, and if you go the other way, you only get 64½ miles.

Q. How do you know it has been measured and is only 64½ miles?

A. I have been told that by several; I have measured part of it myself.

Q. So all you know is hearsay?

A. Yes, sir; as to that distance.

Q. If the state line marks had actually struck the river one-half mile or more above Slick Rock Creek, would not the most natural crossing be by the Hangover Ridge?

A. Perhaps it would; I think it would be the most direct route to get to the main ridge, but would perhaps not be any very great difference between the two routes in distance.

Q. If you as a surveyor had run up Slick Rock Creek six miles as you think the commissioners did, would you not have mentioned the fact in your report, and would not any surveyor do so?

A. I think I would; but perhaps others would not.

164 Q. From your experience and observation, would not almost any surveyor do so?

A. I think they would now-a-days.

Q. Would it not have been *easy* for a surveyor to have followed the ridge up to Hangover, than to have followed the Slick Rock Course?

A. I never went over either and could not say.

Q. Would it not have been easier to have followed up the Hangover Lead to have reached the main ridge than the Slick Rock Creek?

A. I believe it would.

Q. Were you ever on the north side of the river for the purpose of seeing the topography of the country on the south side?

A. No, sir.

Q. So you don't know what the general topography of the country is, approaching from the north side?

A. No, sir; I have never been down to the river on the north side.

Q. Was the state line located by the commissioners along the Slick Rock Ridge to the Fodder Stack Ridge?

A. I think not.

Q. Why do you think so?

A. I think we found it up the Slick Rock Creek.

Q. You located the Slick Rock Creek as the line, from the fact that you found those marks?

A. No; that with the map of the Ocoee District. If I had not found those marks, I would not have thought the map correct.

Q. You know Mr. Wilson, Mr. Muller and Mr. Hale as surveyors?

A. I know Mr. Wilson and Mr. Hale. I do not know Mr. Muller.

Q. Is it not a fact that both Mr. Wilson and Mr. Hale are good surveyors, and well acquainted with mountain lands?

A. I regard them as such.
Q. Are they not above the average surveyors?
A. Yes, sir; they are.
Q. Do you know Mr. Muller's reputation as a surveyor?
A. I do not.
Q. Had you ever any experience in locating state lines before this, and if so, where?
A. I run a state line around the edge of a 20,000 acre tract in North Carolina; and I run a tract for Dan Lawson in Blount County; and I run a line for Col. Sanford—state line.
165 Q. Were you giving your attention to the state line or more particular to the land you were running out?
A. To the land entirely; I paid no attention to the state line.
Q. Is it not a fact that marked trees on tops of ridges are more easily obliterated by age than in hollows and ravines?
A. I think so; they are more exposed to the weather.
Q. The state line marks north of the river are nearly all gone, are they not?
A. Yes, sir; they are nearly all gone. But there is no dispute about the line along there.
Q. The same condition would exist on the south side of the river on the main heights, would it not?
A. I think so; if it was covered by the same sort of timber.
Q. And it is covered by the same kind of timber, isn't it?
A. No, sir.
Q. What is the difference?
A. There is more spruce pine on the south side than on the north. You rarely see a spruce pine on the north side; spruce pines hold the line better. And on the south side there are a great many.
Q. Would a tree be marked as a fore and aft and side line also?
A. No, sir; it couldn't be done; I never heard of one.
Q. I see No. 41 on your map is noted as side line and as fore and aft. How do you explain that?
A. There are two trees there, and the same number applies to both. One is marked a side line; the other a fore and aft.
Q. As I understand you, after you went some distance up the point of the ridge, after leaving Slick Rock Creek and going up toward Fodder Stack Ridge, you left them?
A. Yes, sir.
Q. And then you met them within one-half mile of Glen Gap?
A. Yes, sir.
Q. And surveyed thence back to Glen Gap and beyond that about a half a mile?
A. Not a half a mile, but I saw the marks there at trees marked 41.
Q. So all the surveying you did on Fodder Stack ridge was less than a mile in distance?
A. Yes, sir.
Q. Did you run on Ford Ridge up from the Junction of Little Slick Rock and the Big Slick Rock?
166 A. No, we just examined along there for marks; we didn't survey along there.

Q. You found nothing there?
A. We found marks but no state line marks, as we thought.
Q. From where the Big Fodder Stack Branch empties into the Creek, what distance does it run?
A. It makes a circle towards the east.
Q. Where does it head?
A. On the side of the mountain, I suppose.
Q. As a matter of fact, does it not head under the junction of the two ridges?
A. I think it heads more over towards the Hangover Lead.
Q. Then if you was to follow up the creek as a state line, the Hangover would be the main ridge, would it not.
A. I don't know as that would make it a main ridge.
Q. The creek would lead up to the Hangover, would it not? If you follow up the creek the main ridge, would you not approach the Hangover quicker than the other point?
A. I think you would, if you followed up that way.

Redirect examination.

By Mr. SANFORD:

Q. You mean by that last answer that you think the Slick Rock Creek heads closer to the Hangover lead than to the Junction?
A. I think it does.
Q. Did the fact that you thought before you began your search that the Slick Rock Creek was the state line influence you at all in making your survey, or influence your judgment with reference to the marks on the trees which you have testified about?
A. Not a thing in the world. I thought that was it, and when I found the marks on the trees it confirmed what I thought before.
Q. You had no hide-bound theory which you were trying to establish?
A. No, sir; not a bit of it.
Q. State whether your efforts was to establish a line or to find the true line and report?
A. We agreed to find the true line and to report.
Q. Was that your instructions?
A. Yes, sir.

Q. Was this map made by you jointly?
167 A. Yes, sir; Mr. Hayes did most of the work, but I called off for him, and assisted him in it.
Q. And it is to be considered as your joint map?
A. Yes, sir.
Q. Does the Hangover Lead come down abruptly to the Tennessee River?
A. I don't know. I did not go right down to the river.
Q. You have stated in your examination in chief that you went to the sourwood in Sourwood Gap, shown on the map of Wilson & Hale, and believed by them to be a state line tree, and have stated that there were marks on said sourwood, but that they were irregular and not of sufficient age for state line marks. Please state what kind of sourwood this was?

A. A double sourwood.

Q. Did you make notes of the marks on this double sourwood at the time you examined it, and have you those notes now?

A. I did, and have the notes here.

Q. Now please state in detail the marks you found on this double sourwood, beginning with the larger fork of the tree?

A. On the south side of the larger fork of the sourwood were two marks horizontal and a space and then three marks below, appearing thus: ≡ On the east side of the tree appears one hack, appearing thus: —; on the north side of the same tree there were two hacks, appearing thus: =; and on the west side of the tree there were no marks.

On the smaller fork of the sourwood on the east side appears five marks, irregular, the upper is a horizontal mark; the second below an oblique to the right, then two horizontal and then an oblique to the left, appearing thus: ≡ ; on the north side of the same tree appears two blazes and a little to the right of the blazes, three hacks, appearing thus: :≡ on the west side there were no marks, and on the south side no marks appeared.

Q. In the call for the state line, as set forth in Section 61 of the Code, this call occurs: "Crossing Tennessee River at a distance of 65 miles from the beginning; from Tennessee River to the main ridge, and along the extreme height of same to the place where it is called Unacoi or Unaka Mountain." Now please state where, in your opinion the main ridge referred to in this call begins, basing your opinion upon your examination of the ground, and the aforesaid calls referred to in the Code?

168 A. My opinion is that it begins at the junction of Hangover and Big Fodder Stack leads. If the Hangover Lead was the main ridge, you would be at it when you crossed the river.

Q. Is the description of the boundary line between Tennessee and North Carolina as set forth in Section 61 of the Code, a meagre or a full description of their survey of said line?

A. It is evidently a very meagre description of said survey.

Q. As I understand from your examination in chief, you assisted in making the survey from the mouth of Slick Rock Creek to the maple, No. 26, and from the spruce pine, No. 38, to the pine past spruce pine No. 41, as shown on the map filed as Exhibit to Mr. Hayes' deposition and made by you. Is this correct?

A. Yes, sir.

Q. Did you examine all of the marks on these trees on this part of the line?

A. Yes, sir.

Q. Did you examine all the marks on all of the trees that were blocked, and also all of the blocks that have been filed as exhibits to Hayes' deposition?

A. I did.

Q. From your experience as a surveyor, and your examination of these trees, have you any doubt but that they are old state line trees, marked as such in the year 1821 by the commissioners?

A. I have no doubt whatever.

And further deponent saith not.

J. C. M. BOGLE.

Bill of Costs.

H. S. Hayes, 266 miles and two days	$16 30
J. C. M. Bogle, 60 miles and two days	6 00
Frantz & Hutchinson, stenos. 49 pp. 300 words each 3 copies	$24 50
J. H. Frantz, N. P. 2 depns	2 00
Total	

I certify that the foregoing bill of costs has been paid by Lucky, Sanford & Tyson, Counsel for Defendants.

[SEAL.]

J. H. FRANTZ,
Notary Public.

I, J. H. Frantz, Notary Public, hereby certify that the foregoing deposition of H. S. Hays, and J. C. M. Bogle were taken before me by the witnesses, and that counsel representing the respective parties in interest personally waived formal action and certificate thereto.

169

This 17th July, 1897.

[SEAL.]

J. H. FRANTZ,
Notary Public.

Endorsed: Filed July 17, 1897. J. T. Carter, Deputy Clerk.

And afterwards to wit, on the 13th day of September, 1897, certain depositions of W. D. Hale and H. M. Ditmore were filed in the clerk's office of said court, which said depositions are clothed in the words and figures following, to wit:

In the United States Circuit Court at Knoxville, Tennessee.

No. 1056.

CHARLES HEBARD
vs.
D. W. BELDING et al.

Negative.

Depositions of W. D. Hale and H. M. Ditmore, witnesses for the complainant, taken by consent of parties except as to defendant J. W. Cooper, and upon notice as to him, at the office of the clerk of the United States Circuit Court at Knoxville, Tennessee, on the 10th day of September, 1897.

Said witness, W. D. HALE, being duly sworn, says:

Direct examination by T. E. H. MCCROSKEY:

Q. 1. Are you the W. D. Hale whose deposition has heretofore been taken in this case?

A. I am.

Q. 2. Since your deposition has been taken in this case state whether or not you have been back to Slick Rock Creek and its vicinity to examine with reference to the state line and its location?

A. I have.

Q. 3. How often have you been back?

A. Twice.

Q. 4. State if you have taken out or blocked out any of the marks noted in your former deposition and the notes filed as exhibits to your deposition at that time, and if so please state which of
170 the trees or marks you had blocked, giving their location?

A. I blocked the black oak station 94, 121 2-10 chains from the Tennessee River south of the river, and a sourwood one mile 3½ chains south of the river. The sourwood is station 100.

Q. 5. Have you these blocks with you at the present time?

A. I have.

Q. 6. Will you please file the same as Exhibits "A" and "B" to your deposition?

A. I file the black oak as Exhibit "A" and the sourwood as Exhibit "B."

Q. 7. Is it really a black oak or not; explain the same?

A. It is really a red oak. At the time that it was noted as a black oak there were no leaves on the tree. At the time this block was taken out the leaves were on the tree and I could tell it was red oak instead of a black oak.

Q. 8. How long has that been since you first noted it?

A. About 18 months since I first noted it.

Q. 9. At the time you first noted it what indications were there on the bark about its being a state line mark?

A. There was an indistinct upper hack and a plain lower hack and a plain blaze.

Q. 10. When you blocked it out recently was one of the marks missing—if so, explain about it generally.

A. The upper hack was entirely gone—the other marks were intact.

Q. 11. How long since you took these marks?

A. It has been about two months.

Q. 12. Describe the location of the black oak or red oak relative to the lead or the ridge it is on, and whether it was found in the lead or above on the ridge, or where?

A. The black oak is on the ridge leading from the river east of Slick Rock Creek to the Hangover, and on the turn in the ridge. The turn marks an angle larger that a right angle.

Q. 13. State whether or not it is on the same line located as the state line by yourself, Wilson and Muller?

A. It is.

Q. 14. Give the number and designate its location on the map you file with your deposition?

A. It is number 94 in the notes and I mark it on the map "B. O. or R. O. Blocked," meaning black oak or red oak blocked.

Q. 15. Have you counted the growths on that black oak or red oak blocked, offered as Exhibit "A" to your deposition?

171 A. I have repeatedly.

Q. 16. How many growths are indicated from the time the marks were originally made up to the present time?

A. 76.

Q. 17. How many years since does that indicate?

A. 76 years; one growth for each year.

Q. 18. I notice from the block that there are only two notches or marks; please explain in regard to that?

A. When I went to the tree to examine it and block it the upper hack was entirely gone in the bark and, not knowing just where to cut them, cut too low and cut out the upper hack. I found it in the wood, and it exactly corresponds with the depth of the two notches that still show in the wood, but in cutting the block it was cut out but didn't show on the bark.

Q. 19. Is there any doubt about the upper hack showing in the tree and to the same depth as the ones exhibited now?

A. None whatever.

Q. 20. In the tree what do the respective marks indicate?

A. Two hacks above a blaze.

Q. 21. Did you say that this black oak or red oak was one of the trees that yourself, Wilson and Muller, noted as the state line mark in your original survey or investigation of the state line?

A. It is and was noted.

Q. 22. State the object in blocking it out and whether or not it was for the purpose of proving or disproving that it was or was not the state line mark.

A. It was to ascertain the age of the mark, and whether or not it was the state line mark?

Q. 23. What year do the indications show they were marked on the black oak or red oak?

A. 1821.

Objected to by Mr. Tyson on the ground that it was impossible for the witness to determine what year these marks were made.

Q. 24. In referring to the other block marked Exhibit "B" to his deposition, please explain where that was found and what your former notes state in regard to it?

A. The block was taken from a sourwood in Sourwood Gap, station 100, on the same lead as the black oak on Hangover Lead, and is noted in our notes as a fore and aft tree. I refer you to the notes to show what the marks were.

172 Q. 25. Now tell what marks are on this block?

A. There are two hacks above a blaze.

Q. 26. Are there any other indications noted about the hacks or blaze or former hacks or more recent hacks or marks?

A. There is a scar in the upper hack that slightly disfigures it—can not say what made the scar.

Q. 27. Please tell or explain on what part of the upper hack this scar is, and how it appears?

A. It is in the center of the hack and looks as if it might have been a bullet hole or a worm hole and healed over.

Q. 28. Is that indication of the bullet hole or worm hole later or younger that the other hacks or blaze?

A. It is younger than the ax marks.

Q. 29. Please explain a little more definitely why you can say it is younger than the ax marks?

A. Its general appearance, as the appearance or color of the bark, for instance, would indicate that it was younger. The scar rises above the bottom of the ax marks so that if the ax marks had been made at the same time or afterwards there would have been a gap in the ax to have left this rise above the bottom of the mark. The hack made below is straight and smooth in the bottom, showing there was no gap in the ax. This is why I say the scar was made after the ax marks.

Q. 30. Is there anything particular about the lower hack on this sourwood?

A. It has been made with two strokes of the ax.

Q. 31. Explain how you can say it has been made with two strokes of the ax.

A. The bark shows where the edge of the ax struck twice.

Q. 32. Did these original two hacks or blaze penetrate to the wood or sap and if not, how can you tell it did not?

A. The lower hack and the blaze did not reach the sap and I don't think the upper hack did either. If the hacks had reached the wood there would have been a different shaped scar; it would have healed over and left a cat face.

Q. 33. On the sourwood, state whether the two hacks and the blaze are plainly indicated?

A. They are.

Q. 34. State whether or not the part of the blaze in the bark has been chopped or split off and state how it happened?

A. A part of the bark that indicated the blaze was knocked off, sloughed off in cutting out the block.

Q. 35. Have you any method of knowing how long it has
173 been since the two hacks and blaze were made in this sourwood, and if so, explain?

A. I can not tell how long it has been there but I can tell that it has been there longer than a certain period. In the wood opposite to and corresponding with the scar in the upper hack, indicating a bullet or worm hole, is a snarl showing the depth of the scar in the wood, and there are 61 growths of wood from this snarl to the bark; the two hacks and the blaze are more than 61 years old.

Q. 36. State whether or not the sourwood was hollow and the heart had rotted out?

A. Yes.

Q. 37. How many or about how many growths are indicated from the surface to the hollow?

A. 70 growths from the hollow to the bark.

Q. 38. Did you examine any other marks which you mentioned in your former deposition as indicating state line marks and have

you blocked them, and if you did not block them give your reasons for not doing so?

A. I did. I examined a hickory, station 114 but did not block out the marks. It was indicated that the marks did not go to the wood.

Q. 39. What about a chestnut oak stump indicated in your former deposition?

A. The chestnut oak stump is hollow and would not carry the marks in the wood for the required age.

Q. 40. Taking into consideration the location of the ground and the sourwood and black or red oak, the topography of the country and the leading ridge as you say, have you any doubt as a surveyor of the two being the true state line marks?

A. I have not.

Q. 41. State whether or not they are found on the same leading ridge as explained and indicated in your former deposition south of the river?

A. They are.

Q. 42. I will ask you if you knew Thomas G. Harvey who lived in Monroe county, and state whether or not he is now living or dead, and when he died, and how old he was when he died?

A. I knew Thomas G. Harvey. He has been dead something near two years I believe, and was between 80 and 90 years old when he died. About that age. He told me his age but I don't remember now his exact age.

Q. 43. State if in your capacity as surveyor and with a view of ascertaining the survey of the Ocoee Land District, you had a conversation with him in regard to the survey of said district,
174 and if so what did he tell you if anything about his being along when the Ocoee Land District was surveyed, and in what capacity he was along?

A. I had several conversations with Mr. Harvey about the surveys in the Ocoee District, and he told me he had acted as chairman on the original survey sectionizing the Ocoee District.

Q. 44. What, if anything, did he tell you about the survey in the Slick Rock Basin, and why they surveyed up the Slick Rock creek and stopped?

A. He told me they were very tired and worn out, and that the ground east of Slick Rock creek was so steep and rough they abandoned the survey, and didn't regard the creek or the limit of their survey as the State Line, but regarded the ridges east of the Slick Rock creek as the state line.

Counsel for defendant excepted to the foregoing questions and answers as to what was said by T. G. Harvey as incompetent for the reason that the party is dead and the evidence is hearsay.

Q. 45. State whether or not since J. C. N. Bogle and H. S. Hayes have made a survey up Slick Rock creek you have been to the creek to examine which they found up the creek and along the Fodder Stack Lead?

A. I have been on the creek to examine the marks since they made their survey.

Q. 46. Did you find the marks as they claim to have found them?

A. I did.

Q. 47. Will you please explain what kind of marks you found there?

A. I found principally three hacks. Most of the trees were marked with three hacks. Some trees were marked with two hacks above a blaze.

Q. 48. These trees you found marked with three hacks what side of the tree were they on with relation to the creek and about how far from the creek?

A. From 10 to 30 feet from the creek, the marks facing the creek. Some trees, one tree in particular that has three hacks on three sides; two sides would indicate (without the other side) that it was a fore and aft tree; with the third side it would indicate that it was a corner tree.

Q. 49. Did you find any of the trees with three hacks on them on the opposite side from the creek?

A. I don't remember distinctly whether or not I found any facing from the creek, but it seems to me that I did. I can't be positive on this point.

175 Q. 50. Did you find any with two hacks and a blaze?

A. Yes, sir.

Q. 51. About how many?

A. I think only two on the creek. I don't remember but two on the creek.

Q. 52. At what point on the creek were they?

A. They were within a hundred yards of the river approximately.

Q. 53. State whether or not they were marked as fore and aft or state line, or how?

A. One of them, a cucumber, was marked as a side line; the other, a poplar, as fore and aft. I could not swear positively the marks on the poplar are two hacks and a blaze, for the marks are indistinct.

Q. 54. About how far were the trees with the two hacks and the blaze from the creek?

A. About ten feet I think.

Q. 55. Would these trees marked with three hacks indicate anything to you as a surveyor with reference to the line running up the creek? If so, what do they indicate?

A. From the marks I have seen on the state line north of the Tennessee river and south of this disputed territory and from having blocked these marks, I would think they indicated a land line and not a state line.

Q. 56. State whether or not from first beginning at the mouth of the creek how far you followed these marks up the creek before they gave out or ceased?

A. About one and half a mile.

Q. 57. Then how far is it from the place where they gave out, following up the creek, to where the spur comes down to the creek from the Fodder Stack Mountain?

A. From four to four and a half miles.

Q. 58. Did you find any marks in that distance of four or four and a half miles of the same character?

A. None. I was not over the entire distance. There is about a mile that I did not go over; maybe a mile and a half.

Q. 59. Was the ground along the creek and in this space of four and a half miles at places sufficiently open that marks might have been made as well as the first mile and a half up the creek?

A. I think at least half of the ground was as accessible and as susceptible of marks as where the marks were.

Q. 60. Had you been a surveyor and ent on the survey locating the state line between North Carolina and Tennessee and locating it up Slick Rock creek and had marked it for a mile and a half up the creek would you or any other competent surveyor have
176 left a space of four or four and a half miles unmarked?

A. I would not. They would reasonably be expected to mark it and note it. I don't know what other surveyors would do.

Q. 61. State the character of the ground, its roughness, etc., up and down the creek?

A. There is part of it exceedingly rough; almost impossible to travel. Parts of it can be traveled over readily by a woodsman.

Q. 62. How is it compared with the Hangover Lead up and from the river going south?

A. Well it is far rougher on the creek than on the Hangover Lead.

Q. 63. In your former deposition you located the state line as striking the river, coming from the north, about a half mile above the mouth of Slick Rock creek—is that correct?

A. It is.

Q. 64. If the surveyors in locating the state line had run up Slick Rock creek how would they have reached the mouth of Slick Rock creek from where the true state line strikes the river on the north side?

A. They would have to drop down the river a half mile to come to the mouth of Slick Rock Creek.

Q. 65. How far is it up Slick Rock creek from its mouth to the Fodder Stack Lead—about how far?

A. It is about 8 miles to the Fodderstack.

Q. 66. Had you as a surveyor been locating the state line and had struck the river a half mile above Slick Rock Creek, thence down the creek to the mouth of Slick Rock creek half a mile or more, thence up the creek six miles, would you have noted this fact in your report as a surveyor?

A. Yes.

Q. 67. Is it always customary for surveyors when they cross a stream or follow a stream to note these facts in their report of their surveys?

A. It is; at least I have so found it.

Q. 68. State whether or not you have found marks two hacks and a blaze on other ridges than the Fodder Stack and Hangover in that section of the country, and if so on about how many different ridges?

A. I have so found it on numerous ridges, I do not remember the

number; I expect a dozen ridges other than the Hangover and Fodder Stack.

Q. 69. State the ages of those marks and indications of those marks in other ridges, whether or not they vary in those?

177 A. They do vary. I have blocked them from 23 years up to 35 years in age.

Q. 70. State whether or not there is a ridge leading from Fodder Stack on the Fodder Stack Lead down to Slick Rock Creek?

A. There is a spur or ridge; more properly a spur.

Q. 71. State whether or not this is the same spur or ridge that you understand Bogle and Hayes located as the state line and on it they claim to have found state line marks?

A. It is.

Q. 72. Have you been up and down that spur or ridge since they made their survey and did you find the marks as they claim?

A. Yes, sir.

Q. 73. State whether or not that spur is an old trail way showing an old or ancient path leading up and down the ridge?

A. There is an old trail on the backbone of the ridge leading from the creek to the Big Fodder Stack.

Q. 74. State whether or not the old trail going east from the foot of that ridge crosses the creek, and if so, where does the trail lead?

A. It crosses the creek at the point of the spur and leads across the Hangover Lead near the Big Fat Gap, and extends on east towards Cheoah river.

Q. 75. State whether or not those trails or a great many of them through that country have been marked with two hacks and a blaze?

A. I don't remember to have traveled any of them but what I could find two hacks and a blaze along. A great many of them I remember had the two hacks and a blaze.

Cross-examination for the defendants except J. W. Cooper. The said defendants, not waiving any grounds for exception to the foregoing testimony, cross-examine as follows:

By Mr. SANFORD:

Q. 1. Will you please tell which is the upper end of the block filed as Exhibit "A" to your deposition?

A. The one that is nearer square.

Q. 2. How much of the state line north of the river have you surveyed?

A. Something more than four miles.

Q. 3. Have you ever seen the North Carolina statute declaring that three hacks are a side line marked on the state line?

A. I have not.

Q. 4. Well now, running the state line when you have

178 come across trees marked with three hacks, you have taken those to be private lines and not state line marks?

A. I took them to be private land marks.

Q. 5. Is that the reason that you have answered on direct examination that from the marks you have seen on the state line and from

having blocked these marks you think they indicate a land line and not a state line?

A. That is the reason, and from having run some lines marked with three hacks for a short distance.

Q. 6. Is there anything in the marks of these trees marked with three hacks that is any different from the marks on the trees marked with two hacks above a blaze? I mean with reference to their apparent age and the instrument with which they were made—are the marks thus made different in any other respect?

A. There is no difference in the marks except they are three hacks instead of two hacks and a blaze.

Q. 7. Did you find any other trees on the Hangover Lead from the river to the junction with the Fodder Stack Lead that showed marks 76 years old or thereabouts, besides the black or red oak and perhaps the sourwood if it is that old?

A. There is a hickory, I can't tell its age because the marks are not cut to the wood south of Slick Rock creek that form the marks in the bark I would judge to be as old as the marks of the red oak or black oak.

Q. 8. Did you block it?

A. No, sir. The marks in the bark don't show that the ax went to the wood. Consequently I didn't block it.

Q. 9. Is that the hickory that you have described before on direct examination?

A. Yes, sir.

Q. 10. You said on direct examination that you have noticed on various trails trees marked with two hacks and a blaze; had you ever, or have you ever blocked any of them to ascertain how old the marks were?

A. Yes, I have blocked several.

Q. 11. Outside of this territory in dispute?

A. Yes, on several ridges.

Q. 12. What ridge for example?

A. On Pine Mountain running east and west from the Big Fodder Stack and on two or three other similar ridges leading into the forks of Citico creek.

Q. 13. Please locate the hickory that you have referred to exactly so that another surveyor would be able to find it?

A. The hickory is at stations 114 and 115 in my notes as filed Exhibit "B" to my deposition, and is one mile ninety-eight
179 and three-tenths chains south of Tennessee river and forty-five and three-tenths chains south of Slick Rock Gap on the ridge running to the Hangover east of Slick Rock Creek. A surveyor in hunting that will only find one hack and a blaze now. One hack has sloughed off since it was first marked.

Redirect examination by T. S. WEBB:

Q. 1. When did you first see the hickory tree which you have located south of Slick Rock Gap on the Hangover Lead?

A. On January 17th, 1896.

Q. 2. Did that tree then have marks of two hacks above a blaze?
A. It did.
Q. 3. When did you last see it?
A. I will read my note made January 17th, 1896. At five and three-tenths chains pass one chain west of a small hickory on the broad top of side line marked with two hacks above a blaze on the east side of the tree. The upper hack and the blaze are plain, the lower hack indistinct but discernible.
Q. 4. When did you last see this hickory tree?
A. About two months ago.
Q. 5. When you last saw it the lower hack had sluffed off or become obliterated, as I understand it?
A. Yes, sir.
Q. 6. Were these marks in that hickory tree cut to the wood or just to the bark?
A. Only in the bark.
Q. 7. When you say that the lower hack had sloughed off do you mean by that that the bark containing the hack had fallen from the tree?
A. I do.
Q. 8. How large a tree is that hickory?
A. Ten or twelve inches in diameter.
Q. 9. Is it a young and vigorous growth, or old and scrubby?
A. It is an old and scrubby growth.
Q. 10. Is it high up on the mountain in a poor place or in a lower place where the ground is richer?
A. It is on the north face where it is rocky and the ground sterile.
Q. 11. Do the marks on that hickory tree indicate great age, or do they indicate that they were recently made?
A. They indicate great age.
Q. 12. According to your best judgment, would you say
180 that these marks are as old as the marks on Exhibit "A" to your deposition?
A. Yes.
Q. 13. State whether the hickory tree on the north face of the ridge and in the character of soil that that tree stands in would attain a large growth?
A. It would not a large growth in that character of soil on any face.
Q. 14. What is the character of the other timber in that sterile spot near this hickory tree?
A. It is a poor, scrubby growth.
Q. 15. At this point where this hickory tree stands is it on top of the main ridge or on a slope leading up to the main ridge?
A. It is on a steep slope of the main ridge.
Q. 16. How near to the top of the main ridge?
A. It is on the immediate back bone of the main ridge, but it is not the steep part where the back bone runs up steep.
Q. 17. You have stated heretofore in your cross-examination that you had blocked out some other trees which were marked with two

hacks above a blaze along trails in the mountain side, what age did you find these marks to be which you so blocked out?

A. From 23 to 35 years of age varying.

Q. 18. Do these trails along which you found these marks run along the state line as claimed by the other parties to this suit or across these lines, or how do they run?

A. Some of them run along the state line as claimed by both parties, some run across the state line as claimed by both parties.

Q. 19. State what three hacks indicate as a private land mark in Tennessee surveying?

A. Some of them indicate section lines. I frequently find lines marked with three hacks, especially in the Hiwassee District, some in the Ocoee. I find land lines of regular surveys in running with section lines marked with three hacks.

Q. 20. In Tennessee surveying do the three hacks indicate a corner or a line?

A. It is owing to their position on the trees.

Q. 21. Can you tell what the three hacks indicate in a North Carolina survey or private lands?

A. I can not.

Q. 22. Have you ever found any trails on any ridges running from the Fodder Stack westwardly which are marked with two hacks above a blaze?

181 A. I have.

Q. 23. Those trails so marked would be running away from the state line as claimed by both parties, would they not?

A. Yes, sir.

Q. 24. You have spoken in your deposition of a cat face appearing in a tree mark—please explain what you mean by a cat face?

A. In marking a tree, when the axe reaches the sap or wood of the tree it heals over and makes a scar different from the scar made by the axe in the bark. In surveyor's parlance we call that a cat face.

Q. 25. Please examine the bark on the broad end of Exhibit "B" to your deposition near the top which appears to be a slit running lengthwise of Exhibit "B," and state whether that is what you call a cat face?

A. It is what we call a cat face though it was not made by an axe; I think it was made by a bullet.

Recross-examination by Mr. SANFORD:

Q. 1. Did you not at the time you made your survey in January, 1896, enter in your note under your description of the hickory as to age you have decided "this tree shows age, but not enough?"

A. I did.

Redirect examination by Mr. T. S. WEBB:

Q. 1. What did you mean by the expression in your note book "not enough?"

A. At that time I did not think the tree showed enough age but

I have since twice examined this tree and have changed my opinion.

Q. 2. Do you think now that the tree and the marks indicate age enough to take the marks back to 1821?

A. I do.

W. D. HALE.

Filed Sept. 13, 1897. J. T. Carter, deputy clerk.

Next witness, H. M. DITMORE, being duly sworn deposed as follows:

Q. 1. State whether or not you were along with W. D. Hale some two months ago when he blocked out some marks on Hangover Lead?

A. I was.

182 Q. 2. State what you had to do with cutting or blocking out the blocks?

A. I cut them out myself, sir.

Q. 3. Are the two blocks which he has filed as Exhibits "A" and "B" to his deposition, one of them a black or red oak and the other a sourwood, the same blocks you cut out under his instructions?

A. They are.

Q. 4. Please state where these trees stood from which these blocks were taken—I mean on what lead and what direction from Slick Rock Creek?

A. On the southeast side of Slick Rock Creek, on the main ridge leading from the river above the mouth of Slick Rock Creek to the Hangover?

Q. 5. State whether or not the ridge where you found these trees is called the Hangover Ridge.

A. It is.

Q. 6. State if you were along with J. C. M. Bogle and H. S. Hayes when they made this survey up Slick Rock Creek?

A. I was.

Q. 7. State whether or not you as axman blocked out some of the marks they cut on that survey?

A. I did from two of the trees.

Q. 8. Where were those trees located?

A. One of them in what was called the Glen Gap to the Fodder Stack Lead. The other was up Big Slick Rock Creek about a mile and a quarter from its mouth.

Q. 9. The trees that were marked along Slick Rock Creek were they marked facing the creek or both ways?

A. Both ways. My recollection is the most of them facing from the creek.

Q. 10. The one you blocked on Slick Rock Creek was it marked facing to the creek or from the creek?

A. Facing from the creek.

H. M. DITMORE.

Formal caption and certificate of transmission and the right of exception to any or all propositions of the foregoing depositions on account of incompetency, irrelevancy or inadmissibility or all or any proof of the same is hereby reserved until the hearing.

It is also agreed that the depositions may be signed by the stenographer.

WEBB & McCLUNG.
LUCKY, SANFORD & TYSON.

183 Sworn to before me this 11 day of Sept., 1897.

[W. K. Anderson, Notary Public, Knox County, Tenn.]

W. K. ANDERSON,
Notary Public.

Bill of costs. W. K. Anderson, N. P., taking two depos. $2.00.
I certify that the above bill of costs is correct.

W. K. ANDERSON,
Notary Public.

Filed Sept. 13, 1897. J. T. Carter, Deputy Clerk.

And afterwards, to wit, on Sept. 21, 1897, certain depositions of Dave Orr, H. P. Hyde, Reuben Carver, J. S. Maroney, Samuel Henry, Dr. J. W. Patton and Samuel Sneed were filed in the clerk's office of said court, which depositions are clothed in the words and figures following to wit:

In the U. S. Circuit Court, at Knoxville, Tenn.

No. 1056. In Equity.

CHAS. HEBARD
vs.
D. W. BELDING et als.

The depositions of Dave Orr, H. P. Hyde, Reuben Carver, J. S. Maroney, Samuel Henry and Dr. J. W. Patton and Samuel Sneed, taken by consent, Sept. 15th, 1897, at the office of Capt. J. W. Cooper, Murphy, North Carolina, in the presence of T. E. H. McCroskey, solicitor for comp'l't, Capt. J. W. Cooper, one of the def'ts, and Edward T. Sanford, Sol. for def'ts except J. W. Cooper, said depositions being taken in behalf of def'ts except J. W. Cooper.

Said witness, DAVE ORR, of lawful age, being duly sworn deposed as follows:

I am almost 57 years of age, am a farmer, and live in Graham County, North Carolina. I live about three miles east of the land
in dispute, east of Slick Rock Gap, and about two and ¼
184 miles from the Little Tennessee River. I have been living in the same place for about twenty-three years. I am familiar

with the land in dispute, and have hunted over it all the time since I have lived there.

Questions by Capt. COOPER:

I have always ever since I lived in that country heard that the state line ran up the Fodder Stack lead. It was about 15 years ago since I heard these men claim Hangover lead to be the state line. I mean the Tennessee side, claiming the line ran up Slick Rock Ridge. I was with the surveyors Hayes and Bogle in the spring of this year when they ran the state line up Slick Rock Creek. I helped carry baggage and provisions. I didn't go all along the line, but I saw all the blocks they cut out. I had never before looked for any state line trees. I knew a sourwood tree or cluster of sour wood trees near Slick Rock Gap. They are marked pretty well around on all sides, but I never examined them as to the exact marks, but I have been around the tree hundreds of times. The old Tallassee Trail, as called by the oldest Indians turns off square to the left just opposite the sour wood tree, and there is a trail turning to the right down the hollow to the old Joe Locust Indian Camping Ground, about 150 yards away. It was there when I moved there, an old board camp about 14 feet wide. The old trail leads down to it yet. The blaze on the sourwood pointed both to the right and left in the direction of the trail in each way. I have often been up and down that ridge, leading to the Hangover. I have seen occasional blazes along the trails, but didn't know what they were. I have never traced the state line and don't know the state line marks. I mean blazes, but I don't mean there were any hacks and blazes and don't mean they were state line blazes. There is an old Indian trail leads along this ridge, and it is blazed occasionally. There are blazes on all the old Indian Trails and the same blazes extend all the way along down the old Tallassee Trail from the sourwood down to Slick Rock Creek. These are the same kind of blazes that are on the sourwood. The same blazes extend further along the old Tallassee Trail to Stone Grave Gap and to the Yellow Hammer Branch and down to the old Tailassee Ford.

I knew old man John Debity and his son John Debity and Dave Debity, another son, who married my daughter. They all lived on Mr. Belding's land, if it should prove to be his. They were there claiming as tenants of D. W. Belding—that was my under-
185 standing. The old man and Dave lived on the east side of the creek and young John lived in Nichols Cove, also on the east side of the creek but nearer the river. I have known of their living there for about nineteen years, as near as I can come at it. It was about two years after I moved where I now live. I don't think it was over a year or a year and a half after the old man Debity came there that he got a lease from Belding. I have since then seen old man Debity and Mr. D. W. Belding together. It was at Debity's house, and I heard Mr. Belding tell old man Debity to go ahead on his, Belding's land and set out a good orchard but not to kill any more timber. That was fourteen or fifteen years ago. Debity promised not to kill any more timber. Mr. Belding also

told Mr. Debity to keep other people's stock off the Beldings' land, and Debity went ahead and did keep other people off. I have since that time heard old man Debity tell a man named Bill Johnson, that he had that land under control for Mr. Belding, and he wouldn't let Johnson go in and settle in the Big Fat Cove. That is the only man I ever knew him to stop, but I have heard him tell other people that he had the land under control from Belding.

I heard my son-in-law, Dave Debity, while living on these premises, say that Maj. T. E. H. McCroskey had paid him through Bill Debity another son of the old man's, $50.00 for the lease—that is, that Maj. McCroskey had given Bill Debity the $50.00 to give to the old man for the lease and that Bill had given it to the old man—that is what Dave told me. That was about 4 years ago.

(Compl't excepts to statements of Dave Debity as hearsay and incompetent.)

Bill Debity is about 45 years old, and Babe is about 27.

Babe Debity lived with his father when he first moved there. Bill didn't live on the land in dispute. Young John Debity also lived on the same property, within the Big Survey. He lived in Nichol's Cove. Old man Debity claimed this also within his lease from Belding, as it was part of Belding's land. They were both lessees of the Beldings and young John sold his lease from Belding for $30.00 to Jim Farr, about 12 or 14 years ago. Old man Debity made annual crops on this land on both places from about 19 years ago up until this year—that is, he did it himself or had it done. Jim Farr had six children who for at least 4 years while he lived on
186 that land were enrolled to draw free money for free schools for Graham County, North Carolina, under the North Carolina laws. Old man Debity had one or two for a while.

I know Henry Ditmore. He lives on the head of Little Slick Rock Creek on the Tennessee side, according to the Slick Rock Creek line run by Hayes and Bogle. He has never lived east of Slick Rock Creek, on the land in dispute.

Ab Cline never lived on the east side of Slick Rock Creek. He has lived on the head of Little Slick Creek for about 3 years; before that he lived on First Creek on the Wetmore land.

Questions by SANFORD, Sol.:

The Sourwood I have testified about is a double sourwood in Sourwood Gap. There is the best Deer stand in that country right about the sourwood; I have often been there. The sourwood has a good many marks on it. I think I heard Williams and Mr. Hoyt once speak of it as a state line tree. It was this way: They stopped at my house once at night and said if there was any state line tree on the ridge it was that sourwood, and then the next day they ran on up that ridge and came back and said they couldn't find any state line trees, and turned and went down and tried the creek to see if they could find the state line. That was between 12 and 15 years ago.

Questions by Capt. COOPER:

I have been along the lead between Big Fodder Stack and its junction with Hangover Ridge, and saw the trees that were cut out and blocked by Hayes and Bogle. I saw them both before and after they were cut out, and have always understood both before and since, and ever since I have lived there, that this Fodder Stack Lead was the state line.

I have seen a spruce pine marked fore and aft as a state line tree, close to the Big Fodder Stack. The trail does not run right by the tree—it does not stand very far. The tree is on top of ridge but the trail is a little on one side. I never paid attention to any other marked trees on the ridge leading down from the top of the Fodder Stack to the creek, because I haven't been there.

Cross-examination:

I live on my own land. I bought from my brother, George Orr. I am not a tenant of D. W. Belding; never have leased anything from him. My own cattle runs on his land. My land is in the center of his survey, and when I turn them out they immediately get on his land—that is all. Jim Farr lived about 6 or 7
187 miles from the School House in Graham County. Farr didn't send his children to school. I think I gave his children in for enrollment in Graham Co., but I wasn't the Justice of Peace or enrolling office-. I gave them in to Mr. Rymer, the Justice of the Peace. R. N. Archer, I think, had a lumber contract on Slick Rock Creek from Mr. Belding.

(Def'ts except to the foregoing statement as to lumber contract as not made of witness' own knowledge.)

They built a lumber road up Little Slick Rock Creek, about to Ab Cline's, I suppose, though I call it a "ration road" to get victuals over.

I didn't know what the state line marks were before the surveyors went in to survey this last year. I don't know yet what they are, except what they say. But I saw the line myself.

And further deponent saith not.

His
DAVE X ORR.
mark.

Attest:
EDWARD T. SANFORD.

Jurat to the foregoing deposition waived.

Filed Sept. 21, 1897. J. T. Carter, Deputy Clerk.

Said witenss, H. P. HYDE, being duly sworn deposed as follows: I live in Graham County, North Carolina, near Robbinsville, am 41 years of age, and am County Surveyor of that County. I have

been surveyor seventeen years. I have had considerable experience surveying mountain land. I have surveyed all around the country. By an act of the last General Assembly of North Carolina, I was appointed with Mr. Lovinggood, County Surveyor of Cherokee County, to run and determine the state line between Tennessee and North Carolina, beginning at the Little Tennessee River and extending southwardly through and beyond the land in dispute in this litigation, to the Tennessee Bald. We ran this line this year beginning in May, 1897. As a result of that survey we determined the state line to begin at the mouth of Slick Rock Creek and thence running up Slick Rock Creek as it meanders to a spruce pine on the west of
188 creek, marked on east side, N. C. 5 M., being 5 miles and 101 poles from mouth of the creek, as it meanders, and being at mouth of first branch that heads north of the Big Fodder Stack and at the point of the ridge that leads to said Fodder Stack; thence with said ridge to the top of the stack, and thence up the Fodder Stack lead to the junction with the Hangover Lead, about ½ mile from the Stratton Bald. We found marks on that line that indicated state line marks—two hacks above a blaze, fore and aft trees, and three hacks for side line trees. We cut out a good many of them and counted the growths. I have one of the blocks here; it came from a hemlock or spruce pine tree that was marked as a fore and aft tree, with two hacks and a blaze below, and which stood 34 poles from the pine on Slick Rock Creek and being on the point of the spur leading up to the ridge. I counted the growths twice—once I made it 76 the other 77. That block shows the hack mark made by the axe on the outside piece, that is, the side above the hack, and also shows the mark where the axe stopped, on the inside piece. I have both pieces, and they fit together just as they were in the tree. I file said block as Exhibit No. 1 to my deposition. I also will file as Exhibit No. 2 to my deposition another block showing 3 hacks, taken from the west side of a side line tree, a hemlock or spruce pine, standing within 5 chains of the creek on the same ridge leading to the Fodder Stack. This block shows the hack marks on the outside and also on the inside. Beginning at the mouth of Slick Rock Creek, and extending to the top of the Fodder Stack we found as I recollect 5 or 6 trees marked as fore and aft trees, some of which we cut into, and many more side line trees, as it was not often that trees stood precisely on top large enough to have been fore and aft trees. Those marked fore and aft trees were all exactly on top of the ridge. We also noted that a considerable number of trees had been blocked, some within a few months and others perhaps a year or more before. All the trees that were blocked and all the fore and aft trees and side line trees seemed to have been made at the same time. We compared the marks in the wood and they all seemed to have been made with the same kind of an axe. These marks all seemed to have been of the right age for marks made by commissioners running the state line in 1821. They were all on the very largest trees my observation being that it took the largest trees to hold the hacks.

As a surveyor I had, and now have, no doubt whatever but that

this line I have described is the state line as run by the commissioners in 1821, and I so made my report.

189 I have recently been employed by the def'ts in this case to make certain surveys along the Hangover lead line. I was furnished with copies of the field notes of Mr. W. D. Hale, on file in this case, and with copies of so much of the depositions of W. D. Hale, J. K. Wilson and O. W. Muller, as related to their survey of the Hangover Lead line. I file said copies as Exhibits 3 and 4 to my deposition, respectively. I was instructed to follow these surveys in order to find the various trees claimed by these witnesses as being state line trees in order to be able to testify as to their exact appearance. I made an accurate survey for that purpose, beginning Sept. 2, 1897. I followed accurately the courses and distances in the field notes of W. D. Hale, and located exactly the various trees testified to by them. D. K. Blanton and E. A. Shepard were my chain carriers. J. L. Hyde and Mr. Denton were the packers, and cooked for us.

I found the black oak or red oak about ¾ of a mile from the river—we considered it a black oak.

It was marked as follows: On the south side a cross or X. That cross indicates the beginning corner to a tract in North Carolina. This is frequently done in North Carolina, the X pointing in the direction the land lays.

On the north side we found a block freshly cut out and going nearly to the center and two hacks above this block and still in the bark. If the block had two hacks and a blaze this would have made originally, before the block was cut out, four hacks and a blaze. On the southeast side of the tree there were three hacks—the line leaving the tree runs off in this direction. The tree stood right on top of the ridge. Assuming that the block had two hacks above a blaze then the marks originally on the tree would not have been proper marks to indicate either a fore and aft or a side line tree on the state line.

I have examined a block now shown me, marked Exhibit A to the deposition of W. D. Hale and can see no marks of axe or indications of a hack on the inside of wood, though there are two scars on the wood. If the piece were well preserved, then if there had been hack marks they ought to show as in the block filed Exhibit No. 1 to my deposition. If there had been hack marks then unless there had been decay from some defect, the marks where the axe stopped should have shown on the corresponding piece inside of the scar, which do not seem to have been filed. We found pieces of wood on the ground where the block had been split up and we searched these pieces carefully to see if we could find any hack marks, but

190 could not find any. The scars on the outside bark of this block seem to have been made at some time as the marks now on the tree and not cut out, all of which see into be of same dates.

The double sourwood in gap a mile from the river has two prongs, the larger bends to the east and I call it the east prong; the smaller bows to the west and I call it the west prong. The smaller or west prong is marked as follows. The east side is marked with a blaze

above three hacks; the blaze a slight blaze, and the blaze seems to have been made with two strokes, of the axe, running together. The north side has a fresh block cut out to the hollow. There are no corresponding marks on the south side. The west prong is small, about 9 or 10 inches in diameter.

The larger or east prong is marked with two hacks on the north side; on the south side is two hacks and a blaze, the upper hack made with two strokes of the axe running together; the west side is hollow—east side one hack and fresher than others.

All the other marks on the two prongs of the sourwood seemed to be about the same age, and made with the same axe.

There is an old trail four feet west of this double sourwood. There is also indications of another old trail on the east side just above, but not so plain as the one on the west. This old trail goes down off of the mountain on each side crossing it. We followed this old trail for some distance down on east side of the mountain as it came up and as it went off. It had many marks; some trees only one blaze, some one hack and a blaze, some two hacks and a blaze, some three hacks and a blaze. Some of the trees had two hacks and a blaze like the sourwood. The marks on the trail looked to be about the same age as the marks on the sourwood.

I have examined the block here shown marked Exhibit B to the deposition of W. D. Hale, and it doesn't look to me like a state line mark. The lower hack has two marks, making three hacks in all, and there is some indication of a blaze, but that is hard to tell. The two hacks are also too close together, being within an inch or two together, while the hacks on state line trees are 7 or 8 inches apart. Also, if it was a fore and aft tree on state line, it should have similar marks leading off in the opposite direction as the line ran off. It is not possible to tell definitely the age of the marks. The outward indications on this block indicate the marks are the same age 191 as the other marks on the sourwood. I furthermore think the west prongs very small to have been marked at all in 1821.

Assuming that this last block came from the small prong of the sourwood, there are no marks on the double sourwood proper to indicate either a fore and aft tree or side line tree on the state line. The marks simply indicate general chopping on the trees and do not indicate either land marks or state line marks.

The hacks on the black oak above spoken of indicate a corner for land in North Carolina.

I found the small hickory noted by Hale in his field notes as 1 ch. west of line, running from his station 114 to 115.

On the east side was marked one plain hack and the other dim as if the lower hack had scalped out. I considered it two hacks and not a hack and a blaze. I could see no indication of a hack above this. I considered these hacks for line of private land. The hickory was east of the crest of the ridge and was marked on the east side. It was tolerably old tree, but I did not consider it old enough to have been a state line tree in 1821, nor were the marks old enough

for state line marks in my judgment. It was a tolerably small hickory it seemed to have age, but not age enough.

This hickory is a line of North Carolina entry No. 920 (then Cherokee county) which now belongs to the Thomas heirs. I resurveyed this entry about 8 or 9 years ago. I had my field notes with me on my last trip, but I have not got them with me to-day. This entry was made in 1853 or 1854, calls for beginning at the mouth of Slick Rock creek at the state line. It lies on both sides of Hangover lead for about two miles up the divide. I don't remember exactly where it crosses the divide on the extreme southern boundary line; it crosses it several times before that. In starting from the black oak corner of this entry near the Slick Rock Gap, which was standing when I made my survey and is still standing, and following the course and distance of that entry, it passes within 10 feet on the east of the hickory mentioned. The two hacks on the right side of the hickory are proper side line marks for this entry and are rightly located as the line of the entry runs. The trees along the line of the entry were well marked, and the age of the marks on the hickory correspond with the other marked trees of this entry.

As a surveyor, I have no doubt about this hickory being a side line tree of that entry No. 920. I found the marks of entry both before and after reaching the hickory.

192 Going back to the black oak, about ¾ of mile from river first mentioned, about 2 or 3 chains to the southeast, I noticed a white oak marked as a North Carolina line, but I didn't follow it any further to see how far this North Carolina line ran. This white oak is down easterly from the top of the ridge.

The small hickory I have testified about is the same one that Mr. Hale described in his original deposition as being 1 mile and 198 chains from the river.

I found and examined all the other trees mentioned by Hale, Wilson and Muller, in the copy of their depositions filed as Exhibit No. 1 to my deposition, locating them by the depositions and Hale's field notes. I found no trees showing state line marks either fore and aft or side line, unless perhaps a water oak which Hale describes in his field notes as a small Mt. oak at end of call—running from station 263 to 264, some people call it a water oak and some a mountain oak; my notes are as follows: "Mountain oak marked two hacks above blaze on west side; east prong split off and block taken out of prong—prong split off." We examined the block and could find scars but no hacks. The tree was thrifty and seemed to have been marked when young, but the marks were not old enough. This tree was not half old enough for a state line mark.

In running the Hangover Lead from river to junction with Fodder Stack Lead we went through some very rich gaps and found many very large trees, poplar, chestnut oak, mountain oak and chestnut and various other kinds—some of them were very large; some three or four feet in diameter; plenty of them three feet through. Some of these trees were right on top of the ridge, and many of them from two to ten feet from the top. I saw none of

them marked with state line marks though we looked at them very carefully. Some of them had fresh marks, a hack, blaze and hack, some of which we cut out and found to be about 14 years old. Those trees were old enough to have been there in 1821, some of them being at least 200 years old. These trees were of suitable character and suitable to have been marked, and were such trees as would na-urally have been marked by the commissioners if they had run the line up there.

Referring again to the ridge leading up from Slick Rock creek to the Big Fodder Stack, the trail which runs up this ridge does not follow the crest of the ridge all the way up, but runs off to one side in several places, and for some distance. This trail does not follow the state line marks, and some of the state line trees I have testified to were found in places where the trail did not run at all.

193 Questions by Capt. COOPER:

I have surveyed by order of court North Carolina Entry No. 4455, grant No. 2969; I found two corners in running up the Hangover lead—one was a mountain oak on top of the Hangover Divide, between the Hao and the Bald, standing near the junction of the ridge between Little and Big Santeetla. Then I ran from this mount. oak N. 40 east 320 poles to Spanish oak on top of said divide and found that also. The balance of corners were back on Santeetla. This entry was made in 1853, and surveyed April 11, 1856. I surveyed it about 3 years ago. The Spanish oak was a mile nearer to the Hao than the Spanish oak.

Entry No. 1035, grant No. 2336, filed as Exhibit H to deposition of H. S. Hayes, calls for these 2 corners of entry No. 4455, and runs with it the 1 mile between.

According to grants before me now 2336 and No. 4455, grant No. 2336 covers the land between Hangover Lead and Big Fodder Stack, running with the ridge and Slick Rock Creek, the state line, to the river.

From all my information, prior to this suit, including reading (?) land papers and North Carolina Code of 1821, I understood that the state line ran up the ridge between Little Slick Rock and Slick Rock, but when I ran the line this spring I became thoroughly convinced that it ran up Slick Rock creek, as I first testified in this deposition.

Questions by SANFORD:

My examination of the line run by Hale, Wilson and Muller on Hangover Lead in no way caused me to doubt the correctness of my previous conclusion that the state line ran up Slick Rock creek as I have stated.

Cross-examination by Maj. T. E. H. MCCROSKEY:

I have examined map filed as Exhibit A to deposition of W. D. Hale, now shown me. It presents a general outline of the Slick Rock Creek Basin. About 10 or 12 years ago to hunt the ridge marked on Hale's map as Slick Rock Ridge for the state line. It

was my impression before that this was the true state line. It wa
not then generally claimed by North Carolinians, but Capt. Evan
had a North Carolina entry embracing this territory. I never a
any other time made any other survey to locate the state line alon
Fodder Stack Lead until this spring. In surveying up Slick Roc
creek we follow all way up creek till we started up ridge. Some
times we found trees marked a little to one side of creek. W
194 could follow near the bank all the way, but in some places
on account of falls in the creek had to turn aside a little
perhaps 10 or 12 feet. I took the bearings of the creek. There were
some places, at the Falls of the Creek, where it was impossible to ge
along without wading the creek, or at the falls in some places getting
on either side.

The fore and aft marked trees along creek were below the mouth
of Little Slick Rock. The side line trees marked with three hacks,
we found both above and below the mouth of Little Slick Rock, until
we got nearly to the point of the ridge. Between the mouth of Little
Slick Rock and the ridge we found half a dozen or perhaps more
marked trees, but it was not marked as well above Little Slick Rock
as it was below.

We blocked a birch above mouth of Little Slick Rock about ¼
mile, on east side of creek; I have the block here in my saddle
pockets. The marks showed all right, but I couldn't count the
growths. It was 120 poles above the mouth of Little Slick Rock.

(Witness here hands block to counsel for complainant.)

We found two hacks and a blaze in this birch. There were two
birches marked about there. This birch stood about a rod from
the creek. It was marked fore and aft on both sides.

I file said block as Exhibit No. 5 to my deposition.

We only cut out one hack—the others are still on the tree, and
when we cut it out, as the sap was up, the bark slipped off. Most of
the marked trees above the crossing of Tallassee Trail were found on
east side of creek, though a few were on the west side. Below the
Tallassee Trail we found them more on both sides.

Some of the marks faced the creek and some were on trees stand-
ing near the creek and facing from the creek. All the trees we
found marked stood near the creek; we searched for some distance
on both sides; one or two marked with two hacks and a blaze were
facing from the creek.

It is very rough up the creek. We began at the mouth of Slick
Rock creek. Before beginning we made preliminary investigations,
searching the points of all ridges on both sides for state line marks.
Before we went down to the creek at all, we searched the Hangover
Lead for state line marks. I had heard of Bogle and Hayes' Survey
before I started, and had heard they ran up Slick Rock creek, though
I had not heard they located the state line then, though I heard that
they claimed the state line was there.

195 I have never surveyed the state line to the southwest of in-
tersection of Fodder Stack and Hangover leads, though I

have surveyed there. I never had experience in locating state lines except as shown in this deposition.

I have the calls of my survey of state line running up Slick Rock creek, and I here show same to counsel for compl't. In said calls of survey I did not note any trees; I only noted passing the mouth of the various creeks, trails and other similar prominent points. In this state it is customary for surveyors, in making surveys and in running up creeks, to note such points, and that is all we are required to do here. I don't know as to the custom in other states. If the commissioners in locating Tennessee line ran down river ½ mile to mouth of Slick Rock and thence up Slick Rock creek 5 miles I can not explain why they did not note it. If I had been running the line and had struck any stream I would have mentioned it.

Re-examination by SANFORD:

We were four days in running along the Hangover Lead on my September trip. In running up Slick Rock creek we found marked state trees up to within ¾ of a mile or a mile of the foot of the ridge leading up to the Fodder Stack, but for that distance it was exceedingly rough and we didn't find any more marked trees until we got to the foot of the ridge.

Questions by Capt. COOPER:

Hale's map is incorrect in giving the outlines of the creek from mouth of Little Slick Rock up to the foot of ridge leading to the Fodder Stack, and it leaves out this ridge altogether.

The bearings of the crest of Hangover Lead as laid down on Hale's map, from opposite the mouth of Little Slick Rock creek, are slightly southwest.

The Hayes and Bogle map seems to me to be correct, and the ridge seems to be correctly laid down. There are notable points along the Hangover Lead such as the Eagle's rock, a very high rock and if I, as a surveyor, had run the state line in 1821 on this lead I would in my description of the line have noted these conspicuous points. I would also have mentioned any notable point like a Bald. If I had been running this Hangover Lead I would not have passed over any part of the Fodder Stack Lead as it runs right by the junction with the Fodder Stack.

The black oak that I have mentioned as a corner of Entry
196 920 is the black Hale mentions in his deposition as a black oak 1 mile and 63 chains from the river, and marked as a corner. It is still standing, it is marked with three hacks on two sides as the lines of No. 920 come up to it and leave it. These are the marks for a North Carolina corner. It had the original marks when I surveyed it, the same apparent age as other marks of 920, and I re-marked it then. It has no other marks.

Filed Sept. 21, 1897. J. T. Carter, deputy clerk.

REUBEN CARVER, of lawful age, being duly sworn, deposed as follows:

I live near Robbinsville, Graham County, North Carolina, am 61 years of age, and am a farmer. I have formerly been a surveyor. I was county surveyor before Graham county was cut off from Cherokee county, and have also been county surveyor since the war—both before and since the war. I was county surveyor, altogether, for about 20 years.

Capt. Ep. Everett, as I learn it, lived before the war in Tennessee, in either Blount or Monroe county.

I knew Thos. B. Reynolds. He was the agent and representative of the Beldings and their associates as to their ownership of mountain lands several years ago. About 1882 Reynolds as agent for the Beldings and associates employed me to locate and survey certain lands.

I knew Reynold's handwriting. I have examined a lease from Henry Lewis, D. W. Belding and Associates by Thos. B. Reynolds, att'y in fact dated Nov. 16, 1882, to John Debity and John Debity, Sr., and the same in the genuine handwriting of said Reynolds and his signature is his genuine signature.

I file said lease as Exhibit No. 1 to my deposition. Said grant covers entry No. 1035 or what is known as the Big Survey, and is the same land on which the two Debity's lived.

Questions by Capt. COOPER:

In October 8th, 1892, I, for Mr. Belding and associates, leased the Nichols Cove place to James Farr. Said lease was in writing and I file the same as exhibit No. 2 to my deposition.

About 1869 or 1870 I surveyed certain North Carolina entries for Tennesseeans. Their names were Nutte (?) Harrison, Calvin Harrison, and either John or Bill Harrison. I think per-
197 haps they took out the entries in the name of Ballew. The Harrisons lived in Monroe county, Tennessee. I met them at the mouth of the Big Fat Branch and the next morning we went across Slick Rock creek over on the ridge that leads up from Slick Rock creek to the Big Fodder Stack, and they said that the state line ran up that ridge, and they wanted their entries located up towards Hangover from that point, and I located them in that direction, lying southeasterly from this ridge in the direction of Hangover.

I was along with H. S. Hayes and J. C. M. Bogle when they made their survey of the state line. I was employed by the Beldings. I have been recently in the general employment of the Beldings. I carried chain part of the time on this survey, and was flag bearer part of the time.

I went with them in the search for state line up Slick Rock Ridge and Little Fodderstack; also on the survey up Slick Rock creek, and also on the Hangover Lead. I helped Mr. Bogle search along this line. The conclusion I reached as a surveyor was that the state line that had been run by the commissioners was the line running up Slick Rock creek to the ridge, thence up the ridge to the

Big Fodder Stack and then along that Big Fodder Stack lead to its junction with the Hangover lead. I had no doubt at all in my mind about this being correct.

There were 15 or 20 marked state line trees on this line. I don't remember exactly how many—it was not part of my business to keep the number of trees. There may have been more or less than 15 or 20. These trees all seemed to be same kind of marks, made at same time and with same kind of axe. I think I could have found more marked trees if I hadn't been flag bearer, and had time to have hunted. I don't think I saw all the trees that were found. The fore and aft trees were marked with two hacks and a blaze, on two sides in opposite directions as you approached and left the tree. The side line trees were marked with three hacks. They blocked several trees and the age all corresponded.

On the Hangover Lead I was not at the black oak about ¾ of a mile from the river. I was at the double sourwood in Sourwood Gap. I didn't think that there were any state line marks on that sourwood. I examined it carefully and hunted round in the gap with Mr. Bogle to see if we could find any state line trees. I am still of the same opinion that it has no state line marks.

The marks on block filed as exhibit B to Hales deposition do not indicate state line marks. The marks on that tree simply
198 indicate to me that somebody was simply hacking around there on the trees at the deer stand in going along the old trails. We find such marks all along on the old mountain trails, all through the mountains everywhere; some times with hacks and no blazes; sometimes with blazes and no hacks, and sometimes with more or less of both blazes and hacks. We found trees hacked and blazed on the old trail leading down from this sourwood on both sides down the mountain sides. They appeared to be the same kind of hacks and blazes as those on the sourwood.

The two prongs of this sourwood cross each other from east to west about at the root.

I saw the black oak south from the sourwood about 63 chains. I took it to be a North Carolina corner.

I went with Bogle all the way, he went on Hangover Lead from the sourwood on south. We were searching for state line trees and found none we took to be state line trees.

Referring to the ridge leading up from Slick Rock Creek to the Big Fodder Stack, the trail does not follow along in all places the same as the marked line of trees on state line as we ran it. In some places where we found state line trees the trail was some distance away.

Mr. Reynolds acted as agent for Belding, Lewis and associates for two years or thereabouts, and was their general agent in surveying and leasing lands.

I can't recollect now the number of the entries I surveyed for Harrisons as above stated, except I remember it was two tracts and in the name of either Harrison or Harrison and Ballew.

Cross-examination by McCROSKEY:

The sourwood block I didn't take to be a state line mark. The lower mark seems to be a scalp with an axe, and I think there are three hacks above—two strokes close together and one above that. I don't remember particularly any trees with two hacks and blaze on trail leading down from each side of sourwood, but there were all kinds of blazes and hacks. Nearly all the trees around were blazed and hacked. I have been acting as agent for the Beldings for 10 or 12 years. I never made a survey of the Big Survey. I never ran the Fodder Stack Lead around by head of Little Slick Rock creek as state line. I never took any leases for the Beldings from any parties on the waters of Little Slick Rock. I tried to get some of them—the Leadbetters—back about '86 or '87 or about that time.

199 One of them lived where Henry Ditmore now lives on Little Slick Rock and the other lives close by. I tried to get these leases by direction of Mr. Belding. He has always claimed all the land drained by the waters of Little Slick Rock as well as Big Slick Rock. He claimed from the mouth of Slick Rock creek; thence up the ridge to Tallassee Mtn. and along Little Fodder Stack and Big Fodder Stack to the junction with Hangover Lead.

In surveying on crossing or running with streams I generally note that fact in my report of survey. If I located the state line ¼ mile down Tennessee river and then up Slick Rock creek for 5 miles, I think I would have mentioned this in my report. If the commissioners located the line in this way and didn't mention it, I can not explain it.

I have never before this had any experience in locating state lines.

Redirect examination by Capt. COOPER:

I am acquainted with the tops of the mountains along the Hangover. I have noted prominent rocks along them, and if I had been running state line as a surveyor along the Hangover lead I think I would have noted them in my report.

After leaving the Fodder Stack junction the largest Hangover ridge heads down on Tennessee river between Bear creek and Slick Rock creek. Hangover is at the butt of the mountain and north of the main ridge that leads from the junction down to the Cheoah between the Santeetla and Deep or Rock creek. This ridge that leads down to the Cheoah is the biggest and highest lead going off from the beech at junction and turning off at the Hao down to the river. There is a great gap between the Hao and Hangover. No ridge runs on a direct course beyond the Hangover, in running from the Hao to the Hangover. The biggest ridge runs down from the Hao to the Cheoah.

And further deponent saith not.

REUBEN CARVER.

Filed Sept. 21, 1897. J. T. Carter, deputy clerk.

EXHIBIT No. 1 TO DEPOSITION OF REUBEN CARVER.

Lease to John Debity, Sr., and John Debity, Jr.

This instrument, made this 16th day of November, A. D., 1882;
Witnesseth: That Henry Lewis and associates, of Cincin-
200 nati Ohio, by Thos. B. Reynolds (their att'y in fact) have leased to John Debity, Sr., and John Debity, Jr., of Graham county, North Carolina, for the term of one year the following described realty, to wit:

Being tract 1035 and beginning on a beech on the state line where the Hangover mountain strikes the state line near the corner of 5051, and runs with said line south 80 east 320 poles to a mountain oak; then with the line of 4455 north 40 east 320 poles to a Spanish oak; then north 45 east 28 poles to a water oak; then east 92 poles to a large rock on the top of the 2nd high peak of the Hangover Mtn.; then down the ridge with its meanders to a *sarvice* tree on Cheoah river; then down said river to Tennessee river; then down said river and its meanders to a corner of 627 at the mouth of Slick Rock and the state line to the top of the mountain to a locust on said line; then with said line and its meanders to the beginning.

Said lessees agreeing to pay the sum of five dollars therefor to become due and payable October 1st, 1883, and said lessees further agree not to waste or destroy any valuable timber on said property, or permit others to do so, and that they will hold and protect said premises as the lessees of Henry Lewis and Associates, and at the expiration of this lease surrender peaceable possession unto said lessor or their assigns.

In testimony the parties hereto have subscribed their names and affixed their seals on the day above named.

HENRY LEWIS & ASSOCIATES,
By THOS. B. REYNOLDS, [SEAL.]
(*Their Att'y in Fact.*)

His
JOHN x DEBITY, SR. [SEAL.]
mark.

His
JOHN x DEBITY, JR. [SEAL.]
mark.

HENRY LEWIS (*Pres't*).
D. W. BELDING.
HENRY STIX.
NATHAN STIX.
D. W. STRICKLAND.
LOUIS KROHN.
J. W. COOPER.
E. TROY, *Sec'y*.

Witness:
THOS. B. REYNOLDS.

EXHIBIT No. 2 TO DEPOSITION OF REUBEN CARVER.

STATE OF NORTH CAROLINA,
Cherokee County:

The following agreement this day made by and between D. W. Belding, D. W. Strickland, Henry Stix, Nathan Stix, Louis Krohn, Nathaniel Newburgh, and D. M. Hyman, of Hamilton
201 county, of the state of Ohio, and M. M. Belding and Alvah N. Belding, of New York county, of the state of New York, and J. W. Cooper, of Cherokee county, of the state of North Carolina, parties of the first part, and James Farr, of the county of Graham of the state of North Carolina, party of the second part;

Witnesseth, that the said parties of the first part do hereby agree to lease and to farm let unto the said party of the second part, the following described tract of land in Graham county, North Carolina, to wit:

Tract No. 1035, grant 2336; Beginning and bounded as follows: All that part of the above tract known as the Nichols Cove, for the purposes of farming only and for the term of 1 year, for the consideration and upon the terms herein and hereafter set forth. The said party of the second part in consideration of the said lease, use, occupation and enjoyment of said premises, does hereby agree to pay to the said parties of the first part annually $5.00 as rents for the same. And he does further agree that he will not commit nor suffer waste to be committed on said lands by cutting of timbers or otherwise. And it is further agreed that the said parties of the first part, their assigns and agents, shall at all time or times have right to enter on said premises and remove timbers, mine on or improve the same or do any other lawful act during this lease. And it is hereby further agreed by the said party of the second part that for any failure on his part to perform any of the stipulations in this agreement that the same shall work a forfeiture on said term of lease. That he will cede full and peaceable possession of said lands to said parties of the first part at the end of his said term.

In witness whereof the said parties hereunto have signed their names on this the 8th day of October, 1892.

J. A. FARR.

Witnesses:
R. CARVER,
F. M. CARINGER.

The said witness, J. S. MARONEY, being duly sworn deposed as follows:

I am 64 years old, have lived in Murphy, North Carolina, for 58 years, am now and have been for 7 years a newspaper editor, and am a minister of the Methodist church. I knew Robt. Ballew; I think his initials were R. B. I knew him well. He lived in Bald Place—I have been at his house—Monroe county, Tennessee.
202 I was with him on Slick Rock creek; went with an Englishman to examine minerals. We went to Ballew's house in

Tennessee and I think to Harrison's house also, and then we all went up to Slick Rock. This was about the commencement of the war, I think, though I am not good on dates. I have never been on Slick Rock but once. I believe Col. Johnson, of London was then with us. We went on Slick Rock, went around by Little Fodder Stack, Big Fodder Stack, &c., and looked at the property which they pronounced valuable. The Harrison who went with us was the one who claimed the land. They said they were citizens of Tennessee, that the property lay in North Carolina, and that as under North Carolina lands they could not enter the lands they wanted my father or someone else to enter the lands in his name for them. The mineralogist John — went with us. I understood they afterwards entered the land or had it entered, and that they afterwards owned it.

(Complainant excepts to aforesaid testimony of witness' understanding as hearsay.)

They afterwards sent money from Tennessee by me to my father to make payments on that same land on Slick Rock.

And further deponent saith not.

J. S. MARONEY.

Filed Sept. 21, 1897. J. T. Carter, deputy clerk.

Said witness, SAMUEL HENRY, of lawful age, being duly sworn deposed as follows:

I am 78 years old, have been living in Murphy, N. C., about 55 years. I now keep a boarding house. I had some acquaintance with a man named Ballew, a preacher who said he came from Tennessee. I think I entered some lands on Slick Rock creek, somewhere about 1870, for him and someone else. It was entered in my name, as I recollect. I think the reason was that he considered the land lay in North Carolina and they thought that under the law a man could not come from Tennessee here and enter land in this state, and so they got me to enter the land in my name, but really for them.

They made the payments on the land. I think they sent me part of the money by old W. W. Maroney the father of J. S. Maroney. It all seems like a dream to me. I had forgotten about it until Capt. Cooper spoke to me about it, but this is the way I think it was.

SAMUEL HENRY.

Filed Sept. 21, 1897, J. T. Carter, deputy clerk.

203 Said witness, Dr. J. W. PATTON, being duly sworn, deposed as follows:

I am 69 years old, live in Murphy, Graham county, North Carolina, have been living here since Oct. 30, 1849, am a practicing physician and have been engaged in practice since May, 1852.

I knew old man Thomas Tatham who was one of the party when the commissioners for North Carolina and Tennessee ran the state

line in 1821. We called him grandsire Tatham. He has been dead 20 years. I also knew William Graves who was one of the party, and is also dead. I don't know of any of the party that are now living. I have had conversations with both of these persons as to where they ran the state line.

I had a conversation about it with Mr. Tatham about forty years ago. In giving me a history of his life he said he was on the survey between North Carolina and Tennessee; that they ran the line from a point in Haywood, beginning on a rock that had been marked, along the main divide of the Smoky Mountains to the Tennessee river, crossed the river and marked a large pine that stood near the bank of the river near the mouth of Slick Rock creek, and as I recollect 60 or 65 miles from the beginning, and that they ran up Slick Rock creek on the west side to the fork of the creek, crossed the west fork and struck the point of a ridge that ran down into the fork of the creek, and ran up that ridge to the divide that ran up to Big Fodder Stack, over the Fodder Stack and on the main divide to Haw Knob; thence up the Haw Knob mountain to Laurel Top and down the Laurel Top to the divide between Snowbud and Tellico, and ran the line some distance and marked it on that divide; saw that they were going too far south to keep the trend of the mountain, turned and went back and took a ridge from Laurel Top that ran westerly to Tellico river, crossed the river and a short distance from the river marked a holly tree on one side—Tenn. or Ten., and on the other side N. C., and from there to Beaver Dam Ball and on to Unaka Gap; then turned south and ran to the Hiwassee River and on to the Georgia line.

I had a conversation later about the same matter with William Graves, after I owned some land out there. His statements were about the same as Tatham's, though he was not as intelligent a man as Tatham and couldn't remember as well. He remembered the holly tree and the pine on the bank of the Tennessee river, but he couldn't give me the other points as well. My conversation with Graves was in the fall of '67 as I remember. It was just before I went out there and I went in November, '67. I think
204 Graves was in the capacity of one of the helpers—he was a young man at the time.

Questions by Capt. COOPER:

I became interested by my father-in-law entering two tracts of land in '54, on the head of Little Slick Rock. At the end of the war they had not been paid for and he told me in 1867 that if I would pay what was due on them he would give me the lands, and that was how I came to talk to old man Graves. I went to see him to see if I could get any point to get a start. I remembered what Tatham had said about the holly, and I went and asked Graves and he told me about it again, and I went and hunted that holly up. My father-in-law, Wm. H. Maroney, with me. We found the holly on the west side of Tellico river, marked with either Tenn. or Ten., and N. C., and traced the line to the river; then went to the opposite side of the river; found marked line as on opposite side—an old

line—traced that line up to what is known as the state ridge, across Laurel Top and to the Haw Knob Mountain; down that to Haw Knob, and down that to what was known as the old Stratton place, the old fence of which was still there, though torn down; went through the Stratton meadows to the ridge beyond, and then found an old tree marked as the one we had been tracing; traced it some distance that evening and then took a trail down to Bob Stratton's; stayed all night with Bob Stratton and eat bear meat and Irish potatoes. The next morning Bob Stratton went with us to the line and showed us the old marked line, and we followed it within 300 or 400 yards of the head of Little Slick Rock; we tried to trace it to Little Fodder Stack, but couldn't do it; we got bothered and lost trying to trace it to Little Fodder Stack. We then went back to the old line we had been tracing and by sighting concluded we were off the line and went back and found the marked line leading down the ridge between two forks of Slick Rock. We went on, following the line down the ridge to the foot where the forks of the creek came together, at a distance I think of four or five miles from the Tennessee river—but this only guess work. Then we crossed the prongs of Slick Rock and found an old line leading down by the creek just outside of the Laurel as near the creek as they could get along and traced it down the creek that way to the creek's mouth, and found a large pine tree marked. The marks were not very distinct, but we were satisfied it was old marks. It was 10 or 12 steps below the mouth of Slick Rock.

205 In consequence of that tracing I abandoned the land because I believed as it lay mostly north and west of the line I traced that it was in Tennessee; also I believed the line I had traced to be the state line, and abandoned taking up from the state the land north and west from the line I had traced, as I believed it belonged to Tennessee though I would have liked powerful well to have had it. There was not over 150 acres that lay east of this line.

These lines all along that I traced all seemed to be old marks.

The holly had also a mark M and 83 or 86. Graves told me, I think, it was marked M83, but I can't be certain whether it was marked M, 83, or M, 86.

I traced this line in Nov., 1867, I think. I knew it was November.

And further deponent saith not.

J. W. PATTON.

Filed Sept. 21, 1897. J. T. Carter, deputy clerk.

Exception.

Compl't by attorney comes and excepts to statements of Graves and Tatham because it is not shown that they were surveyors locating the line, and their statements for that reason are not competent evidence. It is simply hearsay testimony.

T. E. H. McCROSKEY,
For Compl't.

The next witness, SAMUEL SNEED, being duly sworn, says: I live in Graham county, N. C., and am forty years of age. I was present with T. B. Reynolds who went to see Mr. John Debity about taking a lease. Mr. Reynolds told Mr. Debity he had come to have him, Debity, to take a lease or get off the land. Mr. Debity said he wanted a lease; then Mr. Reynolds wrote the lease and Debity signed it. I don't know whether Mr. Debity's son John signed it or not, but he was there. My judgment is that young John signed the lease, and I suppose he did. Mr. Reynolds went there for that purpose.

Further saith not.

SAM SNEED.

Filed Sept. 21, 1897. J. T. Carter, Deputy clerk.

Formal caption certificate transmission and jurat waived, witnesses having been duly sworn and all grounds of exception reserved to the hearing.

LUCKY, SANFORD & TYSON,
For Compl'ts.

206 *Bill of Costs.*

Dave Orr, attendance 1 day, $1.50; 84 miles, $4.70, total...	$6 20
H. P. Hyde, attendance 2 days, $3.00; 64 miles, $3.20, total.	6 20
Reuben Carver, attendance 2 days, $3.00; 66 miles, $3.30, total	6 30
J. S. Maroney, attendance 1 day, $1.00	1 00
Samuel Henry, attendance 1 day, $1.00	1 00
Dr. J. W. Patton, attendance 1 day, $1.00	1 00
Samuel Sneed, attendance 1 day, $1.50; 64 miles, $3.20, total	4 70

Above bill of costs, $26.40, paid by Lucky, Sanford & Tyson, Sept. 16, 1897.

EXHIBIT NO. 3 TO DEPOSITION OF H. P. HYDE.

Extract from Field Book of W. D. Hale, Filed as Exhibit to Deposition of W. D. Hale, in Case of Charles Hebard vs. D. W. Belding et al., in the United States Circuit Court, at Knoxville, Tennessee.

P. 6.

Beginning Dec. 12th, 1896, at a large hemlock tree on south bank of Little Tennessee river, the notes are as follows:

71 S 48 1-2 W. 100 ft. Chest. at fork of ridge.
72 S 73 1-4 W. 625.
73 N 73 1-4 W. 247.
74 N 82 W. 215.
75 N 67 1-2 W. 142.

76 N 73 3-4 W. 280.
77 N 86 W. 252.
78 S 88 1-2 W. 249, large chest. Suspended work on account of snow storm. On Jan. 16, 1896, in company with J. K. Wilson, returned to above mentioned chestnut and ran,

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79 S 41 1-2 W. 297 ft.
80 N 86 1-4 W. 597, to a large black oak on a ridge that appears to have been blazed on the north side.
On Dec. 14, 1895, reported the above to station 78, signed by O. W. Muller and W. D. Hale.
NOTE.—Pages 7 to 21 inclusive, then relate to survey north of river.

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P. 21.

The survey south of river is resumed Jan. 16th, 1896, and is as follows:

Beginning at "a large rock at the water's edge marked M. W. H. and run up the spur to top of main ridge, as follows:
82 S 40 1-4 W. 36 chains pine = supposed to be Chamber's marks.
83 S 59 3-4 W. 6
84 N 89 1-2 W. 10 8- to head of spur that runs to mouth of Slick Rock.
85 S 76 1-2 W. 8 3-
86 S 28 W. 3 8- The measurement to this point was taken on the surface of the ground and from this point we take horizontal measurement.

P. 22. Jan. 16, 1896.

87 S 6 3-4 W. 8 5-10 to B. O. on top of main ridge, from this point we go to large chestnut where Muller and Hale stopped Dec. 14, 1895, and connect to this line. See page 7. (The distance given in red ink *are* from the river, i. e., the black oak named in note 94 is 3-4 mile from the river. W. D. Hale.)
88 S 38 1-2 W. 6 1-10
89 S 61 1-4 W. 3 2-
90 S 2 3-4 E. 2 2-
91 S 55 1-4 W. 7 7-
92 S 12 1-4 W. 7 8-
93 S 81 3-4 W. 5 7- Pine M. W. H.
94 S 6 1-2 W. 15 1- to B. O. =×= and burr pine =. There are some indistinct marks on the B. O. that bear a slight resemblance to the state line marks.
94 121 2-10 ch. (3-4 mi.)

P. 23.

95 S 45 1-2 E. 5 to large W. O. Stump.
96 S 34 1-2 E. 1.8 8-
97 S 6 1-2 E. 2 8-
98 S 25 W. 4 3- red O.
99. S 69 3-4 W. 8 3-
100 S 30 3-4 W. 7 7- to double sourwood plainly marked $\frac{\cdot}{\cdot}$
1 mi. 3 1-2 ch. 55 ch. f. & a. Both prongs are marked but there has been other cutting on the tree that to some extent disfigures the marks. On Jan. 27, '96, we re-examined this tree and made the following note:

208

P. 24.

"On east side of eastern prong of sourwood, find $\frac{=}{\cdot}$ and above this two newer blazes one run into the other thus oo. On south side of same prong are $\frac{=}{=}$. On east side of western prong are $\frac{=}{\cdot}$ the blaze nearly gone; on west side $\frac{=}{\cdot}$. The upper hack has been made with two strokes of the axe and the blaze with two. There is one new hack on the south side of this prong.

Jan. 16, 1896.

101 S 15 1-4 W. 8 4-

P. 25.

102 S 23 3-4 E. 4 ridge running S. 89 E to Cheoee R.
103 S 56 1-2 W. 7 4- to B. O. in Deer Stand Gap
104 S 78 W. 8 3- to top of high point.
105 S 4 1-2 W. 9 to P. K. Stop on acct. of rain and camp on Slick Rock trail.

Jan. 17, 1896.

106 S 9 1-4 E. 5 at 1-6 a red O. blazed on east and west sides, but see no hacks.
107 S 17 1-4 W. 2 5- pine.
108 S 41 1-2 W. 5 3-
10 S R Gap 1 mi 59 ch. (1 3-8 mi.) 4 4-10 ch.
109 S 16 W. 6 to trail in Slick Rock Gap.
110 S 1-4 W. 4 4- to point 38 links N. 9 E. from B. O.
B. O. 1 mi. 63 4-10 ch. (13-8) marked as a corner with pointers.
111 S 68 3-4 E. 3.
1 mi. 66 4-10

P. 26.

112 S 32 E. 7 4-
113 S 17 1-4 W. 19 2- at 8-10 chest. O. with indistinct indications of mark $\frac{\cdot}{\cdot}$: the blaze is plain and can be dimly seen on examination: marked it is a side line tree at 6 W. O. with indications ($\frac{=}{\cdot}$) on N. E. side of tree; both trees doubtful.

Chest. O. 1 mi. 74 6-10 ch.
Chest. O. 15 4-10 ch.
W. O. 1 mi. 78 7-10 ch.
W. O. 20 8-10 ch.
114 S 9 E. 13 at 5 3-10 ch. pass 1 ch. west of a small hickory on broad top side line on the E. side of tree
Hickory 1 mi. 98 3-10 ch.
Hickory 45, 3 ch.

209 The upper hack and blaze are plain, the lower hack indistinct but still discernible; this tree shows age but not enough at 13 ch. first high butt from Slick Rock Gap.
115 S 36 1-4 W. 9 6-10 to small brushy pine.
116 S 1-2 W. 2 5- to top of knob.

P. 27.

117 S. 32 1-2 W. chs. 46 6-10 at 5-10 ch. a small spn. O. ÷ on four sides and six pines = facing the Spn. O.
Shu. O. 1 mi. 108 6-10 ch.
65 6-10 ch.
118 S 50 W. 11.
119 S 24 1-4 W. 7.
120 S 43 W. 2 to large W. O. f & a. ÷ and on east side = plain and very old. Very old blaze below on the north side. Find other trees marked with = running in a line S 15 W.
W. O. 1 mi. 142 7-10 ch.
W. O. 83 7-10 ch.
121 S. 24 W. 6 top of little knob.
122 S 30 1-4 W. 6 8- to red O. in gap.
123 S 16 1-2 W. 10 5- ch.
124 S 6 1-2 E. 11 3-
125 S 12 3-4 E. 6 7- to B. O. M. W. H.
126 S 17 W. 10- top 2nd knob from Slick Rock Gap.

P. 28.

27 S W. 5 4- to W. O. in Little Gap.
28 S. 50 1-2 E. to 10 1- to B. O. on the north side and ÷ on the west side.
. O. 2 m. 49 5-10 ch.
his tree stands at the head of Caney Branch ridge which runs N. 87 1-4 E. and strikes Cheo river about ½ mile above its mouth. Course to look rock on Chilhowee Mt. N. 4 E.
O. 156 5-10 ch.
9 S 32 W. 4 7- to pine M. W. H.
0 S 2 1-2 W. 5 to N. edge Caney Br. Gap.
1 S 15 1-2 E. 8.
2 S 20 1-4 W. 6 8- at 6 5-10 ch. a chest. and 2 W. O.
3 S. 16 W. 9 8-
4 S 6 1-4 E. 4 8- Chest. & 2 W. O. 2 M. 73 7-10.
5 S 43 1-2 W. 7 4- chs. (2 1-2 mi.) 1 mi. 14 7-10 ch.
6 S 13 W. 9 2-

P. 29.

137 S 38 3-4 W. 7 6- chest. M. W. H.
210 138 S 48 1-2 W. 4 6-
139 S 16 W. 10.
140 S 11 1-2 W. 6
141 S 40 1-4 W. 7 2-
142 S 21 W. 8 1- to top knob by little basin.
Cold Springs Gap 3 mi. 4 5-10 ch.
143 S 37 1-4 E. 15 8- at 10; 1st Cold Spring Gap.
144 S 6 W. 9 9- at 2 7-10 2nd Cold Spring Gap. At 9 9-10 ch high butt.
145 S 66 W. 2 7-
146 S 51 1-4 W. 9 5-
147 S 29 W. 4 8-
148 S 61 3-4 W. 10 2- at 8 5-10 ch. Chest. O. stump bearing a plain o and indistinct =.
Ches. O. Stump 3 mi. 39 9-10 ch. (3 1-4 mi.) on the N. E. side. The lower hack more distinct than the lower one. Can't be positive.
Chest. O. Stump 3 mi. 140 9-10 ch.

P. 30.

149 S 33 1-4 W. 5 2- to top of Cold Spring Knob at head of ridge running to Slick Rock Creek.
150 S 16 1-2 W. 4 6-
151 S 7 1-2 E. 11 2-
152 S 3 1-2 W. 24 4- at 8 4- small B. O. = on the west side. very old but not old enough for state line and shown above the .
B. O. 3 mi. 71 ch.
B. O. 2 mi. 12 ch.
153 S 25 E. 4 3- Big Flat Gap 3 mi. 101 Chs.
154 S 4 3-4 W. 9 8- to Big Flat Gap.
155 S 11 3-4 W. 8 7-
156 S 39 W. 7 8-
157 S 36 W. 6 2-
158 S 6 1-4 W. 5-
159 S 22 1-2 W. 10-
160 S 25 W. 5 3- to large Mt. Oak.

P. 31.

161 S 29 3-4 W. 11 9- to top knob at head of Big Flat ridge. called Fat Cove Knob. Went to E. E. Debity's for night.

Jan. 18, Saturday.

162 S 23 E. 18 at 7 little gap.
163 S 3 3-4 W. 6 to gap at 3 ch. small chestnut . rather new.

211 Chest. 4 m. 20 ch. (4 1-8 mi.) Mr. Debity's trail.
164 S 33 1-4 E 3 3-10.
165 S 7 1-2 E. 23 5-
Burned Chest. 4 mi. 25 6-10 ch. at 1 7-10 ch. pass large chest. burned on East side. Some indications of marks on west side.
Burned Chest. 2 mi. 126 ch.
166 S 1 1-2 W. 4 7-
167 S 13 1-2 W. 8 5-
168 S 22 1-2 W. 7 5-
169 S 2 1-2 W. 4 9- to cliff on N. C. side above head of grassy br. which runs into Bear Cr.
4 mi. 76 ch.

P. 32.

170 S 34 E. 8.
171 S 22 1-4 E. 3 8- to small double chestnut.
172 S 22 1-4 E.
172 S 46 E. 4 5- to near chestnut M. W. H.
173 S 39 1-2 E. 8 5-
174 S 8 W. 3.
175 S 13 1-4 E. 10 5-
176 S 33 E. 3 at 2 2-10 ch. high rock on top of ridge the first high rock from Slick Rock Gap.
High rock 4 mi. 113 5-10 ch.
177 S 19 1-2 E. 4 5- to near rocks on top.
178 S 58 E. 6 2- to chest. M. W. H. at 3 ch. pass Killby's bear stand "Pap and Dave Orr drivin."
179 S 46 1-2 E. 8 at 5 little gap.
180 S. 75 E. 1 5- to top of high cliff, perpendicular on N. C. side.
Cliff 4 mi. 134 5-10 chs.
181 S 52 E. 2 8-

P. 33.

182 S 76 E. 3 to head of ridge running N. 56 E. between Bear Creek and Grassy Branch.
4 mi. 137 3-10 ch.
183 S 3 W. 3 5- to rock at N. edge Beach basin.
184 S 14 3-4 E. 11 6-
185 S 6 3-4 E. 6 2-
Chittin in Beach Basin 5 mi. 11 2-10 ch.
186 S 18 E. 9 6- to Chittin M. W. H.
187 S North edge Laurel 5 mi. 25 7-10 ch.
28 3-4 E. 12 7- to n. edge of laurel.
188 S 12 3-4 E. 1 8- entering laurel.
189 S 10 E. 4.
190 S 20 1-2 E. 1 7-
212 191 S 2 1-2 E. 1 1-
192 S 17 3-4 E. 2 3-
193 S 15 1-4 E. 2 4-
194 S 22 1-4 E. 1 5-
195 S 12 1-2 E. 8 10-
196 S 26 1-2 E. 3 8-
5 mi. 43 ch.

P. 34.

197 S 37 3-4 E. 2 1-
198 S 12 1-2 W. 1 4-
199 S 24 1-2 E. 9-10 to look out in laurel.
200 S 9 1-2 W. 1 1-
201 S 27 1-4 W. 4 3-
202 S 23 1-4 W. 2 1-
203 S 30 W. 1 6-
204 S 21 1-4 W. 1 7-
205 S 42 W. 2 3-
206 S 17 1-2 W. 2 5-
207 S 31 3-4 W. 2.
208 S 17 1-2 W. 1 8-
209 S 31 1-2 W. 1 8-
210 S 7 1-2 W. 3 9-
211 S 56 E. 2 4- to top of rock in Ivey Slick, called Devil's Court House.
Devil's Court House 5 mi. 75 9-10 chs. (5 1-2 mi)
212 S 47 1-2 E. 4 3- to turn near Bear Wallow.
213 S 3 W. 1 6-
214 S 12 1-2 W. 1 7-
5 mi. 83 5-10 ch.

P. 35.

215 S 12 1-4 E. 2 7- to a birch marked M. W. H. at end of large rock. Went to E. E. Debity's and stayed over Sunday, Jan. 19. Jan. 20, Monday, packed to head of Little Santeetle Cr. and while the choppers were cutting through the laurel to the Hangover, Muller, Wilson and Hale searched the timber along the top of the mt. from Christie's Peak to Bob Stratton Bald for marks.

Jan. 21.

Fogged in and spent a horrible day and worse night.

Jan. 22.

5 mi. 87 2-10 ch.
Fog more dense. Beginning to rain and soon turned to snow. Break camp and go to E. E. Debity's. Decide to move to
213 Ditmore and work the low ridges while the fog is on the higher mountains, but for convenience in platting the courses are reversed making a continuous line over the Hangover, Christie's Peak and Stratton's Bald, and over Rock Stack, Big and Little Fodder Stacks and still Knee Mts. See dates.

P. 37.

Jan. 31, 1896, Friday.

216 S 28 3-4 E. 2 Eagle Rock 5 m. 74 6-10 ch.
217 S 18 3-4 E. 5 to top of Eagle Rock.

218 S 39 3-4 E. 6.
219 S 49 1-2 E. 6.
Hangover Rock 5 mi. 109 3-10 chs.
220 S 32 E. 2 7- top of Hangover Rock.
221 S 4 1-4 E. 6 2- to head of ridge that divides Barkers cr. and Deer cr.
Divide Dr. & Br. cr. 5 mi. 115 5-10 ch.
222 S 3- 4 W. 5.
223 S 35 W. 4 6- to top of rock.
224 S 3 W. 4 2-
225 S 27 1-2 W. 12
226 S 17 1-2 W. 11
227 S 11 3-4 W. 6 4-
228 S 2 3-4 W. 4 6- top of Hao or Christie's Peak at head of ridge that divided Deep Cr. and Little Santeetla Courses. 58 1-2 E.
Hao 6 mi. 7 9-10 chs.
Hao 4 mi. 108 9-10 chs.
Hao from Hangover 58 9-10 chs.

P. 38.

230 S 56 3-4 W. 9 8- to rock.
231 N 88 1-2 W. 10 to top of rock.
232 N 63 3-4 W. 3.
233 S 89 1-2 W. 25.
234 S 52 1-2 W. 13 2- to Smoke Camp gap.
235 S 28 1-2 W. 2 9-
236 S 44 1-2 W. 4.
237 S 86 W. 13 2-
238 S 58 W. 3.
239 S 23 3-4 W. 3 6-
240 S 49 W. 7
241 S 36 1-2 W. 4 1-
242 S 27 W. 3 3-
243 S 75 W. 17.
Iron lead 6 m. 134 ch.
214 244 S 56 W. 7 to iron head.
245 S 30 1-4 W. 8 4-
246 S 54 1-2 W. 5 8-
247 S 33 1-4 W. 9 3- to Grassy Gap; the lowest gap from Hao to Stratton's bald.
Grassy Gap. 6 mi. 157 5-10 ch. (7 mi.)

P. 39.

248 N 89 W. 6 6-
249 S 64 1-4 W. 5 1-
250 S 35 W. 5 9-
251 S 28 W. 6.
252 S 59 W. 9 7-
253 S 22 1-4 W. 10.
254 S 16 3-4 W. 9 7-

255 S 43 3-4 W. 4 8- to a beech.
256 S 37 3-4 W. 10 3- to a sarvice.
257 S 29 1-2 W. 14 to head of divide between Little and Big Santeetle.
258 S 60 W. 7 1- to small Mt. O. f. & a. = marks closely resemble those heretofore blocked and found to be 23 years old.
Mt. O. 7 mi. 86 7-10 chs. (7 1-2 mi.)
259 S 49 1-2 W. 15 2-
260 S 67 W. 8 6-
Note: Pages 40 and 41 blank.

P. 42.

7 mi. 110 5-10 chs.
261 S 69 2-4 W. 4 5-
262 S 72 1-2 W. 4 4-
263 S 63 1-2 W. 5 8- to a small Mt. O. f. & a. On blocking find 22 growths from blaze in wood to bark. There are also near the heart of the tree as if it had been marked when only a bush or small sapling. The tree is 9 or 10 inches in diameter and of very slow growth.
Mt. O. 7 m. 125 9-10 ch. (7 3-4 mi.)
Mt. O. from Hangover 1 mi. 117 ch.
264 S 72 1-4 W. 7 7-
265 N 64 1-2 W. 1-9-
266 S 64 1-2 W. 2 5-
267 S 73 W. 7 6-
268 S 67 1-2 W. 4 8-
269 S 55 3-4 W. 3 3- to a break in top of Mt.

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P. 43.

270 S 64 W. 5 ch. to gap in Stratton Bald at 3 ch. a large solid rock marked J. H. Do. N. C. and brush cut from this point towards Bob Stratton Bald. Said to have been cut by McClelland. At 9 ch. east edge of Stratton Bald.
271 S 74 1-2 W. 3 3- to little gap and break in top of mtn.
272 S 65 W. 27.
Rock J. H. Do. & Co. 8 mi. 28 3-10 ch. (8 1-8 mi.)
E. edge Bald 8 mi. 42 8-10 ch. (8 1-4 mi.)
273 N 72 1-2 W. 6 8-
274 S 82 3-4 W. 7 7- to west edge of bald.
275 N 70 W. 20 4-
276 N 65 3-4 W. 6 3-
277 N 78 3-4 W. 4.
278 S 84 1-4 W. 4 to Peruvian Cherry.
279 S 68 W. 3.
8 mi. 80 5-10 ch.

P. 44.

280 S 76 1-2 W. 20 chs. to a stake in laurel near a birch.
State above lead Fodder Stack Lead fom Hangover 2 mi. 92 7-10 ch.
Stake in laurel 8 mi. 100 5-10 ch.

From this point southwest the state line is undisputed. Following the undisputed state line.

(Endorsed:) Exhibit No. 3 to deposition of H. P. Hyde. Charles Hebard vs. D. W. Belding, et al. Filed Sept. 21, 1897. J. T. Carter, Dept. Clerk.

EXHIBIT NO. 4 TO DEPOSITION OF H. P. HYDE.

Copies of so Much of the Depositions of W. D. Hale, J. K. Wilson and O. W. Miller, Filed October 13th, 1897, in the Case of Charles Hebard vs. D. W. Belding et al., as Relates to the Survey of Hangover Lead for State Line.

Direct examination.

W. D. HALE:

Q. 11. Please state fully your survey up the Hangover ridge, and to where the Hangover and Fodderstack ridges come together on the south-west, and if any trees were found showing State line mark or anything indicating the state line, give them their locality on the ridges or depressions, state fully all you found?

216 A. I surveyed the Hangover ridges commencing opposite the marks on the North side and running up the ridge. ¾ mile from the river I found a black oak marked as a corner and some slight indications of marks as if it had been marked as a line tree on the state line. At one mile from the river a double sour-wood in a gap plainly marked fore and aft state line marks. At 1 mile and 63 chains, a black oak marked as a corner. At 1½ miles, a chestnut oak with indications of marks, the blaze in plain and one hack can be seen on close examination. Near the chestnut oak is a white oak that bears some indications of marks on the north-east side. At one mile and 98 chains (I used a 2 pole chain) a small hickory marked with the state line mark on the east side of the tree. At one mile 108 chains is a Spanish oak marked as a North Carolina corner and witnessed by six pines. At 1⅞ miles, a white oak marked with three hacks above a blaze, and a very old blaze immediately below the three hacks and a blaze, find a marked line running from this point S. 15 W. into North Carolina. At 2¼ miles, a black oak on top of a high knob marked with three hacks above the blaze; the lower hack is plainer than the upper one. At below a blaze on the west side. At 2½ miles, a chestnut and two white oaks marked as a North Carolina corner. At 3¼ miles a chestnut oak stump bearing a plain blaze and indistinct two hacks above the blaze; the lower hack is plainer than the upper one. At 3½ miles, a small black oak marked with 2 hacks and blaze but the marks are too recent for State line marks. At 4⅛ miles a chestnut with slight indications of marks on the west side. The bark has been burned off of the east side. I found no other marks until after passing "Hangover Rock" 5⅝ miles from the river and the "Hao"

or "Christie's" peak 6 miles from the river. At 7½ miles from river I found a small mountain oak marked fore and aft with 2 hacks and blaze but by comparing with marks blocked find the marks too recent for state line marks. At 7¾ miles from river find a mountain oak, 9 inches in diameter marked fore and aft with 2 hacks and blaze. This tree was forked but the eastern prong was split off carrying with it the marks but they still show on the wood and bark, by counting find these marks.

Cross-examination from question 46 and answer to question 99 and answer, inclusive:

Q. 46. What marks, if any, did you find on the Hangover Lead, so called?

217 A. One mile from the river going south I found a sour-wood marked with two hacks above a blaze as the state line is marked.

Q. 47. Read your notes taken at the time, relative to this tree and marks?

A. South 30 3-4 degrees west, 7 7-10 chains, to a double sour-wood, plainly marked with two hacks above a blaze, "fore and aft." Both prongs are marked, but there has been other cutting on the tree that to some extent disfigures the marks." On Jan. 27th, 1896, re-examined this tree and made the following note: "On east side of eastern prong of sourwood find two hacks above a blaze and above this two newer blazes one run into the other, thus: oo. On south side of the same prong are five hacks. On east side of western prong are two hacks above a blaze. The blaze nearly gone. On west side are two hacks above a blaze, the upper hack has been made with two strokes of the axe and the blaze with two strokes. There is one new hack on the south side of this prong.

Q. 48. Are the hacks and blazes which indicate state line mark usually made with two strokes of the axe?

A. No, sir.

Q. 49. Did you cut into this tree or take any other means of ascertaining the number of years that had elapsed since the hack or blaze was made?

A. No, sir.

Q. 50. This sour-wood was in Sour-wood Gap as marked in your map Exhibit "A"?

A. It was.

Q. 51. In your direct examination you speak of a chestnut oak, 1½ miles with indications of marks. You may read your notes please, concerning this tree?

A. "South 17 1-4 degrees west, 19 2-10 chains, at 8-10 chains a chestnut oak with indistinct indications of marks one hack above a blaze. The blaze is plain and one hack can be dimly seen on close examination. If marked it is a side-line tree."

Q. 52. What do you mean by side-line tree?

A. I mean that the line passed one side of the tree instead of through the tree.

Q. 53 The blaze is made more recently than the hack, is it not, in your judgment?

A. I can't say that it is. The blaze being larger would show plainer though made at the same time the hacks.

Q. 54. Can you say it is not?

A. I can not.

Q. 55. What do you mean when you say in your notes, "If marked" it is a side line, etc.?

218 A. I mean it is doubtful whether it is marked at all, or not.

Q. 56. You also noticed a white oak near the chestnut oak we have been describing. Please read your notes concerning that tree?

A. Continuing the last quoted note, "At 6 chains a white oak with indications of marks (that is, two hacks above a blaze) on the north east side of tree. Both trees doubtful."

Q. 57. The notes that you have read and in the book which you hold in your hand marked Exhibit "B" W. D. Hale, when were they made?

A. These notes that I read from are copied from originals and compared and are correct, which originals were made at the time of survey.

Q. 58. Now we come to the hickory tree. Please read both your notes concerning that tree?

A. "South 9 degrees east, 13 chains, at 5 3-10 chains pass 1 chain west of a small hickory on a broad top, side line tree, marked with two hacks above a blaze on the east side of the tree, the upper hack and the blaze are plain, the lower hack indistinct but still discernible. This tree shows age, but not enough." I have not the other note with me, but I could give the substance of my observations.

Q. 59. Who was with you the second time?

A. No one.

Q 60. How did you happen to go the second time?

A. I had other business in that location, and for my own satisfaction made the last examination.

Q. 61. Next, take up the Spanish oak, south of the hickory just described, and read your notes, if you have them?

A. "South 32 1-2 degrees west 4 6-10 chains, at 5-10 chains a small Spanish oak marked with two hacks above and one below a blaze, on four sides of the tree, and six pines marked with two hacks above and one below a blaze, facing the Spanish oak."

Q. 62. What did these marks on the Spanish oak indicate?

A. A North Carolina corner.

Q. 63. What did the six pines marked as stated in your answer indicate?

A. Witnesses to the corner tree.

Q. 64. How would that tree — been marked if it were a Tennessee corner?

A. Two hacks or three hacks on each of three or four sides witnessed by three hacks on the pines, or a blaze on the pines.

Q. 65. How old were the marks you observed on the Spanish oak?

219 A. From 20 to 30 years old, is my recollection.

Q. 66. Take up the white oak. Read your notes concerning it?

A. "S. 43 degrees west, 2 chains to a large white oak "fore and aft" marked with three hacks above a blaze on each side and on the east side two hacks plain and very old. A very old blaze below the three hacks and a blaze on the north side." "Find other trees marked with two hacks running in a line south 15 degrees west.

Q. 67. Into what state?

A. Into North Carolina.

Q. 68. What do those indicate, if anything?

A. A line running off from a corner.

Q. 69. Take the black oak on top of High Knob? Read the note?

A. "South 50 1-2 degrees east, 10 1-10 chains to a black oak marked with three hacks above a blaze on the north side and two hacks above and one below a blaze on the west side. This tree stands at the head of Caney Branch Ridge."

Q. 70. About — old were those marks?

A. My notes don't state but my recollection is that they are of different ages, and I don't remember which are the older of the two.

Q. 71. Give a period within which they were both made?

A. I believe both pair of marks were 30 years old, or over.

Q. 72. Next take up the chestnut and two white oaks, read your notes concerning those?

A. "South 20 1-4 degrees west 6 8-10 chains at 6 5-10 chains a chestnut and two white oaks, marked two hacks above and one below a blaze."

Q. 73. What does that indicate?

A. A corner.

Q. 74. What state?

A. North Carolina.

Q. 75. What do you mean by a North Carolina corner?

A. I mean the corner of a tract of land granted by the state of North Carolina.

Q. 76. You mean a corner of a North Carolina survey?

A. That is what I mean.

Q. 77. Take up chestnut oak stump. Read your notes concerning that, please?

A. "South 61 3-4 degrees west, 10 2-10 chains, at 8 5-10 chains a chestnut oak stump bearing a plain blaze and indistinct two hacks on the northeast side, the lower hack more distinct than the upper one. Can't be positive."

220 Q. 78. How was the tree cut down?

A. It had broken down.

Q. 79. Did you take any steps to ascertain the age of those hacks?

A. I did not. The stump was hollow. I looked on the inside of the stump to see if it were possible the marks had gone through but could see no signs.

Q. 80. When you speak of an indistinct hack what do you mean?

A. I mean an impression i nthe bark that resembles a hack but can't be positively stated as a hack.

Q. 81. Take up the small black oak, and read your notes concerning it?

A. "South 3 1-2 degrees west 24 4-10 chains, at 8 4-10 chains a small black oak marked two hacks above a blaze on the west side, very old, but not old enough for state line, and one hack above and one below a blaze above the other marks."

Q. 82. How old in your judgment were the last marks described?

A. From 8 to 12 years.

Q. 83. Now the chestnut. Read your notes concerning it.

A. "South 3 3-4 degrees west 6 chains to a gap, at 3 chains a small chestnut two hacks above a blaze, rather new."

Q. 84. About how recently were they made, in your judgment?

A. Probably ten years ago.

Q. 85. Did you find any other chestnut tree, and if so, read your notes concerning it?

A. A short distance from the above described chestnut there is a chestnut about which I have the following note: "South 7 1-2 degrees east, 23 5-10 chains, at 1 7-10 chains passed a large chestnut burned on the east side, some indications of mark on the west side."

Q. 86. Did you take any steps to ascertain how old those marks were?

A. I did not.

Q. 87. Did you take any steps to ascertain whether there were marks of the axe, or not?

A. No, sir; nothing more than we could discern in the bark.

Q. 88. You can not swear they were marked, can you?

A. No, sir.

Q. 89. I want to call your attention to the small mountain
221 oak, 7 1-2 miles from the river? You found no trees marked between the one last mentioned, and the one I now call your attention to, did you?

A. None.

Q. 90. Read your notes regarding this one?

A. "South 60 degrees west 7-10 chains to a small mountain oak, "fore and aft" marked two hacks above a blaze. Marks closely resemble those heretofore blocked and found to be 23 years old."

Q. 91. The mountain oak 7 3-4 miles from the river, 9 inches in diameter. Please read your notes concerning it?

A. My note made in the general survey reads: "South 63 1-2 degrees west 5 8-10 chains to a small mountain oak, two hacks above a blaze. On blocking find 22 growths from blaze in wood to bark. There are also two hacks above a blaze near the heart of the tree as if it had been marked when only a bush or small sapling. This tree is 8 or 10 inches in diameter and of very slow growth."

Q. 92. What did you do with the block?

A. I left it on the ground because I didn't consider it of any importance.

Q. 93. What did you do with the marks on the inside of the tree that you discovered?

A. I left them on the tree.

Q. 94. What would have been the diameter of the bush or sapling at the time those last mentioned marks were made if ever made?

A. 2 1-2 inches. I measured the heart.

Q. 95. Is it customary to mark bushes 2 1-2 inches in diameter as state line marks in a country as well wooded as this was?

A. From present indications in this locality there was nothing else at that time to mark. I don't know what the custom was.

Q. 96. What else, if anything, did you discover relative to this tree or sapling?

A. Nothing else.

Q. 97. Is it not a fact that higher up in this tree and deeper in the wood there were some scars which merely resembled state line marks?

A. Those are the scars that are described as being on the heart where it was 2 1-2 inches in diameter.

Q. 98. The hacks do not show traces of the axe?

A. No, sir, they do not. They are mere straight discolored lines with a slight indenture but don't show the cut of the axe. The blaze shows the cut of the axe.

222 Q. 99. Did you find any other marked trees until you struck the state line which is not questioned on the lead from the Fodder Stack Lead to the Hiawassee River?

A. No, sir.

"Redirect examination" from question 39 and to question 49 and answer, inclusive:

Q. 39. State whether the state line marks on the double sourwood in Sourwood Gap were old or new marks?

A. Very old.

Q. 40. State whether the sourwood is a tree of slow or rapid growth?

A. Of slow growth.

Q. 41. Does it ever grow to be a large tree?

A. No.

Q. 42. You have referred in your cross-examination to a hickory tree on the Hangover Lead about a mile and a half from the river, and have copied your notes made at the time of your survey. State whether or not you made a subsequent examination of this hickory tree?

A. I did.

Q. 43. Have you with you the notes made on that second examination?

A. I have not, but can state the substance of those notes from memory.

Q. 44. State the result of that second examination and whether the result was different in any respect from your first examination?

A. In my second examination of this tree I decided that it is a "fore and aft" tree, and that it shows as much age as a great many trees that we accepted as state line trees without a question.

Q. 45. What caused you to conclude that it was a "fore and aft" tree?

A. The position of the marks on the tree with reference to the course of the ridge.

Q. 46. State what those two marks were and their position on the tree?

A. The marks were hacks above a blaze. The upper hack distinct the lower hack not so plain, but still discernible, the blaze plain; and they were on the northeast side of the tree.

Q. 47. Was this tree on the top of Hangover Lead?

A. Yes.

Q. 48. Was the position of those marks on the tree such as to meet a line run along the top of this mountain?

223 A. Yes, sir.

Q. 49. Was there any other mark on this tree?

A. None.

"Recross-examination," question and answer 1, page 21:

Q. 1. Might not all the marks that you observed on the Hangover Lead be made to indicate North Carolina corners and mere trails?

A. They might be made to indicate corners and trails.

J. K. WILSON, direct examination, question 8 and answer:

Q. State fully your survey up to the Hangover Lead on to where it and the Fodder Stack came together on the southwest, what trees if any, you found showing state line or indicating said line, the location of these trees in depressions or on the ridge of the kind of trees, also if you found trees showing corners of tracts surveyed, state how many as near as you can, and whether the tracts were surveyed east or west of this ridge.

A. The best way to answer this question is to quote from my individual field notes. At station 94 I have "to stake by black oak, has plain evidence of old state line marks = blaze and one hack plain, other hack not so plain. On the south side not plain and can't say it has them on that side." At station No. 100 "to double sourwood standing 1 2-10 chains west of the center of the Sourwood Gap. This sourwood has the old state line plain, large one fore and aft—smaller one only on the northeast side." On re-examining this double sourwood on Jan. 29th, I have the following note: "The smallest tree has on the east side the two hacks and blaze. That I think is the old state line. Then it has two blazes above the two hacks and a blaze but they are more recent. It also has five irregular hacks on south side. The largest one has the old state line, two hacks and blaze on the east side, blaze nearly gone and also the two hacks and blaze state line marks on west, but the upper hack is made with two licks of the axe. It also has one recent on the south side." On Station 106 "passing black oak fore and aft, has two blazes plain, hacks not plain." At station 114, to "stk. S. 9 W. 38 links from this station stands a black oak with North Carolina corner. Three hacks on east, three hacks on south, no cross."

The above station is 4 4-10 chains south from Slick Rock Gap. Station 113, "passing chestnut oak indications state line (side
224 line) mark, blaze plain, but marks not so plain." Also passing white oak shows evidence of two hacks on northeast side. No evidence of marks on other side." Under Station ..4, "face of the ridge broad, at 5 3-10 chains passing a side line hickory two hacks and a blaze on east side. Hickory stands one chain east of our line. Think too young." Under Station 116, "To stake on first high top from Slick Rock Gap near pine marked $\frac{M}{W}$ $\frac{}{H}$ and a Spanish oak and a lot of pines marked two hacks, blaze under and then a hack under blaze, thus: $\frac{=}{\cdot}$, supposed to be a North Carolina corner." Under station 120, to large white oak with three hacks above a blaze fore and aft, rather new on the north side, has a very old blaze below the younger blaze and looks like new blaze had cut out hacks. There is also on the east side two very old hacks. Line mark and line runs south 15 1-2 W." Station 128: "To black oak on High Knob at the head of Cain Branch Ridge. The black oak has three hacks above blaze on north and south and two hacks above a blaze and one hack below the blaze on southwest." Station 132, "to near large chestunt with two hacks above a blaze and one hack below same blaze. Seems to be North Carolina corner." Under Station 148, "passing an old chestnut oak stump with plain blaze like state line and indication of 2 hacks above on east side. West side burnt off." Station 152, passing small black oak, two hacks and blaze under on west side, and above it a hack and a blaze, thus, $\frac{=}{\cdot}$. Under Station 163, "passing small chestunt at 3 chains with two hacks above a blaze but rather new." Under Station 165, passing half burnt chestnut with indications of state line marks." I have no more trees noted until after passing the top of Hangover Peak, and only two small mountain oaks between the Hangover and the place where the stack lead strikes the same, except two small mountain oaks, one of which was split open and we counted 22 years' growth. Also the other was too young for the state line. The marked trees that we supposed to be North Carolina corners was marked as though the land lay on the east side of this ridge. I will state that some half mile before getting to the Hangover peak the laurel set in and found no trees old enough to hold marks. Also after passing the Hangover peak, there is hardly any trees of a character to hold very old marks, being scrubby beech, buckeye and birch, and in fact for a good part of the way the comb of the mountain is bare of timber.

225 O. H. MULLER, direct examination, question 11 and answer:

Q. Please state in detail the course of your survey up the Hangover, not giving the many calls, but the course, distances, the trees, if any found with state line mark, their locality on ridges or depressions, the trees, their kind, etc., and continuing on said ridge to where the two lines come together on the southwest.

A. We surveyed along the top of this leading ridge which runs in a direction a little west of south to the top of the Hangover, a very

high and prominent peak. Thence its trend is most west, being nearly southwest from the Hangover, passing the "Hao," the highest point in that region, the "Struttan Bald," and continuing in the same general direction toward the Struttan meadows. Several depressions in the leading ridge, commonly called gaps or passes. There are many marked trees on this line, made at different periods; some very old so as to be almost extinct; some recent, apparently only twelve or fifteen years old. Also many indications of corners. Some of these marked trees are so indistinct as to be scarcely discernible, the bark having sloughed off sometimes leaving merely an axe sign. These we did not note.

At a depression—Sour Gap—about one mile from the river we found a double sourwood very plainly marked with the characteristic state line mark as a fore and aft tree. This tree is old and the tooth of time will soon obliterate the marks as part of the bark is beginning to loosen and decay. Passing "Slick Rock Gap" and ascending about one-fourth of a mile from the sourwood is a small scrubby hickory with a plain state line mark as a side line; a little farther on are old chestnut oak stump, with the same marks that bear the stamp of age. From this place on as we ascend to higher ground find no more state line marks that we consider distinct enough to note, and the land marks and corner indications seem to show more age as we ascend, until on the highest ground the marked trees of all kinds disappear, the timber becomes more scrubby and of such nature that it would preserve a mark in the bark but a short time.

Ascending from the Strutton Bald we strike laurel and somewhat lower ground. Here a low flat ridge runs off in a nearly north direction leading to what is called the Fodder Stack Lead.

(Endorsed:) Exhibit No. 4 to deposition of H. P. Hyde. Copy of portions of depositions of W. D. Hale et al. Filed Sept. 21, 1897. J. T. Carter, Deputy Clerk.

226 In the United States Circuit Court, at Knoxville.

CHARLES HEBARD
vs.
D. W. BELDING et al.

In this cause to save costs, it is mutually agreed and stipulated as follows:

1. That prior to the year 1836 the title of the Cherokee Indians had not been extinguished to all that portion of the state of Tennessee lying east and south of the following described line: Beginning at the intersection of the Tennessee River with the southern boundary of the state; thence up the Tennessee River to the Hiwassee River to a ridge; thence northeastwardly west of the land in dispute partly with said ridge striking the Little Tennessee River, with other lands not material to this controversy.

2. That on May 23d, 1836, the Cherokee Indians ceded to the United States all of the above mentioned portions of the present states of Tennessee and North Carolina.

3. That by Chapter 2 of the Acts of Tennessee of 1836, passed Oct. 18th, 1836, and entitled "An Act to provide for the survey of the lands ceded to the United States by the Cherokee Indians within the State of Tennessee, by treaty of the 23d day of May, 1836," all the said lands lying in the State of Tennessee were constituted a surveyor's district by name of Ocoee District, and it was provided for laying out of said District into townships, fractional townships, etc.

4. That by Chapter 2 of the Acts of Tennessee of 1837, passed Nov. 20th, 1837, and entitled "An Act to dispose of the land in the Ocoee District," provision was made for the entry and granting of the lands in the Ocoee District.

5. That North Carolina made provisions for a survey and sale of that portion of the ceded lands lying in North Carolina in the year 1837, but the act specifically provided that only lands which would bring more than 20 cents an acre should be surveyed and that no survey was made by North Carolina of the lands in disputed territory prior to 1851 and no North Carolina grants made in this region prior to that year.

6. That the maps marked "U. S. Geological Survey, J. W. Powell, Director," one being marked "North Carolina Nantahalah Sheet," and the other being marked "Tennessee-North Carolina Murphy Sheet," are official maps published by the Department of the Interior of the United States Government of the lands embraced
227 therein, and that the northwest corner of the first named sheet and the northeast corner of the second named sheet show the lands in controversy.

7. That the Little Tennessee River was formerly known as the Tennessee River.

8. It is agreed that this agreement may be used as evidence by either side, as evidence of the facts therein stated as if shown by competent proof but this agreement is not intended to waive the right of either party to except to any portion of such evidence on grounds of incompetency, immateriality or irrelevancy. This September 25th, 1897.

CHARLES HEBARD, *Compl't.*
By T. E. H. McCROSKEY, *Sol'r.*
Defendants D. W. BELDING ET AL.,
Except J. W. Cooper,
By LUCKY, SANFORD AND TYSON, *Sol'rs.*

(Endorsed:) 1056. Charles Hebard against D. W. Belding et al. Stipulation. Filed Sept. 25, 1897. J. T. Carter, Dep't- Clerk.

And afterwards, to wit: on Sept. 30, 1897, certain depositions of H. P. Hyde and Reuben Carver (re-taken) and D. W. Belding, R. N. Archer, Edward T. Sanford and L. D. Tyson were filed in the

clerk's office of said court, which said depositions are clothed in the words and figures following, to wit:

In U. S. Circuit Court, at Knoxville.

CHAS. HEBARD
vs.
D. W. BELDING et al.

Depositions of H. P. Hyde and Reuben Carver, Retaken, and D. W. Belding, R. N. Archer, Edward T. Sanford & L. D. Tyson, Taken by Consent September 28th, 1897, at the Offices of Lucky, Sanford & Tyson, Knoxville, Tenn., in Presence of Major T. S. Webb and T. E. H. McCroskey, Sol's for Compl't, and Edward T. Sanford and C. E. Lucky, Sol's for All Def'ts Except J. W. Cooper.

228 Said witness, H. P. HYDE, of lawful age, being duly sworn deposed as follows:

Q. 1. Are you the same H. P. Hyde whose deposition has been formerly taken in this case?

A. I am.

Q. 2. Have you, since your former deposition, again at the instance of the defendants visited the land in dispute for the purpose of making further observations as to the state line?

A. Yes, sir.

Q. 3. Have you on this second survey been north of the river searching for state line marks?

A. Yes, sir.

Q. 4. Did you find the state line mark north of the river along the line followed by Hale, Wilson and Muller described in their depositions, and in Hale's field notes, for some distance north of the river?

A. Yes, sir, I did.

Q. 5. About how far did you go?

A. I ran the line from the turnpike road mentioned in Hale's field notes to Tennessee river.

Q. 6. About how many state line trees did you observe?

A. I found good many, about 20 or 25 I suppose.

Q. 7. Did you block any tree on that line north of the river?

A. Yes, sir, one.

Q. 8. What tree is that, and is it spoken of in Hale's field notes?

A. Yes; it is the spruce pine or hemlock standing 10 poles or 5 chains north of the river.

Q. 9. Will you please produce said block and file it as Exhibit No. 6 to your deposition?

A. I so file it.

Q. 10. How is the tree marked?

A. With two hacks above a blaze, as fore and aft, on the north and south side.

Q. 11. Does that show the mark of the axe in the bark and in the wood?

A. It shows it very plainly in the bark and also shows it in the wood.

Q. 12. Did you count the growth in that block to see the number of years since the tree was marked?

A. Yes, sir, twice, and counted 76 and 77.

Q. 13. Please state whether or not the marks o nthe state line tree that you found north of the river along the line followed by Hale, Wilson and Muller were alike or were unlike the marks on the line running up Slick Rock Creek, Fodder Stack Ridge and the
229 Fodder Stack Lead south of the river, which you have testified to in your former examination as being the marked state line south of the river?

A. They were like the marks that I traced south of the river, that is had same appearance and seemed to have been made with the same sized axe.

Q. 14. Did they seem to be of the same or of a different age?

A. Same age and appearance.

Q. 15. How did they resemble marks south of the river with reference to distance between the marks?

A. They were same apparently, six or seven inches apart each mark regularly.

Q. 16. State whether or not your conclusion as a surveyor would be and is that the marked line north of the river was made at the same time and by the same parties as the Slick Rock creek line you have testified about south of the river, or different?

A. I think they were, and made on the same survey. That is my conclusion as a surveyor.

Q. 17. How far is it from the spruce pine or hemlock on the north bank of the river where this line reaches the river, to a point on the north bank of the river opposite Slick Rock creek?

A. 89 chains.

Q. 18. How wide is the river at mouth of Slick Rock creek.

A. I think about 10 or 12 chains.

Q. 19. Is there any old trees standing near mouth of Slick Rock Creek, which is in such condition that the marks can not be counted?

A. There is one large spruce or white pine, I do not remember which, but think it a white pine, that stands about 3 rods below the mouth of Slick Rock creek on the south bank of river. It has been burned considerably on the east side of the tree, so much so I could not distinguish any marks; have examined it to see if there were marks.

Q. 20. Is there any indication of an old trail running up Slick Rock creek from its mouth?

A. No, sir; none that I ever found running up the creek.

Q. 21. Is there any branch that runs into Slick Rock creek on the right hand side as you go up the creek, just before or at the point where the state line as you ran it leaves Slick Rock creek and runs up Fodder Stack Ridge to Fodder Stack Lead?

A. Yes, there is. We leave Slick Rock creek at mouth of this

branch, and the branch is on right hand side all the way
230 as you go up to Fodder Stack Lead. It heads up near the top of the lead.

Q. 22. Please examine the certified copy of Range 6, E. Frac. Township 2 N. of Ocoee District, filed as exhibit A to deposition of T. E. H. McCroskey in this cause, which is here shown you and, assuming that the line running southwest on said map from the intersection of fractional townships 23 and 26 on said map is the line running up Fodder Stack Ridge to Fodder Stack Lead, state whether or not the creek shown on said map would indicate with substantial correctness the location of said branch?

A. Yes, that is exactly as we found it, on the right hand side of the ridge as we go up.

Q. 23. Will you file as Exhibit No. 7 to your deposition a certified copy of Act of North Carolina General Assembly passed March 1, '97, providing for marking the state line between Tennessee and North Carolina?

A. I so file it.

Q. 24. Will you please file as Exhibit No. 8 to your deposition certified copy of the report of H. P. Hyde and F. M. Lovingood on such survey?

A. I do.

Q. 25. Please state whether or not you are the same H. P. Hyde that made that report?

A. I am.

Q. 26. Is this a report of the survey about which you testified in your former examination?

A. It is.

Q. 27. At the time you ran and marked this line and made your report, state whether or not you had been employed by defts. in this case to run the line, or whether you were acting solely in your official capacity as surveyor of N. C.?

A. I was acting solely in my official capacity and had not been employed by the defts. I had previously worked for the Beldings in other matters.

Q. 28. Do you know the reputation of H. S. Hayes and J. C. M. Bogle as surveyors?

A. I know them by reputation.

Q. 29. Is their reputation that of good and accurate surveyors or to the contrary?

A. Their reputation is that of good surveyors.

Q. 30. What, if any, is the general custom of surveyors in running lines as to marking fore and aft trees on one or both sides?

A. It is the general custom to mark them on both sides.

Q. 31. Have you, since your former examination, again visited the black oak on Hangover Lead, standing about ¾ mile
231 from river from which Mr. Hale cut the block filed as Exhibit A to his deposition?

A. I have.

Q. 32. Since looking at the tree again, is there anything in your former deposition that you wish to correct?

A. There is. As to the appearance of the hack on the bark of Exhibit A. Those hacks appear to be much older on this block than those that are still on the tree. The scars on this block do not show the cut of the axe.

Q. 33. Now, taking up that block in connection with the place left in the tree and the splinters lying around, have you made any further investigations with reference to the question as to whether or not those were state line marks and if so, give your conclusions?

A. My general conclusion was that it was not state line marks, the same as before.

Q. 34. First, taking outer bark, does that show state line marks, and give your reasons?

A. This block I hold in my hand, Exhibit A, has appearance of couple of old scars which may have been caused by cut of an axe, but I can't see the cut of the axe in the pores of the bark. It seems that if they have ever been here they have been cut off in taking out the block.

Q. 35. Is there any marks on that bark on the block that indicate to you as a surveyor a chop or hack at the upper or flat end?

A. No, sir.

Q. 36. Is there anything about the mark on the upper or flat end to show it was not made by chop of axe, and if so, what is it?

A. It indicates a scar cat faced termed by us, in the bark caused by wood worm or some other defect.

Q. 37. What kind of scar with reference to the edge does the chop or hack of axe make?

A. It makes a smooth cut in the bark or wood.

Q. 38. Can you make an irregular chop with an axe?

A. Not with one stroke of an axe.

Q. 39. Have you examined the various blocks filed as Exhibits by Mr. Hale to his deposition?

A. Yes, sir.

Q. 40. Does it show smooth cuts in bark?

A. Some of them do and some not so plain.

Q. 41. State whether this block Exhibit A shows in bark that kind of cut of an axe?

A. It does not.

Q. 42. Did you examine this black oak to see whether or not there were any other marks like that on the tree on the bark?

232 A. Yes, I examined it to see if there were any other cat faces or defects in the bark.

Q. 43. State whether or not you found any other cat faces or defects in bark?

A. I did; good many—as many as half dozen.

Q. 44. Were they same or different as this cat face on the upper part of Exhibit A?

A. I can't say they were the same but they had same appearance as this block does at present.

Q. 45. State whether or not when a chop is made in tree with an axe, the piece of wood on the outside ought to show and usually shows the chop? That is to say, whether on the block of wood

taken out above the mark there ought to be a mark on inside of block corresponding to chop and just above where chop was, and if you can illustrate any other blocks filed as exhibits, please do so?

A. It does when the tree is sound and hacks preserved. I would like to illustrate by Exhibit C to Hayes—that shows the slivers of the wood where the axe stopped, growing up into the hack.

Q. 46. Does the inside of Block Exhibit A show any such mark of the chop?

A. No, sir; it does not.

Q. 47. Taking up the scar itself, is there anything about those scars that would indicate whether or not they were made by chops of axe, and please illustrate by reference to other exhibits?

A. It does not indicate it was made by axe; with the cut of an axe the scar on the inside of the block next to where the cut stops in the wood doesn't show the cut of an axe in the block but does in the piece next to where the axe stops. I will illustrate.

Q. 48. Do you mean to say in this particular Exhibit A it shows where the cut of axe stops?

A. It does not show that.

Q. 49. Then, as I understand you, you mean by your former answers that the marks on the piece corresponding to the block, if it had been made by chop of axe, ought to show where the axe stopped but that does not appear in this block?

A. Yes, sir, that it does not appear, for the piece is not here.

Q. 50. Then, as I understand you, there should be two blocks for every cut; one outside of the cut, and the other the wood inside of the cut, and on the outside block showing the growth subsequent to the cut there ought to be mark on inside showing sliver of
233 the cut, and then on the outside of the inside piece there ought to be mark showing where the axe stopped in the wood?

A. Yes, sir.

Q. 51. Now this block Exhibit A, is only outside block and the corresponding inside block is not filed?

A. Yes, sir.

Q. 52. Speaking of this scar on the inside of Exhibit A is there anything about those scars that would indicate that they were made by chop or hack of axe?

A. There is not; there is no appearance of the cut of axe there.

Q. 53. In what way do cracks or crevices in these scars run?

A. Up and down block.

Q. 54. At what angle are hacks or chops made in tree?

A. Usually at angle of about 45 degrees.

Q. 55. Are they ever made vertically?

A. I never seen any line marks made that way.

Q. 56. When a scar is made inside of tree caused by growing up around hack or chop, what will be the angle of that crack or crevice in the scar?

A. Same angle as the hack on the outside—that is usually about 45 degrees. I will illustrate it by Exhibit 2 to my former deposition. I split this open at the hack to-day and it shows the slivers in

outside piece as well as hack preserved in the inside piece running cross-wise the block at angle; the lower hack don't show the slivers growing in the hack as the upper two hacks.

Q. 57. Is there any reason for this in this particular case?

A. It seems to have been caused by axe glancing and bursting slivers in the wood.

Q. 58. Can you see the marks of the cut of the axe in the inside piece of the lower hack?

A. Yes, sir. There is small sliver growing in the outside piece corresponding to where the hack is. It don't show plain axe cut on inside surface of outside piece, of the lower hack. There is growth of rosin in this lower hack and caused it to heal in growing up without showing the marks.

Q. 59. When was your last examination of these trees made?

A. 24 and 25 of this month.

Q. 60. What sort of tree was this black oak with reference to soundness or unsoundness?

Q. There was good many defects in tree where block was cut out.

234 Q. 61. What do you mean by where block was cut out?

A. In the tree as well as piece on the ground where is was blocked on north side.

Q. 62. Had more wood been cut out than simply this block?

A. Yes, this is small amount of the wood that has been cut out.

Q. 63. Were there any pieces lying around the foot of the tree that has been recently cut out?

A. Yes, there were number of pieces cut out and lying around at the foot of the tree.

Q. 64. Did you examine these pieces?

A. I did.

Q. 65. What was their condition with reference to defects?

A. I found defects that had appearance of what we call wood work as appears on this block Exhibit A and also some that have same appearance of this block on inside, that is with same kind of scar.

Q. 66. Did you examine these pieces carefully to see if you could find any marks of axe?

A. Yes, sir, and failed to find any cut of axe.

Q. 67. Did you examine the face of the wood that was left in the tree after taking out this block?

A. I did.

Q. 68. Did you find any marks of axe in that?

A. Nothing only the fresh mark where block was cut out.

Q. 69. I'll ask you whether or not when hacks or chops are made in the tree and when you block that tree afterwards, the inside of block beyond the cut ought to show on its face the marks of the cut?

A. It is owing to condition of tree; if it is a preserved tree and not decayed it does.

Q. 70. Does that show in these various other blocks you have referred to?

A. Yes, sir.

Q. 71. Did the marks on this black oak seem to have been made with the same sized axe as the state line marks you have described?

A. It is made with smaller axe from the appearance of the hacks in the bark that are now in the black oak tree?

Q. 72. Who was with you on your last survey since your former deposition was taken?

A. Mr. Reuben Carver.

Q. 73. Did either he or you cut any other blocks from this black oak to show any similar cat faces to this on Exhibit A. and if so, what became of it?

235 A. No, sir, we did not cut any blocks from this black oak tree. We picked up a block on ground at root of the black oak tree that resembled the appearance of top scar on the inside in Exhibit A to Mr. Hale's deposition. We carried the block with us to down near Tennessee river on north side and hid it until we traced the line down to Tenn. river, and as we came out we forgot the block and left it there.

Q. 74. Did you visit again the hickory referred to in your deposition as side line tree to Entry No. 920?

A. Yes, sir.

Q. 75. Did you again take the course of any lines on No. 920 running by that hickory to see whether you were right in your opinion that it was side line tree of 920, and with what result?

A. Yes, sir, we traced the line from the hickory some distance up the ridge on east side of slope of ridge, and found it marked with marks as old in appearance as the marks on the hickory and the same kind of marks, and marks going in same direction. That is line was running up the mountain and the slant of the axe making the cut on hickory was made in same direction as the slant of the axe in cutting the marks on the line of 920.

Q. 76. Does the hickory stand on the east side of the ridge, and on what side is it marked?

A. It stands on east side and is marked on east side.

Q. 77. Did you run this tract of land from copy of entry or from copy of grant, and if from grant, what is its number?

A. I ran No. 920 from Grant—number of grant as appears here is 8234.

Q. 78. When you say "as appears here," do you mean as appears in the certified copy you have in your hand?

A. Yes, sir.

Q. 79. You ran from calls of grant?

A. Yes, sir, had grant in my possession when I ran it.

Q. 80. Will you file said certified copy of the grant as Exhibit No. 9 to your deposition?

A. I file same as said Exhibit.

Q. 81. Did you go again to the chestnut oak stump testified to by Hale, Wilson and Muller in their original deposition?

A. Yes, sir, I did.

Q. 82. Is that the chestnut oak stump 3¼ miles from the river?

A. Yes, sir.

Q. 83. On what side of the ridge does that chestnut oak stump stand?

236 A. On east side.

Q. 84. Did you examine that stump carefully?

A. Yes, sir.

Q. 85. Did you find two hacks and blaze on that stump?

A. No, sir.

Q. 86. Did you find any state line marks on that stump?

A. No.

Q. 87. Did you cut out piece of the bark of that chestnut oak stump that contained every possible indication of the mark?

A. I did not, but Mr. Reuben Carver did.

Q. 88. Is it here present in its original condition as it was cut out?

A. I have it here just as it was cut from tree.

Q. 89. Will you file it as Exhibit No. 10 to your deposition?

A. I so file it.

Q. 90. What are the marks on that chestnut oak stump, or are there any marks or indications of marks?

A. There are no marks. There is an old scar, but no marks of the cut of axe.

Q. 91. What does that scar indicate to your mind as surveyor?

A. It indicated a scar caused by falling timber, may have been caused by limb on lap of tree rubbing against outside bark, as sometimes they move and rub another tree.

Q. 92. Does it indicate a state line mark in any way?

A. It does not.

Q. 93. Did you survey for J. W. Cooper in 1883 Entry No. 418 N. C. beginning at mouth of Slick Rock creek on state line, and lying between Slick Rock creek and the Hangover lead?

A. Yes, sir, I surveyed that.

Q. 94. Will you file your original certificate of survey and grant No. 144 based thereon as Exhibit No. 11 to your deposition?

A. I so file it.

Q. 95. Does this grant lie east of Slick Rock creek?

A. Lies south east from mouth of Slick Rock creek.

Q. 96. Do you remember course of Slick Rock creek?

A. It is something east of south; I remember in running the line we ran along the body of creek for something like 10 chains and then our line took us east of creek.

Q. 97. Did your last survey give you any reason to doubt the correctness of your conclusion that the state line ran up Slick Rock creek, as you stated before?

237 A. None whatever.

Q. 98. Did you examine the sourwood?

A. Yes, sir.

Q. 99. Did you find anything to change your former opinion?

A. No, sir.

Q. 100. Did the marks on the sourwood seem to have been made with the same kind of axe as those on the state line trees?

A. Not the same width, but larger than the marks on the black oak.

Q. 101. Please examine the book of field notes, Exhibit B, to deposition of W. D. Hale in this cause, and from said book calculate accurately the distance as shown by said field notes from 61 mile tree on state line mentioned on page 8, to the locust stump described as 62 mile tree on bottom of page 9, thence to the station 74 on page 18, said to be at white oak the 64 mile tree, and thence to river bank at the spruce pine or hemlock, where Hale and Wilson's line struck the river on the north side.

A. I have done so; the distances are as follows: From locust 61 mile tree to locust stump 62 mile tree 179 chains; from locust stump to point 3 4-10 chains beyond station 74, described as probably the white oak 64 mile tree, 331.5 chains; and from this point to river 54.5 chains. This makes total distance according to Hale's notes from locust 61 mile tree to river on Hale and Wilson's line, to be 565 chains or 3 and 85-100 miles, being trifle over 3 and ½ miles.

Q. 102. Please state whether the fore and aft state line trees that you found marked on the north of the river, were marked on one side only or on both sides in the direction the line approached and left the tree?

A. They were all marked on both sides that we found, I think.

Q. 103. Please state whether or not the state line as described in the report of Mr. Lovingood and yourself which you have filed as Exhibit 8 to your deposition, corresponds with or differs from the state line running up Slick Rock creek, up Fodder Stack Ridge and thence along Fodder Stack Lead as you testified in your former deposition.

A. It is the same line testified to in my former deposition.

Q. 104. What do the marks on the black oak block, Exhibit A to Hale's deposition, taken in connection with the other indications and marks on the tree, indicate to your mind as a surveyor?

238 A. It doesn't indicate any plain line marks at all, but indicates scars caused by some defects in bark or wood; I see no axe cuts about the piece at all.

Witness, H. P. Hyde, cross-examined by Solicitor for complainant:

Q. 1. How old are you?

A. 41 years old.

Q. 2. How long have you been a surveyor?

A. 17 years this November.

Q. 3. When was the first time that you made any survey on the state line in the locality in question?

A. The first time I made survey on the state line was last spring; I searched for the land some 8 or 10 years ago with Capt. Everett.

Q. 4. At what point did you search for the line at that time?

A. From the mouth of Slick Rock Creek up the dividing ridge west of Little and Big Slick Rock round by Little Fodder Stack.

Q. 5. At that time did you locate the state line on dividing ridge and the Little Fodder Stack Lead?

A. No, sir, I did not.

Q. 6. Did you locate it at any place at that time?

A. Not to my satisfaction. I found marks up Big Stack Lead that I supposed to be state line marks; I was at that time running entry for Capt. Everett.

Q. 7. Did you locate that entry?

A. I located the entry.

Q. 8. Was it a Tennessee entry or North Carolina entry?

A. North Carolina entry.

Q. 9. Does that entry call for the state line?

A. I ran agreeably with the calls of the warrant of survey and the instructions of Capt. Everett.

Q. 10. The question was, did the entry for the state line?

A. I don't remember as to warrant calling for state line. Beginning was specific calling for certain directions.

Q. 11. Did the entry call for state line at beginning or at any other point in the call?

A. I can't remember all of the exact calls in the location.

Q. 12. Did you locate that entry on what you then understood to be the state line?

239 A. I did not know at that time where the state line was; I located the entry where I was instructed to locate it.

Q. 13. Did your survey or notes call for the state line at any point?

A. I don't remember as to that.

Q. 14. Did you locate that entry along the Fodder Stack Lead?

A. Yes, sir, that is my recollection that we ran up the Fodder Stack Lead.

Q. 15. Then the Fodder Stack was one of the lines of the entry?

A. Yes, sir, that is my recollection.

Q. 16. Then the entry ran from Fodder Stack Lead eastwardly toward Hangover?

A. No, sir; we ran westwardly with the divide leading on by John Stratton meadows.

Q. 17. Then you located this N. C. entry on the west side of Hangover Lead?

A. We ran west of Hangover Lead to junction of Fodder Stack Lead.

Q. 18. Then you located this entry west of Fodder Stack Lead, did you not?

A. I ran up divide between Slick Rock Creek and the waters running back into Tennessee, around head of Little Slick Rock Creek, there may be some point that would be west or northwest of Fodder Stack.

Q. 19. You have stated that one line of the entry and your survey was top of Fodder Stack Lead. Now did your entry lie on east side or west side of this line?

A. It is east or northeast.

Q. 20. Was this entry north or south of Little Slick Rock Creek?

A. This entry embraced all the land on Little Slick Rock Creek.

Q. 21. Did this entry lie north or south of the Big Stack Gap branch?

A. It embraced all the land on the waters of Big Slick Rock.

Q. 22. Then it embraced the Big Stack Branch, did it not?

A. That is one of the tributaries of Big Slick Rock, is it not; if so, it embraced it.

Q. 23. How many acres were there in that entry?

A. The boundary I ran out was something like 100,000 acres it ran on to Johnson Bald in Cherokee County.

Q. 24. Then the line of that entry ran along Fodder Stack Lead up the main mountain?

240 A. Yes, sir.

Q. 25. It included Hangover Mountain did it not?

A. Yes, sir, everything back to the river.

Q. 26. What county of N. C. are you the surveyor of?

A. Graham County.

Q. 27. Graham County lies adjoining the lands in dispute, does it not?

A. Yes, sir.

Q. 28. Isn't it a fact that surveyors mark a fore and aft tree on the side where the line they are running strikes that tree and then mark it on the other side where that line is run through the tree would come out on the other side?

A. Yes, sir, it should be marked that way; that is the way I mark them.

Q. 29. The hemlock tree on the north bank of Tennessee River and which you blocked was marked that way, was it not?

A. Yes, sir; on the north side and the south side; there may have been a variance of degree but on the degree the line ran down.

Q. 30. If the line had been continued southwardly from that tree, across the river, it never could have reached the mouth of Slick Rock Creek, could it?

A. Owing to the course that you had gone when you crossed the river, but would not have reached the creek continuing the same direction that the fore and aft tree was marked.

Q. 31. Isn't it a fact that if this line had been continued southwardly in the same direction that said fore and aft tree was marked, that it would have gone in a general direction towards the black oak blocked by Hale?

A. It would have gone in the general direction of the Hangover Lead.

Q. 32. This black oak referred to is on the Hangover Lead, isn't it?

A. Yes, sir.

Q. 33. If you had been running the state line under the calls given in the Code of Tennessee and North Carolina, would you have turned down the river at the fore and aft hemlock to the mouth of Slick Rock Creek or would you have continued the course indicated by the fore and aft tree to the top of Hangover Lead?

A. I would have went from a point on the north bank of the river near the hemlock to connect with the original marked line where it could be found.

Q. 34. If you had been running the line as the state commission-

ers were and before any marks had been made, would you run the
call from the hemlock fore and aft tree to the top of Hang
241 over Lead, or would you have run it down the river to the
mouth of Slick Rock Creek?

A. I can't say how I would have run it if I had been one of the commissioners.

Q. 35. Now taking the calls as reported by those commissioners and as found in the code and assume that there are no state line marks either on Hangover or on Slick Rock Creek, or on Fodder Stack; now, upon that assumption, would you run the line as called for in the code from that fore and aft hemlock to the Hangover Lead, or would you run it to the mouth of Slick Rock Creek?

A. Doing away with all lines, taking the course from the code, I would be liable to go most direct line to the main lead.

Q. 36. The most direct line to the main lead would be to the top of Hangover, would it not?

A. I don't know that it would be the most direct line, there might be a straight line, but taking meanders of ridge from that point it would probably reach the main ridge with as short a distance as any other.

Q. 37. When you say the main ridge you mean the Hangover do you not?

A. Yes, sir.

Q. 38. If you had been a surveyor running that line originally down to north bank of Tennessee River, at the fore and aft hemlock, and then you had run the line from there down the river to the mouth of Slick Rock Creek, would you have made your survey and calls show that you ran down the river to the mouth of Slick Rock Creek or would you have made the call as the commissioners made it and as it is in the code?

A. I always make my calls special when I strike a water course, and calling for it when I run with it.

Q. 39. When a surveyor is running a line, he makes notes as he goes along, and then when he is through running the line he makes out his report showing the calls of the line he ran, doesn't he?

A. Yes, sir; I always did.

Q. 40. Isn't it a fact that surveyors sometimes run more than one line and then determine afterwards which line to adopt, and then report the adopted line in their survey?

A. Yes, sir, I have done that in locating warrants of surveys.

Q. 41. In that case, they leave out of their report, the calls of all
other lines, except the one finally adopted, do they not?

242 A. Yes, sir; they would omit the calls of all except the one adopted.

Q. 42. You have stated that the distance from the fore and aft hemlock down the river to a point opposite Slick Rock Creek is 89 chains; this is more than a half mile isn't it?

A. Yes, sir.

Q. 43. Did you examine to see whether there was marked line running from hemlock down the river to the point opposite the mouth of Slick Rock Creek?

A. Yes, sir.

Q. 44. Did you find any state line marks on that line?

A. Nothing that satisfied us that they were state line marks; we found some old hacks and blazes down the river, but did not consider them state line marks.

Q. 45. Why did you examine for marks on this line on the north side of the river, when the state line calls for crossing the river to the south side from the fore and aft hemlock?

A. I had previously examined the south side for marks but had failed to find any opposite the fore and aft hemlock.

Q. 46. Did you examine for marks on the south side all the way from a point opposite the hemlock down Slick Rock Creek?

A. No, sir; not all the way down.

Q. 47. You stated in your direct examination, Mr. Hyde, that you ran the state line from the turnpike road down to the Tennessee river, and found 20 to 25 state line marks. What is the distance from that turnpike road down to river?

A. I do not know the distance, never having measured it, but it is something over three miles, maybe near four, but I have never measured it.

Q. 48. As I understand your direct examination, you counted the growths on the hemlock block filed as Exhibit 6 to your deposition, twice? One time you made the growth 76 years and the other time 77 years?

A. Yes, sir.

Q. 49. Who procured the passage of the act of North Carolina General Assembly passed March 1, 1897, and copy of which is filed as Exhibit No. 7 to your deposition?

A. Mr. Deaton introduced the bill, our representative, so he wrote me.

Q. 50. Did you have any conference with Mr. Deaton about introducing this bill, before he introduced it?

A. I don't remember that I did. There was a law in the statute at that time providing for the location of the state line be-
243 tween N. C. & Tenn., and that county surveyor of Graham county should do the work for N. C.

Q. 51. If there was already a statute providing for this survey, why was the new statute of March 1, 1897, procured to be passed?

A. The former law was not as full as the last act passed.

Q. 52. What part did you take in procuring the passage of this statute?

A. I don't know that I took any part in it any way. I may have written Mr. Deaton but don't remember how that is now, but I got a letter from him.

Q. 53. Do you know Mr. J. W. Cooper, one of the defendants in this cause?

A. Yes, sir.

Q. 54. Did you have any conference with him about this statute?

A. None whatever, that I recollect of; if I did I have forgotten it.

Q. 55. Did you have any talk with him about it since the statute was passed?

A. I may have but don't know that I have. I may have a
him his opinion, but don't remember that I have.
Q. 56. Don't you know from him or otherwise, that he was a
in procuring the passage of this statute?
A. No, sir; I do not.
Q. 57. How long were you and Mr. Lovingood making the su
reported in your report filed as Exhibit No. 8 to your deposition
A. Three weeks in my recollection now.
Q. 58. Did the statute under which you made this survey di
you to begin at mouth of Slick Rock Creek?
A. No, sir, directed to begin at state line on the south bank
Tennessee river.
Q. 59. Did you at that time know where the state line reached
river on north side at the fore and aft hemlock?
A. I had never seen the hemlock at that time, that I remem
Q. 60. Who directed you to begin that survey at the mouth
Slick Rock creek?
A. No one at all.
Q. 61. How then did you know that that was the place to beg
the survey?
A. By information obtained from marks on trees, and pape
grants from state of N. C.
Q. 62. Had your attention ever before that time been called
the marks on Slick Rock Creek?
244 A. I had never searched Slick Rock creek for lines pri
to that.
Q. 63. How did you happen to go to Slick Rock creek to searc
for lines?
A. We went into the Talassee Trail and camped and searched bot
sides of the creek; also the Hangover lead for state line marks, an
arrived at the conclusion that the state line ran up the creek from th
marks we found.
Q. 64. At the time you entered on this survey, you knew of th
litigation in this cause about that land, did you not?
A. I had heard of it.
Q. 65. You had also heard that Bogle and Hayes had run a lin
up Slick Rock creek, hadn't you?
A. Yes, sir; I had heard they had run up the creek.
Q. 66. You also knew or heard that one McClellan had a fe
years before that, run and marked a line which he called the stat
line?
A. Yes, sir; I had heard that.
Q. 67. He ran and marked that line under a N. C. statute, didn'
he?
A. No, sir; I don't understand that there was any statute at th
time he ran the line; if there was I never seen it.
Q. 68. He ran that line for the state of North Carolina, didn'
he?
A. That was my understanding.
Q. 69. That line didn't run up Slick Rock Creek, as you ran you
line, did it?

A. It is not my information that it did.

Q. 70. Do you know of any other lines in that locality that had been run by state of N. C. or North Carolina surveyors, as the state line?

A. No, sir; I do not.

Q. 71. Coming now, Mr. Hyde, to the oak block filed as Exhibit A to the deposition of W. D. Hale, can you swear that the marks on that block were not made by an axe?

A. I can't swear that they were not made by an axe, but can swear that I see no axe marks on them now.

Q. 72. The tree from which that block was taken grows on top of Hangover in a poor place, doesn't it?

A. The land is not very rich where it grows; it is on top of the ridge.

Q. 73. Is it not a scrubby, unhealthy tree?

A. Yes, sir; I don't consider it a healthy tree?

Q. 74. Is not the wood of that tree brittle and liable to break rather than sliver?

245 A. I would think from the appearance that it is brittle on the outside of the tree but near about the heart it may be tough.

Q. 75. Is it not a fact that the wood of that tree is more liable to break and not to sliver when cut with an axe, than wood of the hemlock or spruce pine block, which are exhibited in this case?

A. I don't know that it is; hemlock is very brittle wood.

Q. 76. Assuming that hemlock is as brittle as oak, still would not the oak grown upon a poor spot be more brittle than hemlock grown upon better ground and with a healthier growth?

A. I don't know how that would be; I can't say as to that.

Q. 77. Please examine white oak block exhibited with W. D. Hale's deposition and state whether the scars or cat faces shown on the inside of outer portion of that block, are not similar to the scars shown on Exhibit A to Hale's deposition?

A. They are not the s ame. The upper scar of white oak block has angle running across it; the lower scar seems to have small sliver of wood grown in it, but no appearance of axe cut across it.

Q. 78. Is it not a fact that the crease or crack in the lower scar on the white oak block runs up and down the block and not across it?

A. It runs up and down it nearly; a slight angle.

Q. 79. Then in that particular, this scar on the white oak block is similar to the scar on Exhibit A the black oak block is it not?

A. It is as to the upper scar; on the black oak; the lower scar has two scars.

Q. 80. Is it not a fact that all the blocks filed as exhibits in this cause show that they were taken from healthy trees except the black oak block Ex. A to Hale's deposition, and the sourwood block Exhibit B to Hale's deposition?

A. Generally speaking, the blocks exhibited seem to have been of healthy growth, except those two.

Q. 81. Recurring to the chestnut oak stump about which you

have testified in your direct examination, you have said that the scar on that chestnut oak stump that is caused by falling timber and may have been caused by limbs on lap of tree rubbing against the outside bark as they sometimes move and rub against another tree. How far above the ground on this stump is this old scar which you say
246 may have been made by falling timber or by limb on lap of tree rubbing against outside bark?

A. I think about three feet.

Q. 82. Does not that stump lean towards that scar?

A. No, sir.

Q. 83. Is that stump straight?

A. The stump is straight or about it.

Q. 84. Did you find any fallen tree alongside that stump which may have caused that scar by falling?

A. The trunk of that tree or another was within a few feet of it.

Q. 85. Was it lying with end or side towards the stump?

A. My recollection is that it was lying with end little past the stump.

Q. 86. Was it lying on the side of stump next the scar?

A. Yes, sir; lying on side next the scar. Few feet from stump.

Q. 87. On which side of the stump was the scar?

A. Rather on north side of stump.

Q. 88. Then the fallen tree was lying east and west?

A. In an east and west direction.

Q. 89. Did that fallen tree have any limbs on it?

A. None that I remember noticing.

Q. 90. Was it a chestunt oak tree?

A. I do not remember; don't think bark was on the tree.

Q. 91. Do you mean by your answer to direct question to give the court to understand that the scar on that stump was made by that tree falling against it?

A. No, sir; I don't say that that tree made the scar.

Q. 92. You have said the scar may have been caused by limb on the lap of tree rubbing against outside bark. You mean by lap of tree, the limb portion of fallen tree?

A. Yes, sir.

Q. 93. Do you mean to say that the limbs of fallen tree rubbed against that stump and caused that scar?

A. I say it may have done it.

Q. 94. Did it do it while the tree was falling or after it fell?

A. I have seen scars made on trees by falling timber; also by limbs rubbing against the tree after they had fallen, lying against the tree.

Q. 95. Coming back now to the dead fallen tree which you say lay within a few feet of this stump, what part of that tree was nearest the stump—was it the butt of the tree or limb portion?

247 A. It was the trunk of the tree; I don't remember as to limbs.

Q. 96. Did you cut into this chestnut oak stump to see what mark the wood showed?

A. I did not, but Mr. Carver that was with me did.

Q. 97. Isn't it a fact, Mr. Hyde, that you was sent to this chestnut oak stump for the express purpose of devising some excuses for that mark being on the stump outside of axe mark?

A. No, sir.

Q. 98. Do you mean for the court to understand you as swearing that this mark on this chestnut oak stump could not have been made with an axe?

A. I say there is no appearance of an axe mark on that piece of bark that is visible to me.

Q. 99. Do you swear that this mark could not have been made by an axe?

A. I don't swear it could not have been made with an axe.

Q. 100. Do you swear it was made by tree falling against it or by limb of lap rubbing against it?

A. No, sir.

Re-examination:

Q. 1. Please state whether the extract from the depositions of Hale, Wilson and Muller the first time that Hale's deposition was taken and which you have handed to Mr. Carver on his re-examination, said re-examination being taken before your re-examination, is the only copy of Mr. Hale's deposition you ever had with you in running that line?

A. It is the only one.

Q. 2. Did you ever have with you in running that line any copy of Mr. Hale's second deposition?

A. I did not.

Q. 3. State what instructions were given you as to running the Hangover Lead line, as to ascertaining whether it was true state line and what was the purpose for which said extract from the said deposition or duplicate thereof, was furnished you?

A. I was asked to go and re-examine the Hangover Lead as to state line marks, and given the deposition to ascertain certain points called for and to locate those points, in the deposition and report.

Q. 4. Was the extracts of deposition given that you might locate trees and be certain that you examined the same trees?

A. Yes, sir; that was the express purpose they were furnished for, as I understood it.

248 Q. 5. Have you any theory or opinion as to why it would have been natural for commissioners of N. C. & Tenn., in running state line in 1821 to have run up Slick Rock creek, as shown by the marked line which you found?

A. It would have been natural as I think, to locate some point on the south side of river when they were on the north side; I have opinion about it but don't know that it would be worth my while to say anything about it.

Q. Please file as Exhibit 12 to your deposition original North Carolina grant No. 2969, about which you testified on your direct examination?

A. I so file it.

Q. Please file as Exhibit No. 13 to your deposition certified copy of North Carolina Entry No. 455 by John M. Lyle, here shown you?

A. I so file it.

Q. What is the nearest ford on the Little Tennessee River from the lands in dispute?

A. The Tallassee Ford is the nearest. It is down the river from Slick Rock some seven or eight miles.

EXHIBIT No. 7 TO DEPOSITION OF H. P. HYDE.

An Act to Locate the Line Between This State and Tennessee.

The General Assembly of North Carolina do enact:

SECTION 1. That the county surveyors of Graham and Cherokee counties be and they are hereby authorized, appointed and fully empowered to survey and locate the boundary line between said counties and the state of Tennessee, to the top of the Tennessee Ball Mountain. They shall run said line according to the calls set out in the Act of the General Assembly of North Carolina at its session of one thousand eight hundred and twenty-one (1821), being chapter forty-one (XLI) of said Acts, and entitled "An act to confirm the boundary line between this state and the state of Tennessee and for other purposes." The said surveyors shall follow the calls contained in said chapter, and mark and distinctly locate said line, and hereafter in all the courts of this state, and for every purpose whatever, the line so located nad marked by said surveyors shall be the true line between North Carolina and Tennessee.

SECTION 2. The said surveyors may employ such assistance as they may need.

SECTION 3. The auditor of the state is hereby authorized to draw his warrant on the treasurer of the state for three hundred
249 dollars (300.00) in favor of said county surveyors for locating said line, and out of same they shall pay all expenses of the survey, and establishing said line, and the treasurer shall pay said warrant: Provided said warrant shall not be drawn until a copy of said survey, with the calls distinctly set forth, be transmitted to the secretary of state, signed officially, by said surveyors. The secretary of state shall file said survey in his office for future use.

SECTION 4. In all indictments and proceedings in the courts of this state for every and all purposes whatsoever, the lines so located by the said surveyors shall be recognized as the true line between this state and Tennessee.

SECTION 5. All laws and clauses of laws in conflict with this act are hereby repealed.

SECTION 6. This act shall be in force from and after its ratification.

In the General Assembly read three times and ratified this 1 day of March, 1897.

A. T. HILEMAN,
Speaker of the House of Representatives.
C. A. REYNOLDS,
President of the Senate.

[Great Seal of the State of North Carolina. May 20, 1775.
Esse Quam Videri.]

STATE OF NORTH CAROLINA,
OFFICE OF SECRETARY OF STATE,
RALEIGH, *September 23rd,* 1897.

I, Cyrus Thompson, secretary of state of the state of North Carolina, do hereby certify the foregoing two (2) sheets to be a true copy from the records of this office.

Done in office at Raleigh this 23rd day of September, 1897.

CYRUS THOMPSON,
Secretary of State.

[State of North Carolina. May 20, 1775. Department of State. Esse Quam Videri.]

Endorsed: Filed Sep. 30, 1897. J. T. Carter, dep. clerk.

250 EXHIBIT NO. 8 TO DEPOSITION OF H. P. HYDE.

NORTH CAROLINA,
Graham County:

To the Honorable Secretary of State:

Pursuant to an act of the General Assembly for the year 1897, entitled "An Act to locate the line between North Carolina and Tennessee"—

We, H. P. Hyde, county surveyor of Graham county, and F. M. Lovingood, county surveyor of Cherokee county, have surveyed and located the boundary line between said counties in the state of North Carolina and the state of Tennessee according to the calls set out in Chapter Forty-one (XLI), Laws of 1821, and have distinctly located and marked said line from the south bank of the Tennessee river, at the point where the line set out in said Chapter Forty-one (XLI), Acts of 1821, crosses said river, and at the mouth of Slick Rock creek, and runs thence up said creek to the lower point of the Big Fodder Stack Lead, being five miles, one hundred and one poles from Tennessee river. Thence up said Lead to the top of the Big Fodder Stack. Thence up the divide between Slick Rock creek in North Carolina and Citico creek in Tennessee, with the heights and peaks thereof passing Rock Stack Knob and continuing to a point on said divide where it connects with a lead running from Hawk Knob to the Bob Stratton Bald, and about one (2) half mile south west of said Bald at which a stone is set up, marked "N. C. 10 M." and is situate on the divide between the head waters of Slick Rock and Santeetla creeks in North Carolina and Citico creek in Tennessee. Thence with the divide leading from the Bob Stratton Bald through the John Stratton Meadows to the Haw Knob. Thence in a southwest direction with the divide to Laurel Knob to what is known as state line ridge. Thence down state line ridge to Tellico river, crossing said river, and thence up a ridge just opposite said state line ridge, in a south west direction, passing an old holly tree

at forty poles from said river, marked on the west side "86 M." and continuing to the top of the dividing ridge leading to the Tennessee or Beaver Dam Bald. Thence up said divide to the said Tennessee or Beaver Dam Bald, which Bald is on the Uncay or Unaka Mountain at which point on said Bald a stone is set up marked "N. C. 25 M. 1897"—whole distance from the beginning point at the Tennessee river, twenty-five miles and one hundred and eleven poles, and more particularly described as follows:

Beginning at a large rock on the south bank of Tennessee river on the west bank of Slick Rock creek, which said rock is marked on the east side "N. C. 65 M.";

251 Thence running south up said creek as it meanders, 54 poles;
Then S. 6 E. 24 poles;
Then S. 20 W. 20 poles;
Then S. 57 W. 30 poles;
Then S. 42 poles;
Then S. 60 W. 40 poles;
Then S. 17 E. 40 poles;
Then S. 22 W. 14 poles;
Then N. 60 W. 44 poles;
Then S. 85 W. 80 poles;
Then S. 59 W. 24 poles;
Then S. 58 poles;
Then S. 80 W. 40 poles;
Then S. 13 E. 40 poles;
Then S. 48 poles;
Then S. 35 E. 18 poles;
Then S. 26 W. 14 poles;
Then N. 62 W., crossing Slick Rock Trail at 10 poles, whole distance 20 poles;
Then N. 84 W. 22 poles;
Then S. 24 W. 41 poles;
Then N. 80 W. 16 poles;
Then N. 50 W. 52 poles;
Then West 20 poles;
Then S. 30 W. 10 poles; to the mouth of Little Slick Rock creek;
Then S. 10 W. 28 poles;
Then S. 30 W. passing the mouth of Nichol's Cove Branch at 44 poles, whole distance 76 poles;
Then S. 15 W. 56 poles;
Then S. 58 W. 24 poles;
Then S. 68 W. 14 poles;
Then N. 70 W. 16 poles;
Then N. 55 W. 30 poles;
Then N. 85 W. 12 poles;
Then S. 50 W. 14 poles;
Then S. 35 W. 10 poles;
Then S. 27 E. 20 poles;
Then S. 73 W. 10 poles;
Then N. 77 W. 30 poles;
Then N. 17 W. 20 poles;
Then N. 55 W. 18 poles;

Then S. 65 W. 14 poles;
Then S. 23 W. 24 poles;
Then S. 38 poles;
252 Then S. 50 W. crossing an old trail leading from Tennessee to Deputy Place at 18 poles, same course, whole distance 32 poles;
Then S. 32 poles;
Then S. 28 W. 20 poles;
Then N. 81 W. 20 poles;
Then S. 20 W. 24 poles;
Then S. 77 W. 10 poles;
Then N. 76 W. 28 poles;
Then S. 71 W. 12 poles;
Then S. 30 W. 16 poles;
Then S. 20 E. 8 poles;
Then S. 51 E. 26 poles;
Then S. 42 W. 24 poles;
Then S. 25 E. 8 poles;
Then N. 85 E. 12 poles;
Then S. 40 E. 8 poles;
Then S. 30 W. 16 poles;
Then S. 14 poles;
Then S. 37 W. 30 poles;
Then S. 10 E. 18 poles, passing falls in said creek;
Then S. 70 E. 8 poles;
Then S. 20 W. 14 poles;
Then S. 4 E. 14 poles;
Then S. 14 W. 34 poles;
Then S. 47 W. 26 poles;
Then S. 10 E. 14 poles to a spruce pine on the west side of said Slick Rock creek, marked on the east side "N. C. 5 M." it being 5 miles 101 poles from the mouth of said Slick Rock creek as it meanders, said pine tree being at the mouth of the first branch that heads north of Big Fodder Stack at the point of the ridge that leads to the said Big Fodder Stack;
Then with said ridge S. 11 W. 18 poles;
Then S. 5 E. 11 poles;
Then S. 32 W. 31 poles;
Then N. 65 W. up said ridge 14 poles;
Then N. 75 W. 14 poles;
Then S. 77 W. 14 poles;
Then S. 72 W. 22 poles;
Then S. 38 W. 8 poles;
Then S. 12 W. 26 poles;
Then S. 35 W. 13 poles;
Then S. 68 W. 12 poles;
Then S. 33 W. 14 poles;
Then S. 50 W. 20 poles;
Then S. 42 W. 16 poles;
253 Then S. 60 W. 30 poles;
Then S. 38 W. 34 poles;
Then S. 60 W. 22 poles;

Then S. 7 W. 10 poles;
Then S. 32 W. 12 poles;
Then S. 25 W. 8 poles, to a rock marked on the east side "N. C. 6 M."
Then same course S. 25 W. 20 poles;
Then S. 35 W. 24 poles;
Then S. 60 W. 24 poles;
Then S. 50 W. 16 poles;
Then S. 77 W. 26 poles;
Then N. 82 W. 34 poles;
Then N. 59 W. 24 poles;
Then S. 80 W. 24 poles to a spruce pine on old fore and aft tree on the Big Fodder Stack Lead;
Then W. 16 poles;
Then S. 57 W. 22 poles to the top of the Big Fodder Stack;
Then S. 25 E. 16 poles;
Then S. 5 E. 24 poles;
Then S. 30 E. 50 poles to a rock marked "N. C. 7 M."
Then same course S. 30 E. 28 poles;
Then S. 14 W. 52 poles;
Then S. 40 E. 20 poles;
Then S. 30 E. 25 poles;
Then S. 7 E. 8 poles;
Then S. 28 E. 34 poles;
Then S. 34 E. 18 poles;
Then S. 58 E. 20 poles;
Then S. 80 E. 28 poles;
Then S. 60 E. 36 poles;
Then S. 30 E. 6 poles to the top of Rock Stack;
Then S. 25 W. 18 poles;
Then S. 58 E. 13 poles to a stone marked "N. C. 8 M."
Then S. 12 E. 80 poles;
Then S. 13 W. 12 poles to the Glen Cove Gap;
Then S. 10 poles;
Then S. 60 E. 12 poles;
Then S. 47 E. 10 poles;
Then N. 71 E. 24 poles;
Then S. 66 E. 52 poles;
Then S. 10 W. 12 poles;
Then S. 12 E. 6 poles;
Then S. 20 W. 20 poles;
Then S. 37 W. 26 poles;
Then S. 28 W. 32 poles;
Then S. 7 W. 10 poles;
Then S. 19 W. 4 poles to a stone marked "N. C. 9 M."
254 Then same course S. 19 W. 28 poles;
Then S. 17 E. 20 poles;
Then S. 42 E. 10 poles;
Then S. 61 E. 4 poles;
Then S. 46 E. 24 poles;
Then S. 13 E. 10 poles;
Then S. 3 W. 16 poles;

Then S. 15 W. 8 poles;
Then S. 8 E. 8 poles;
Then S. 24 E. 62 poles;
Then S. 3 W. 18 poles;
Then S. 25 W. 20 poles;
Then S. 2 E. 16 poles;
Then S. 5 W. 14 poles;
Then S. 10 E. 26 poles;
Then S. 28 E. 14 poles;
Then S. 50 E. 18 poles;
Then S. 70 W. 4 poles to a stone marked "N. C. 10 M." about one-half mile S. W. of Bob Stratton Bald on the divide between the head waters of Slick Rock and Santeetla creeks in North Carolina and Citico creek in Tennessee;
Then S. 70 W. 6 poles;
Then S. 60 W. 12 poles;
S. 39 W. 16 poles;
Then S. 25 W. 18 poles;
Then S. 8 E. 14 poles;
Then S. 26 W. 10 poles;
Then S. 40 W. 20 poles;
Then S. 55 W. 12 poles;
Then S. 30 W. 10 poles;
Then S. 42 W. 60 poles;
Then S. 52 W. 26 poles;
Then S. 25 W. 48 poles;
Then S. 30 W. 20 poles;
Then S. 45 W. 12 poles;
Then S. 22 W. 16 poles;
Then S. 37 W. 20 poles to a stone marked "N. C. 11 M." same course S. 37 W. 20 poles;
Then S. 24 poles;
Then S. 30 W. 38 poles;
Then S. 60 W. 24 poles;
Then S. 87 W. 12 poles;
Then S. 44 W. 14 poles;
Then S. 25 W. 6 poles;
Then S. 2 W. 32 poles;
Then S. 73 W. 34 poles;
Then S. 82 W. 14 poles;
255 Then S. 66 W. 28 poles;
Then N. 66 W. 14 poles;
Then N. 85 W. 12 poles;
Then S. 71 W. 48 poles to a large rock marked "N. C. 12 M., 1897."
Then S. 83 W. 13 poles;
Then S. 43 W. 14 poles;
Then S. 17 W. 18 poles;
Then S. 54 W. 20 poles;
Then S. 73 W. 52 poles;
Then S. 33 W. 30 poles;
Then S. 25 W. 14 poles;

Then S. 10 W. 21 poles;
Then S. 53 E. 20 poles;
Then S. 40 E. 50 poles;
Then S. 24 E. 20 poles;
Then S. 37 E. 16 poles; to a rock marked "N. C. 13. M."
Then same course, S. 37 E. 28 poles;
Then S. 41 W. 50 poles;
Then S. 10 E. 16 poles;
Then S. 45 W. 12 poles;
Then S. 52 poles;
Then S. 80 E. 18 poles;
Then S. 85 E. 24 poles;
Then S. 70 E. 10 poles;
Then S. 75 E. 36 poles;
Then S. 35 E. passing through the gap of the John Stratton Meadows at 11 poles, same course, whole distance 29 poles;
Then S. 17 E. 30 poles;
Then S. 23 E. 15 poles; to a stone marked on East side "N. C. 14 M."
Then S. 28 E. 30 poles;
Then S. 32 W. 10 poles;
Then S. 14 W. 27 poles;
Then S. 39 W. 22 poles;
Then S. 45 W. 16 poles;
Then S. 22 W. 42 poles;
Then S. 62 poles;
Then S. 17 W. 30 poles;
Then S. 24 W. 58 poles;
Then S. 30 E. 13 poles to a stone marked on the East side "N. C. 15 M."
Then same course S. 30 E. 10 poles;
Then S. 25 W. 64 poles;
Then S. 16 W. 34 poles;
Then S. 6 E. 26 poles;
Then S. 3 W. 10 poles;
256 Then S. 14 W. 20 poles;
Then S. 14 E. 32 poles;
Then S. 21 E. 12 poles;
Then S. 43 E. 20 poles;
Then S. 61 E. 16 poles;
Then S. 75 E. 46 poles;
Then E. 36 poles to a stone marked on the north side "N. C. 16 M."
Then same course E. 16 poles;
Then S. 64 E. 44 poles to Haw Knob;
Then S. 4 W. 12 poles;
Then S. 25 E. 16 poles;
Then S. 5 W. 16 poles;
Then S. 7 E. 26 poles;
Then S. 38 E. 8 poles;
Then S. 52 E. 28 poles;
Then S. 43 E. 20 poles;

Then S. 25 E. 44 poles;
Then S. 63 E. 46 poles;
Then S. 35 W. 16 poles;
Then S. 25 W. 12 poles;
Then S. 40 W. 16 poles to a stone marked "N. C. 17 M."
Then same course S. 40 W. 20 poles;
Then S. 17 W. 20 poles;
Then S. 4 poles;
Then S. 27 E. 18 poles;
Then S. 15 E. 8 poles to the top of Laurel Knob;
Then S. 30 W. 12 poles;
Then S. 40 W. 26 poles;
Then S. 45 W. 60 poles;
Then S. 67 W. 10 poles;
Then S. 50 W. 34 poles;
Then S. 60 W. 30 poles;
Then S. 50 W. 44 poles;
Then S. 65 W. 10 poles;
Then S. 50 W. 24 poles to a stone marked "N. C. 18 M."
Then S. 60 W. 8 poles;
Then S. 73 W. 12 poles;
Then S. 83 W. 8 poles;
Then S. 50 W. 16 poles;
Then S. 18 W. 34 poles;
Then S. 28 W. 34 poles;
Then S. 36 W. 46 poles;
Then S. 12 poles;
Then S. 30 W. 36 poles;
Then S. 15 W. 22 poles;
Then S. 28 poles;
Then S. 35 W. 10 poles;
257 Then S. 45 W. 18 poles;
Then S. 55 W. 34 poles;
Then S. 32 W. 12 poles; to a stone marked "N. C. 19 M."
Then S. 45 W. 54 poles;
Then S. 27 W. 14 poles;
Then S. 45 W. 14 poles;
Then S. 15 W. 16 poles;
Then S. 70 W. 16 poles;
Then W. 12 poles;
Then S. 65 W. 14 poles;
Then S. 71 W. 12 poles;
Then N. 80 W. 12 poles;
Then S. 53 W. 12 poles;
Then S. 32 W. 8 poles;
Then S. 22 W. 10 poles;
Then S. 43 W. 22 poles;
Then S. 27 W. 14 poles;
Then S. 23 E. 16 poles;
Then S. 26 W. 14 poles;
Then S. 55 W. 36 poles;
Then S. 45 W. 24 poles to a stone marked "N. C. 20 M."

Then same course S. 45 W. 6 poles;
Then S. 75 W. 8 poles;
Then N. 80 W. 12 poles;
Then S. 62 W. 22 poles;
Then S. 45 W. 16 poles;
Then S. 78 W. 16 poles;
Then N. 72 W. 12 poles;
Then S. 68 W. 30 poles;
Then S. 86 W. 14 poles;
Then S. 81 W. 16 poles;
Then S. 74 W. 16 poles;
Then S. 60 W. 34 poles;
Then S. 45 W. 12 poles;
Then S. 60 W. 34 poles;
Then S. 73 W. 16 poles;
Then S. 65 W. 20 poles;
Then S. 77 W. 8 poles;
Then S. 57 W. 14 poles;
Then S. 83 W. 14 poles; to a rock marked on the south side "N. C. 21 M."
Then S. 65 W. 12 poles;
Then S. 35 W. 10 poles;
Then S. 87 W. 12 poles;
Then N. 72 W. 12 poles;
Then S. 70 W. 18 poles;
Then W. 8 poles;
Then S. 55 W. 16 poles;
258 Then S. 67 W. 10 poles;
Then S. 42 W. 12 poles;
Then S. 77 W. 26 poles;
Then S. 64 W. 14 poles;
Then S. 60 W. 28 poles;
Then S. 50 W. crossing Telico river at 12 poles, whole distance 16 poles;
Then S. 30 W. 12 poles;
Then S. 40 W. 8 poles;
Then S. 32 W. 8 poles;
Then S. 48 W. 8 poles to a large holly tree with an old mark "86 M." on it;
Then S. 37 W. 26 poles;
Then S. 16 W. 8 poles;
Then S. 30 E. 28 poles;
Then S. 15 E. 20 poles;
Then S. 45 W. 8 poles marked "N. C. 22 M." same course S. 45 W. 14 poles;
Then S. 84 W. 16 poles;
Then S. 60 W. 10 poles;
Then S. 8 W. 12 poles;
Then S. 25 W. 12 poles;
Then S. 40 W. 15 poles;
Then S. 64 W. 10 poles;
Then S. 53 W. 20 poles;

Then S. 6 W. 18 poles;
Then S. 75 W. 34 poles;
Then S. 24 W. 20 poles;
Then W. 11 poles;
Then S. 78 W. 27 poles;
Then S. 40 W. 10 poles;
Then S. 29 W. 10 poles;
Then S. 46 W. 14 poles;
Then S. 68 W. 14 poles;
Then W. 10 poles;
Then S. 68 W. 24 poles;
Then W. 10 poles to a rock marked "N. C. 23 M."
Then same course W. 12 poles;
Then S. 53 W. 20 poles;
Then S. 65 W. 17 poles;
Then N. 64 W. 49 poles;
Then S. 72 W. 8 poles;
Then S. 81 W. 24 poles;
Then N. 57 W. 12 poles;
Then N. 42 W. 34 poles;
Then N. 65 W. 28 poles;
Then N. 45 W. 20 poles;
Then N. 60 W. 12 poles;
259 Then S. 70 W. 14 poles;
Then S. 50 W. 42 poles;
Then S. 73 W. 14 poles;
Then N. 67 W. 14 poles to a stone marked "N. C. 24 M."
Then S. 57 W. 56 poles;
Then N. 82 W. 18 poles;
Then N. 43 W. 24 poles;
Then N. 30 W. 44 poles;
Then S. 42 W. 22 poles;
Then N. 60 W. 38 poles;
Then S. 52 W. 26 poles;
Then S. 25 W. 30 poles;
Then S. 70 W. 32 poles;
Then S. 85 W. 40 poles to a stone marked "N. C. 25 M. 1897," on the top of the Tennessee or Beaver Dam Bald, whole distance from beginning point at Tennessee river, twenty-five miles, one hundred and eleven poles.

This May 19th. 1897.

H. P. HYDE,
Co. Sur., Cherokee Co., N. C.
F. M. LOVINGOOD,
Co. Sur., Cherokee Co., N. C.

O. P. WILLIAMS,
H. M. LOVINGOOD,
C. C.

STATE OF NORTH CAROLINA,
OFFICE OF SECRETARY OF STATE,
RALEIGH, *Sept.* 23*rd*, 1897.

[The Great Seal of the State of North Carolina. May 20, 1775. Esse Quam Videri.]

I, Cyrus Thompson, secretary of state of the state of North Carolina, do hereby certify the foregoing ten (10) sheets to be a true copy from the records of this office.

Done in office at Raleigh this 23rd day of September, 1897.

CYRUS THOMPSON,
Secretary of State.

[State of North Carolina, Department of State, May 20, 1775. Esse Quam Videri.]

260 EXHIBIT 9 TO DEPOSITION OF H. P. HYDE.

No. 8234.

STATE OF NORTH CAROLINA:

Know ye, that we, for and in consideration of the sum of — dollars and — cents, paid into the treasury by W. H. Thomas, have given and granted and by these presents do give and grant unto W. H. Thomas a tract of land containing two thousand (2,000) acres, lying and being in the county of Cherokee, it being part of the land lately acquired by treaty from the Cherokee Indians, and bounded as follows, viz.: On the Cheoah and Tennessee river:

Beginning on a small spruce pine on the state line at the mouth of Slick Rock creek, and about 1 pole N. E. of the corner of No. 611, and runs with the state line south 25 east 221 poles to a corner of said No.;

Then with that line north 65 degrees east 220 poles to a corner of No. 405;

Thence with its line south 53 west crossing the Tallassa Ford at 9 onts and 6 links, 208 poles to a black oak on said line;

Then south 10 west 74 poles to a chestnut;

Then south 24 poles to a pine;

Then south 45 west 46 poles to a white oak, Devil's Bear creek and Slick rock;

Then S. 15 W. 116 poles to 5 chestnuts;

Then south 20 east 234 poles to a chestnut on the top of a ridge;

Then north 65 east 194 poles to a forked black oak;

Then north 85 east 40 poles to a chestnut oak;

Then south 60 east crossing Bear creek at 104 poles and crossing the left hand fork at 120 poles and crossing the old Tolopa trail at 180 poles, 640 poles to a white oak in a cove;

Then north 70 east crossing the ford at 19 onts and 2 pins, 440 poles to a maple;

Then north 15 east 104 poles to a spruce pine;

Then north 35 west 40 poles to chestnut oak on the bank of Cheoah river;
Then down the river north 20 east to a ford and pointers on the bank of said river, and on the line of No. 1727;
Then south 45 west 120 poles to a black oak, corner of said No. and the southwest corner of No. 1724;
Then with that line north 5 west 452 poles to a corner of No. 611;
Then with that line north 25 east 220 poles to a corner of said No.
261 Then with that line south 65 west 220 poles to the beginning, as by the plat hereunto annexed doth appear, together with all woods, waters, mines, minerals, hereditaments and appurtenances to the said party belonging or appertaining, to hold to the said William H. Thomas, heirs and assigns forever, yielding and paying to us such sums of money yearly or otherwise as our general assembly from time to time may direct, and promising obedience to all acts of the general assembly of this state now existing or hereafter to be enacted, concerning the passage of fish in the waters of said premises.

Entered 1st June, 1853.

In witness whereof we have caused these our letters to be made patent, and our great seal to be hereunto affixed.

Witness Alfred M. Scales, Esq., our Governor and Commander in Chief at Raleigh, the 1st day of December, in the one hundred and twelfth year of our independence, and in the year of our Lord one thousand eight hundred and eighty seven.

A. M. SCALES, *Governor.*

By Command:

[L. S.] W. L. SAUNDERS,
Secretary of State.

Recorded and registered March 2nd, 1899.

W. F. MANNEY,
Reg. of Deeds.

STATE OF NORTH CAROLINA,
Graham County:

I do hereby certify that this is a true copy of Grant No. 8234 as recorded in my office. Witness my hand and official seal, this Sept. 24th, 1897.

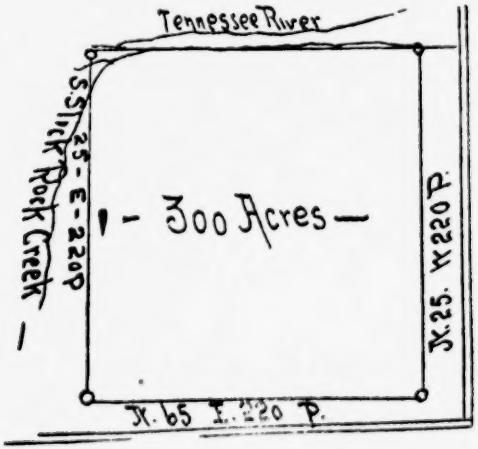
[SEAL.]

J. A. HYDE,
Reg. of Deeds.

Filed Sept. 30, 1897. J. T. Carter, Deputy Clerk.

262 EXHIBIT No. 11 TO DEPOSITION OF H. P. HYDE.

Scale 100 Poles per Inch.



STATE OF NORTH CAROLINA,
Graham County:

In pursuance to a warrant No. 418, issuing from the entry taker of said county, I have surveyed for James W. Cooper a certain tract of land lying in said county on the waters of said river and Slick Rock Creek, in District No. 10—

Beginning on a stake and small black gum at the mouth of said creek, on the south of Tennessee river, and west bank of said creek, about 1 pole west from a small spruce pine, corner of tract No. 920, on the state line, and runs south 25 degrees east 220 poles to a stake.

Thence N. 65 east two hundred and twenty poles to a stake;

Thence north 25 west two hundred and twenty poles to a stake on the south bank of said river;

Thence down said river with its meanders to the beginning.

Containing three hundred acres more or less, surveyed June the 18th, A. D. 1883.

H. P. HYDE, *C. S.*

JOHN C. HYDE,
&
WM. B. GIBSON,
} *C. C.*

Hyde, mark.

263 STATE OF NORTH CAROLINA:

No. 144.

Know ye, that we, for and in consideration of the sum of thirty-seven (37) dollars and fifty (50) cents paid into the treasury by James W. Cooper, have given and granted and by these presents do give and grant unto James W. Cooper a tract of land containing three hundred acres (300), lying and being in the county of Graham, Section No. —, in District No. 10, warrant No. 418, it being part of the land lately acquired by a treaty from the Cherokee Indians and sold in obedience to an act of the general assembly of this state, bounded as follows, on Tennessee river and Slick Rock creek:

Beginning *on* a stake and small black gum at the mouth of said creek on the south side of said river and west bank of said creek about 1 pole W. from a small spruce pine, corner of No. 920 on the state line and runs S. 25 degrees E. 220 poles to a stake;
Thence N. 65 degrees E. 220 poles to a stake;
Thence N. 25 degrees W. 220 poles to a stake on the south bank of said river;
Thence down said river with its meanders to the beginning.

As by the plat hereunto annexed doth appear together with all woods, waters, mines, minerals, hereditaments and appurtenances, to the said land belonging and appertaining, to hold to the said James W. Cooper, heirs and assigns forever: Yielding and paying to us such sums of money yearly or otherwise as our general assembly from time to time may direct, and promising obedience to all acts of the general assembly now existing, or hereafter to be enacted concerning the passage of fish in the waters of the said premises: Provided, always, That the said grantee shall cause this grant to be registered in the register's office of our said county of Graham within two years from the date hereof, otherwise the same shall be void.

Entered 22 March, 1883.

In testimony whereof, we have caused these our letters to be made patent, and our great seal to be hereunto affixed.

Witness, Thomas J. Jarvis, Esq., our governor and commander in chief, at Raleigh, the 22 day of August, in the one hundred and ninth year of our independence, and in the year of our Lord
264 one thousand eight hundred and eighty-four.

THOMAS J. JARVIS, *Gov.*

By Command:

[Great Seal of the State of North Carolina.]

W. L. SAUNDERS,
Secretary of State.

The within grant came to hand and was duly registered in the register's office of Graham county, North Carolina, Book "D" of Deeds, page 281, this 24th Dec., 1885.

W. F. MAUNEY,
Register of Deeds.

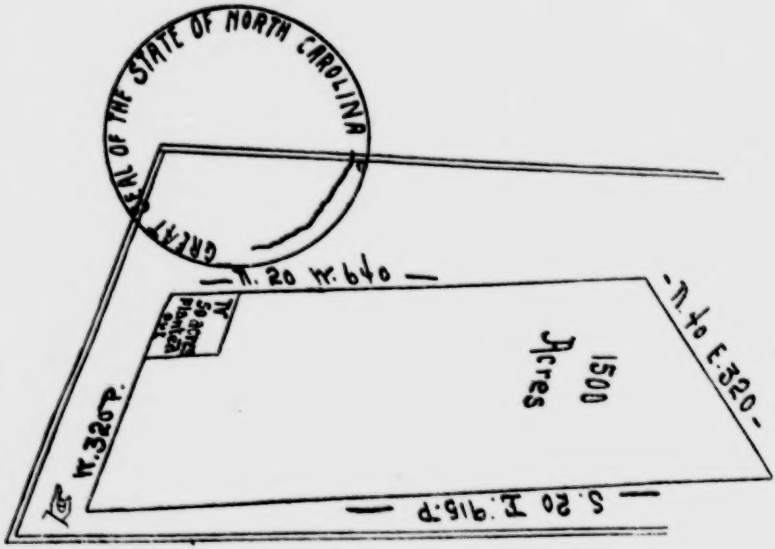
Recorded in the office of the secretary of state, in Book 174 on page 204.

W. L. SAUNDERS,
Secretary of State.

Filed Sept. 30, 1897. J. T. Carter, Deputy Clerk. Exhibit No. 11 to the deposition of H. P. Hyde.

EXHIBIT NO. 12 TO DEP. OF H. P. HYDE.

Scale 200 Poles per Inch.



265 STATE OF N. CAROLINA,
Cherokee County:

By virtue of a warrant, No. 4455, issuing from the entry taker of said county, I have surveyed for A. N. Colvard & Co., a certain tract of land lying in said county on the waters of Santeatly creek in District No. 10, beginning on a stake and cucumber on the N. bank of Santeatly creek near an old trail, and runs W. three hundred and twenty poles to a buckeye, then N. 20 W. six hundred and forty poles passing two farmer corners to a mountain oak; then north 40 E. three hundred and twenty poles to a Spanish oak on the top of the mountain; then S. 20 E. nine hundred and fifteen poles to the beginning; containing one thousand five hundred acres more or less, surveyed April 11th, 1856.

J. W. C. PIERSY, *S.*

C. B. JASPER ROGERS. }
WM. CARINGER. } C. A. COLVARD, *M.*

STATE OF NORTH CAROLINA:

No. 2969.

Know ye, that we, for and in consideration of the sum of eighty-seven dollars and 35 cents, paid into our treasury by S. W. Gilbert and W. H. Peet, have given and granted, and by these presents do give and grant unto S. W. Gilbert and W. H. Peet a tract of land containing one thousand five hundred acres, lying and being in the county of Cherokee, Section No. —, in District No. ten, it being part of the land lately acquired by treaty from the Cherokee Indians and sold in obedience to an act of the general assembly of this state, bounded as follows, viz: On the waters of Santeatley creek, beginning on a stake and cucumber on the north bank of Santeatley creek near an old trail and runs west three hundred and twenty poles to a buckeye; then north twenty west six hundred and forty poles passing two farmers' corners to a mountain oak; then No. 40 E. 320 poles to a Spanish oak on top of a mountain; then south twenty east nine hundred and fifteen poles to the beginning. Entered 29th December, 1854.

As by the plat hereunto annexed doth appear; together with all woods, waters, mines, minerals, hereditaments and appurtenances to the said land belonging or appertaining; to hold to the said S. W. Gilbert and W. H. Peet, their heirs and assigns forever. Yielding and paying to us such sums of money, yearly or otherwise, as our general assembly from time to time may direct; provided, always,
266 that the said grantee shall cause this grant to be registered in the register's office of our said county of Cherokee within twelve months from the date hereof, otherwise the same shall be void.

In testimony whereof, we have caused these our letters to be made patent, and our great seal to be hereunto affixed.

Witness, John W. Ellis, Esq., our governor, captain general and commander in chief, at Raleigh, the 3rd day of November, in the 85th year of our independence and in the year of our Lord, one thousand eight hundred and sixty.

JOHN W. ELLIS.

By Command:
RUFUS H. PAGE,
Secretary of State.

No. 2969.

L. W. Gilbert and W. H. Peet, 1500 acres, Cherokee County. Recorded in the secretary's office.

RUFUS H. PAGE, *Secretary.*

The within deed was registered in Book I, page 113, Jan'y 17th, 1862.

B. S. BRITTAIN, *Rec.*
S. V. BRITTAIN,
Dept. Rec.

The within grant was duly registered in the register's office of Graham Co., N. C., in Book "H," on page 485, on this Nov. 20th, 1896.

W. F. MANNY,
Reg. of Deeds.

Filed Sept. 30, 1897. J. T. Carter, Deputy Clerk. Exhibit No. 12 to deposition of H. P. Hyde.

EXHIBIT NO. 13 TO DEPOSITION OF H. P. HYDE.

J. M. Lyle, No. 445—Entered 640 Acres, Mar. 23d, 1853.

John M. Lyle, enters six hundred and forty acres of land in the county of Cherokee, and state of North Carolina, on the waters of Tennessee river, beginning at a stake on the line which divides the states of North Carolina and Tennessee at or near Slick Rock creek, 340 rods above the place where the old Indian trail leading from Tallassee old town in the state of Tennessee, to Cheoah, in
267 North Carolina, crosses said state line; thence with said state line up the creek and various courses for complement.
Mar. 23rd, 1853.
Wr. Isr. May 4, 53.

JOHN M. LYLE.

NORTH CAROLINA,
Cherokee County:

I, Thos. C. McDonald, register of deeds in and for the county and state aforesaid, do hereby certify that the above is a true copy of entry No. 445 entered by John M. Lyle, as appears on entry book one of the records of my office.

Given under my hand and seal of office, this 28th day of Sept. A. D. 1897.

[SEAL.] THOS. C. McDONALD,
Register of Deeds.

Exhibit No. 13 to deposition of H. P. Hyde. Filed Sept. 30, 1897. J. T. Carter, Deputy Clerk.

And further deponent saith not.

H. P. HYDE.

Sworn to and subscribed before me, this Sept. 28th, 1897.

[Seal J. T. Carter, U. S. Commissioner, Eastern District of Tenn.]

J. T. CARTER,
U. S. Com'r.

Filed Sept. 30, 1897. J. T. Carter, Deputy Clerk.

Next witness, REUBEN CARVER, of lawful age, being duly sworn, deposed as follows:

Q. 1. Are you the same Reuben Carver, whose deposition has already been taken in this case?

A. I am.

Q. 2. Have you since your former deposition been with Mr. H. P. Hyde and re-examined the alleged line along the Hangover lead and examined the state line north of the river with him?

A. Yes, sir.

Q. 3. Was that done this last week?

A. Yes, sir.

268 Q. 4. Were you with him when the block was taken from the spruce pine or hemlock on the north bank of Tennessee river?

A. Yes, sir.

Q. 5. Is the block which has been filed by him hereto the original block taken from that tree?

A. Yes, sir.

Q. 6. Did you see the marks on the various state line trees north of the river?

A. Yes, sir.

Q. 7. How did these marks compare as to apparent age, distance of marks apart, kind of axe and general appearance with what you testified to in your former deposition as being state line marks on the trees extending from the mouth of Slick Rock creek up creek to Fodder Stack ridge, thence up ridge to Fodder stack lead, thence along the lead at the time the party composed of Mr. Haynes Bogel and yourself ran the line?

A. It has the appearance of same hacks we followed south of river, up creek to Fodder Stack lead and with mountain—same axe, cut same way, and same size axe.

Q. 8. Did the marks on tree north of river indicate to your mind as surveyor that they were made by the same party and at same time as the marks on the Slick Rock creek line south of the river?

A. They appeared to have been made at same time; had that appearance to me.

Q. 9. In following this line north of river, did you ever now and then find trees freshly cut with H. & W.?

A. We found fresh marked trees with W. & H.; I did not count them.

Q. 10. You examined with Mr. Hyde the black oak tree on the Hangover lead about three-fourths of mile from river?

A. Yes, sir.

Q. 11. Please examine block Exhibit A to W. D. Hale's deposition and state whether taking into connection this block and the marks on that tree as they still stand, you see any marks showing said tree to have been marked as state line tree in 1821?

A. I do not.

Q. 12. Please state in your own language what you noticed about that tree and what you now notice about that block, that indicates

to your mind as surveyor that that tree was not marked as state line tree?

A. There were six blocks at the root of this tree, appeared to be cut at time as Ex. A.; they all had scars like Exhibit A. has
269 on inside, and some of them had those kind of scars on the bark; I picked one of those blocks up and dressed it up and started to bring it here; where we hitched up our horses to go down to Tennesse river at butt of Smoky Mt., on north side, I left the block laying there and come off and forgot it. I also noticed some scars all over the tree nearly in the bark like those on Exhibit A, and it had the appearance of the same kind of scars above and below where the block was cut out in the body of the tree as Exhibit A has on the inside. I mean by that it had marks where block was cut out on the body of the tree, with same kind of scars as there is on inside of Exhibit A. In cutting out block they had taken out tremendous piece, nearly half the tree and at different depths from the bark to the center of tree I noticed scars similar to those in Exhibit A.

Q. 13. Did you hunt on those pieces lying there and on body of tree to find axe marks?

A. Yes, sir; I did but I didn't find any.

Q. 14. When a hack is made in a tree with an axe, if the wood is preserved without decaying and the tree is blocked, ought there to be mark of axe or sliver showing on inside face of the outside block, and also the mark where the axe stopped on the outside face of the inside block?

A. Yes, that is shown by block Exhibit C. to dep. of H. S. Hayes; in other words it takes one or two years' growth to cover over the impression of the scar, and also the wood fills up the cut that has been made, and also wood grows down and fills up the cut that has been made of the old hack, then when it is split open the block shows the impression of the old hack on the new growth.

Q. 15. Does block Exhibit A. show anything of that sort?

A. Not a bit.

Q. 16. How will the scar when it heals be cracked, up and down or across?

A. It will show just the way the stroke of the axe hit the wood.

Q. 17. When a man stands and cuts a tree to mark a hack on, does he cut it up and down or slantingly?

A. He hacks it at an angle of about 45 degrees, in marking line trees.

Q. 18. Did Mr. Hyde, when you were with him run a line of Entry No. 920?

A. A part of one of the lines.

Q. 19. Did that line lead down off the side of the ridge?

A. Yes, sir.

Q. 20. How did you find the hickory that has been testified
270 to by Hale and Wilson marked with reference to line of No. 920?

A. Marked on east side according to line of No. 920?

Q. 21. Did you find any other trees on that line of No. 920?

A. Yes, sir.

Q. 22. Both side lines and fore and aft?

A. As I recollect we found two other trees on the line—one was side line and the other, I think, was fore and aft.

Q. 23. How was this hickory marked as corresponding or differing with the other trees marked on No. 920?

A. Seemed to be marked in same manner, same kind of axe, and same manner, with same slant and all on the line, and bearing east from top of ridge.

Q. 24. Is Exhibit No. 10 to Mr. Hyde's deposition the entire piece of bark you cut out of the chestnut oak stump?

A. There was nothing left on the stump showing any hacks or marks, and this is the entire piece as we took it off.

Q. 25. Is there anything on that piece that indicates to your mind as a surveyor any state line marks?

A. Not a thing.

Q. 26. What does it indicate?

A. It looks like there had been a piece of bark knocked off by falling tree or something of that kind.

Q. 27. Did you look at double sourwood again?

A. Yes, sir.

Q. 28. Did you see anything to change your former opinion?

A. Not a thing.

Q. 29. Has your last survey caused you to doubt your former conclusion as to the location of the state line?

A. No, sir.

Q. 30. What sort of a house, if any, did old man John Deputy have when he lived on this land east of the creek?

A. He lived in log house. He had two houses close together—used one for cook house.

Q. 31. Did he have any inclosures, and if so, how large?

A. Had 10 or 12 acres under fence and part of it cultivated. He also had mill down on creek near his house.

Q. 32. Did you know J. W. Piercy?

A. I was acquainted with him.

Q. 33. Is he now living or dead?

A. Dead.

Q. 34. Did he ever live near old man Thomas Tatham, if so, when, how close, and for how long?

A. He lived near him for number of years; up until old
71 man Tatham's death; they lived from mile to mile and a half apart.

Q. 35. How old is old man John Deputy?

A. I don't know exactly; but about 80 years old.

Q. 36. What is his son Emerson Deputy sometimes called?

A. Babe Deputy.

Cross-examination by solicitor for complainant:

Q. 1. How long have you been a surveyor, Mr. Carver?

A. 15 or 20 years.

Q. 2. Have you been constantly engaged in surveying during that me?

A. No, sir.
Q. 3. Do you live in North Carolina?
A. Yes, sir.
Q. 4. In what county?
A. Graham.
Q. 5. Have you ever been a county surveyor?
A. Yes, sir.
Q. 6. Of what county?
A. Graham and Cherokee.
Q. 7. When did you first survey any part of state line of the land in dispute?
A. I have never surveyed any part of the state line?
Q. 8. Do you know where the state line is at that point?
A. I was along with Mr. Bogle and Mr. Hayes last Feby.
Q. 9. Now, question is, do you know where the state line is along this land in dispute?
A. I know where the line is we found, taking it to be the state line.
Q. 10. Do you refer to line running up Slick Rock creek?
A. Yes, sir.
Q. 11. Your answer then is, that if this is the state line you know where the state line is?
A. Yes, sir.
Q. 12. Do you swear that the scars on the black oak block Exhibit A to Mr. Hale's deposition were not made with an axe?
A. I don't see any hacks resembling an axe mark on the block.
Q. 13. Because you do not see any marks resembling an axe hack on the bark, can you swear it was not made by an axe?
A. No, sir.
272 Q. 14. Who employed you to go on this survey with Mr. Hyde?
A. Mr. Hyde instructed me that Mr. Sanford requested that we should go there and look over the ground.
Q. 15. Coming now to the piece of bark cut from the chestnut stump and filed as Exhibit No. 10 to Mr. Hyde's deposition—please examine the inside of that piece of bark and state if the mark appearing on outside of bark does not go clear through and show on inside of the bark?
A. I think it does.
Q. 16. Did you cut into that stump under the place you took the bark from to see whether there was any mark on the wood?
A. Yes, sir.
Q. 17. Did you cut a block out?
A. No, sir.
Q. 18. Then, how did you cut into the wood?
A. I scalped the wood off on the outside with an axe.
Q. 19. How thick was the wood at that point?
A. Some two or three inches I think.
Q. 20. Did you bring with you the pieces of wood you cut from that stump?
A. No, sir.

Q. 21. You have stated in your direct examination, that the place on this stump looks like there had been a piece of bark knocked off by falling tree or something of that kind; what suggested that idea of falling tree to you?

A. I have saw such occurrences in the woods.

Q. 22. If the bark of this stump was knocked off by a falling tree, how long ago was it that this was done?

A. I can't tell you.

Q. 23. In the cases where you have known bark to be knocked off by falling tree, how long after it was knocked off was it that you saw it?

A. I can't tell you that in all the cases.

Q. 24. In how many instances have you known bark to be knocked off by falling tree?

A. I never kept any account.

Q. 25. In those cases where you have known bark to be knocked off by falling tree, isn't it a fact that the bark was knocked off in long strip and irregular strip?

A. I have seen it in different ways.

Q. 26. Have you ever seen as old a mark as the mark on Ex. 10 to Hyde's deposition, where you could say positively that the mark was made by a falling tree knocking the bark off?

A. I don't know that I could.

273 Q. 27. Isn't it a fact that you and Mr. Hyde when you went to this chestnut oak stump, put your heads together to account for this mark on the stump in some other way than to say it was done by an axe?

A. No, sir.

Q. 28. Who first suggested that this mark was made by falling timber—was it you or Mr. Hyde?

A. I don't recollect as to that.

Q. 29. How high was this mark on this stump from the ground?

A. Something about three feet I think.

Q. 30. Did you ever know an instance where the bark on a tree was knocked off as low down as three feet above the ground by another tree falling against it?

A. Yes, sir.

Q. 31. Where was it and what kind of a tree was it that had the bark knocked off, and what kind of tree did the knocking off?

A. I don't recollect as to that, sir.

Q. 32. Isn't it a fact, Mr. Carver, that the falling tree would catch upon the limb of the tree upon which it was falling, that these limbs would throw the falling tree off from the body of the other tree?

A. Not in all cases.

Q. 33. In what sort of a case would the limbs fail to throw the falling tree off from the body of the other tree?

A. The tree might be leaning a little, or not have limbs large enough to protect it from the falling tree.

Q. 34. Then if the tree was straight, the limbs would throw the falling tree off, would it not?

A. It would be owing to circumstances then.

Q. 35. What circumstances?

A. If the lap of falling tree was falling direct towards the standing tree, it would break the limbs of the falling tree and let it pitch direct against the standing tree.

Q. 36. Was the fallen dead tree which you and Mr. Hyde saw lying near this stump, lying with its limb end towards the stump?

A. I don't recollect as to that.

Q. 37. Did you see any such fallen dead tree lying near the stump?

A. There was a trunk of tree lying near the stump. That tree never done this mark.

Q. 38. Did you see any other fallen tree there?

274 A. Didn't notice as to that. This log was lying right in my way where I was standing when I chopped out the bark.

Q. 39. You thought this mark had been made by falling tree, didn't you?

A. I don't know that I thought but little about it at the time; I have never seen the stump before.

Q. 40. Didn't you and Hyde go there for purpose of seeing this mark on the stump and determining how it was made?

A. Yes, sir; we went there purposely to see the mark on the stump, and to see whether it was an axe mark or not.

Q. 41. You and he agree in your depositions in suggesting that this mark on the stump was made by fallen tree; now didn't you agree there at the time that this mark was made by fallen tree?

A. That was our conclusion. We didn't think an axe could scalp thick bark off and leave this point in the upper part, as axe would cut it smooth when it cut it.

Q. 42. Then when you agreed there at the stump that the scar was made by falling tree, didn't you look around to see if you find the fallen tree that made the scar?

A. No, sir; we knew it wasn't worth while—at least I did.

Q. 43. Didn't you and he talk among yourselves whether the fallen tree that was lying near the stump had caused this scar?

A. No, sir.

Q. 44. Didn't you and Mr. Hyde understand, when you went to examine the black oak from which Exhibit A to Hale's deposition is taken, that you were sent there for the purpose of breaking down if possible Hale's testimony on that black oak?

A. I never heard anybody talk anything about breaking down Hale's testimony as to the black oak.

Q. 45. Did you know when you went there what Hale had testified about that black oak?

A. I think probably I had seen Mr. Hale's deposition.

Q. 46. Didn't you have copy of that deposition with you?

A. I did not.

Q. 47. Didn't Mr. Hyde have a copy?

A. Yes, sir.

Q. 48. You and he were together weren't you?

A. Yes, sir.

Q. 49. Where were you and he when you read over that deposition?

A. I don't recollect as to that, but read it over at different times.

Q. 50. Didn't you read it over at the stump?

275 A. I don't recollect as to that.

Q. 51. The purpose you had in reading it over, was to see whether you could do Hale up in his testimony, wasn't it?

A. We read it over for the purpose of seeing what he had testified to.

Q. 52. Couldn't you get at the facts about the marks on that tree without knowing what Hale had sworn to?

A. Yes, sir.

Q. 53. Then where was the necessity of you and Mr. Hyde knowing what Hale had sworn to?

A. We wanted to see if his testimony corresponded with the marks on the tree.

Q. 54. You could tell what the hacks on the tree were without seeing what he had sworn to, couldn't you?

A. Yes, sir.

Q. 54. Then if your purpose was solely to tell the facts as shown by these marks, what business did you have with Hale's deposition?

A. I didn't have Mr. Hale's deposition; can't tell how Mr. Hyde happened to have it; don't know who gave it to him.

Q. 55. Now, assuming that you didn't have the deposition, and Hyde did have it, and you were both along together for the same purpose, and did read the deposition, then what business did you have with Hale's deposition?

A. I had none.

Q. 56. The reading of that deposition wouldn't make your evidence any clearer, would it?

A. Don't suppose it would.

Q. 57. Now, isn't it a fact Mr. Carver, that you and Hyde went to that black oak tree for the purpose of finding some evidence to contradict Mr. Hale?

A. We went there for the purpose if we could see any hacks indicating the state line marks on that tree and along that lead.

Q. 58. And you understood that the people that you represented didn't want to find any state line marks on that tree or on that lead?

A. I never understood any such a thing.

Q. 59. You understood that was the proposition they expected to establish by your testimony?

A. I don't know that I understood what they were going to establish by my testimony; there wasn't any understanding about it.

Q. 60. You understood that it would be favorable to their side of the case to show that there were no state line marks on

276 Hangover Lead, but to show that the state line marks were on Slick Rock Creek or Fodder Stack Lead, didn't you?

A. I suppose they had rather have it on Slick Rock Creek than Hangover Lead, but that is supposition?

Re-examination.

Q. 1. When you speak of having Mr. Hale's deposition with you, do you mean his first deposition at the time that he, Wilson and Muller testified?

A. I understood it was the first one.

Q. 2. Is the copy of the deposition you have been testifying about the paper which is now handed you by Mr. Hyde?

A. I think it is.

(It is agreed that the paper shown to witness is copy of extract from the deposition of Hale, Wilson and Muller, and an exact duplicate of which was filed as Exhibit No. 4 to H. P. Hyde's former deposition.)

Further saith not.

REUBEN CARVER.

Sworn to and subscribed before me this September 28th, 1897.

J. T. CARTER,
U. S. Com'r.

[J. T. Carter, Eastern District of Tennessee, United States Commissioner.]

Filed Sept. 30, 1897. J. T. Carter, Deputy Clerk

The said witness, D. W. BELDING, being duly sworn, deposed as follows:

Q. 1. Capt. Belding state your age, residence and occupation?

A. 64 years old. Silk Manufacturer, Cincinnati, Ohio.

Q. 2. Are you the same D. W. Belding who is the defendant in this case?

A. Yes, sir.

Q. 3. Are you the same D. W. Belding who was one of the purchasers of the N. C. grant No. 2336, granted to L. W. Gilbert
277 and W. H. Peet based on entry No. 1035 which was purchased by D. W. Strickland and others at a court sale from W. A. Bartlett, administrator of the estate of Wm. H. Peet, dec.?

A. Yes, sir.

Q. 4. Is that grant, the original of which is filed in this cause as an Exhibit "H" to the deposition of H. S. Hayes, and which is here shown you, the tract which is commonly known as the Bib Survey?

A. Yes, sir.

Q. 5. Will you please file as Exhibit No. 1, to your deposition the certified copy of deed from L. W. Gilbert to Wm. H. Peet, dated Mch. 1st, 1861, and conveying the said grant by number from the said Gilbert to said Peet?

A. I will.

Q. 6. Will you please file as Exhibit No. 2 to your deposition the certified copy of the proceedings of the Probate Court of Cherokee County, N. C., under and by which the said W. E. Bartlett, Admr. sold the same with other land as aforesaid?

A. Yes, sir.

Q. 7. Was that part of Graham County including the Big Survey formerly a part of Cherokee County?

A. It was.

Q. 8. Please file as Exhibit No. 3 to your deposition the original deed from W. A. Bartlett, Admr. to D. W. Strickland and others, dated Dec. 1st, 1881, conveying the said land and other lands as aforesaid?

A. I do.

Q. 9. Has the timber on the Big Survey subsequently been conveyed by the purchasers under the Bartlett deed to any one else, and if so to whom has the title to the timber since passed, and in whom now vested?

A. The title to the timber on said survey was transferred to the Belding Lumber Company, from the Belding Lumber Co. to the Crosby Lumber Co., from the Crosby Lumber Co., to M. M. Belding, from M. M. Belding to Lewis Krohn and T. F. McGary, from Louis Krohn and T. F. McGary to R. N. Archer.

Q. 10. Will you please file as Exhibit No. 4 to your deposition certified copy of the deed from Lewis Krohn and Thos. F. McGary and wife to R. N. Archer conveying said timber with other lands?

A. I do.

Q. 11. Does the trust under which Capt. Archer holds that timber appear on that instrument?

278 A. I don't know; the deed shows for itself.

Q. 12. Have you here any other original links in the chain of title, or certified copies present with you?

A. No, sir; I have not.

Q. 13. Do you know who was the agent of Peet and Gilbert in obtaining that grant from the state?

A. Sanders Calloway; he was a Tennesseean.

Q. 14. Did you ever, since you became one of the purchasers of that big survey, and when you were one of the owners, go upon that land and have any conversation with John Debity, Sr., or old man John Debity as he is generally called, in reference to a lease of the land?

A. Yes, sir; we sent a man by the name of Thos. B. Reynolds, after purchasing the property, to find out squatters and put them under lease, and he put Mr. Debity under lease.

Q. 15. At the time that you yourself went on the land and saw Mr. Debity, were you one of the joint owners in the Big Survey?

A. I was one of the joint owners in the Big Survey.

Q. 16. What year was that if you remember, and what time of the year?

A. It was in the month of Jan., whether in the year 1885, 1886 or 1887, I can't say, but I think in 1885 or 1886.

Q. 17. At the time you went on the land and saw Debity, you and your associates were claiming title to the land under the deed to you from Bartlett, Admr., and the links in the chain of title connecting you with the N. C. grant to Peet and Gilbert, and were claiming to own that grant?

A. Yes, sir; we bought and paid for it.

Q. 18. Did you on this Jan. visit go to Debity's house?

A. Yes, sir; old man Debity's.

Q. 19. Where was his house located?

A. East side of east prong of Slick Rock Creek, between Slick Rock Creek and Hangover Lead, and on the land in dispute in this cause and on the Big Survey.

Q. 20. Did he have any inclosures beside his house?

A. Some 10 or 15 acres under fence, I should say.

Q. 21. Did he have any of it in cultivation?

A. Couldn't tell anything about it as snow covered the ground.

Q. 22. Did Debity say anything to you about how he was then on the land?

A. He said he came in from Tennessee.

Q. 23. Did he state whether or not he was holding under you and your associates and how?

279 A. He said Reynolds had given him a lease from our company and that he was holding under that lease; I told him I wished he would take lease and take charge of the whole boundary of that survey; he told me he would do so provided I would state it in presence of Dave Orr and man who lived in the house, whose name I don't remember.

Q. 24. Had he been holding that Big Survey for you under that Reynolds lease?

A. The Reynolds lease did not cover the whole of the Big Survey.

Q. 25. Will you examine Reynolds lease filed as Exhibit No. 1 to deposition of Reuben Carver, and state whether it covers all or part of Big Survey?

A. I never saw the lease that Reynolds gave them, and he might have given for the whole tract. This lease shown me covers all the Big Survey and more too on the south, taking in the waters of the Santeetla.

Q. 26. Do you remember the name of the other man you have testified to in connection with Dave Orr?

A. I don't remember his name.

Q. 27. Did you or did you not at that time in presence of Dave Orr and this other man, make the agreement with old man Debity, and continue him in possession of the Big Survey as tenant of yourself and your associates?

A. Yes, sir; I did it right then and there.

Q. 28. Did you put him in possession and tell him to take charge of part or of all of the Big Survey?

A. Told him to take charge of all and gave him the boundary.

Q. 29. Did you put any limit on what he should cultivate?

A. Could cultivate anything he saw fit, as much or little—but he was not to cut merchantable timber, such as poplar, cherry, ash, walnut, etc.

Q. 30. Was there any other restriction put upon him?

A. None but that he was to keep off squatters. When I got through he come up the proudest man you ever saw and shook hands.

Q. 31. Did he agree to this, and agree to stay on the land and take charge of it as your tenant?

A. He agreed to, but asked how in case squatters refused to go, how he should do, and I told him that man with his reputation ought to know what to do.

Q. 32. Was your lease at that time in writing?

A. No, sir; this was not in writing as it was 16 miles before we could get any paper. It was carrying out of the lease he had and was a verbal lease before witnesses to take full charge of the tract.

280 Q. 33. How long was it to continue?

A. Until we revoked it.

Q. 34. When did you next see Debity?

A. About three years after that.

Q. 35. Did he speak of still being in possession under you?

A. Certainly.

Q. 36. Did you ever receive any word or notice of any character from old man Debity that he had ceased to hold possession of the Big Survey under yourself and your associates, as lessee?

A. Never, but what I have heard since this suit was brought.

Cross-Examination by solicitor for complt.. waived.

Further saith not.

W. D. BELDING.

Sworn to and subscribed before me, this Sept. 28th, 1897.

J. T. CARTER.
U. S. Com'r.

[J. T. Carter, Eastern District of Tennessee, United States Commissioner.]

Filed Sept. 30, 1897. J. T. Carter, Deputy Clerk.

EXHIBIT NO. 1 TO DEPOSITION OF W. D. BELDING.

Whereas, I and William H. Peet, obtained grants from the State of North Carolina, for the land described in said grants numbered as follows, to wit: Numbers 2932, 2914, 2911, 2708, 2905, 2902, 2957, 2970 2971, 2975, 2967, 2983, 2980, 2958, 2940, 2974, 2973, 2976, 2897, 2927, 2954, 2982, 2904, 2950, 2730, 2924, 2941, 2934, 2929, 2952, 2896, 2910, 2907, 2959, 2923, 2910, 2898, 2990, 2930, 2900, 2931, 2903, 2962, 2781, 2917, 2915, 2978, 2942, 2922, 2969, 2977, 2972, 2988, 2987, 2986, 2935, 2987, 2965, 2955, 2968, 2966, 2925, 2928, 2939, 2938, 2749, 2751, 2956, 2947, 2953, 2926, 2918, 2921, 2940, 2976, 2961, 2960, 2919, 2916, 2913, 2912, 2909,
281 2933, 2984, 2920, 2936, 2948, 2964, 2963, 2336, 2943, 2945, 2899, 2944. And for a full and description of all the lands mentioned and described in each one — said grants above specified and numbered as aforesaid reference is hereby specially and specifically made to said grants and the description of lands described in in each one of said grants is hereby adopted and the same shall

have the same force and binding effect as if they were hereby specifically set forth in this instrument and this instrument is intended to relate to and link to said grants and form a part and parcel of the same.

And whereas I, the said Lyman W. Gilbert, have bargained and sold to William H. Peet all my interest in said grants and the lands therein mentioned and described, and have received a valuable consideration for the same, now, in consideration of the premises I, the said Lyman W. Gilbert, do hereby transfer and convey unto the said William H. Peet, and his heirs and assigns forever all the right, title, claim and demand which I have in and to the said land described in said several grants aforesaid and numbered as aforesaid in the state of North Carolina in the county of Cherokee in said state, and for a description thereof reference is hereby made to said several grants as aforesaid, and this deed and instrument shall have the same force and binding effect as if the same were truly specifically described and given as aforesaid. And I will warrant and forever defend the title to my interest in the same to the said William H. Peet and his heirs and assigns forever against the lawful claim or claims of all persons whatever.

In testimony whereof I hereto subscribed my name and affixed my seal, this first day of March, 1861.

LYMAN W. GILBERT.

Witness:
W. C. RUGGLES.
H. D. FAULKNER.

CITY OF NEW YORK:

On this, the 16th day of August, A. D. 1861, personally came before me Lyman W. Gilbert to *make now* to be the person who executed the foregoing instrument and acknowledged that he executed the same.

HELAND FAULKNER,
Notary Public.

STATE OF NEW YORK:
City and County of New York:

I, John Clancy, Clerk of the City and County of New York, also clerk of the Supreme Court for the said city and county, the
282 same being a court of record, do hereby certify that Heland D. Faulkner whose name subscribed to the certificate of the proof of or acknowledgment of the annexed instrument and there *or* written was at the time of taking such proof or acknowledgement a notary public in and for the State of New York, dwelling in the said city, commissioned and sworn and duly authorized to take the same, and further that I am well acquainted with the handwriting of such notary public and verily believe that the signature to the certificate of proof or acknowledgment is genuine. I further certify that said instrument is executed and acknowledged according to the law of the State of New York.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 15th day of August, 1861.

JOHN CLANCY, *Clerk.*

The within seal was registered in Book J page 159, Feb. the 4th, 1862.

B. S. BRITTAIN, *R. C. C.*

STATE OF NORTH CAROLINA,
Cherokee County:

OFFICE OF REGISTER OF DEEDS, *October* 23*d*, 1883.

I, W. M. West, Register of Deeds in and for the County of Cherokee do hereby certify that the foregoing is a true copy as doth appear from the records of my office.

Given under my hand and seal of office at office in Murphy, date above written.

(SEAL.)

W. M. WEST,
Register of Deeds.

EXHIBIT No. 2 TO DEPOSITION OF D. W. BELDING.

STATE OF NORTH CAROLINA,
Cherokee County:

Be it remembered that the following proceedings were had in the Probate Court of Cherokee, before Jas. C. Axley, Judge of Probate, in and for said county, to wit:

STATE OF NORTH CAROLINA,
Cherokee County:

In Probate Court.

Appointment.

283 W. A. Bartlett comes into court and made application and was duly appointed administrator of W. H. Peet, deceased, and having filed his bond in the sum of six thousand dollars with William Beal, J. W. Patton, J. B. Fain, Hiram Gunter, N. H. Payne and D. C. Ghomley as his security, which bond is accepted by the court, and the said W. A. Bartlett having duly taken the oath according to law, as administrator, and letters duly issued to the said W. A. Bartlett, according to law. This the 9th day of November, 1870.

STATE OF NORTH CAROLINA,
Cherokee County:

In Probate Court.

Bond.

Know all men by these presents, that we, W. A. Bartlett, William Beal, J. B. Fain, Hiram Gunter, J. W. Patton, N. H. Payne and D. C. Ghomley, are held and firmly bound unto the State of North Carolina in the sum of six thousand dollars to the payment whereof well and truly to be made we bind ourselves jointly and severally, our executors and administrators firmly by these presents. Sealed this 9th day of November, 1870.

The condition of the above obligation is such that if the above bounden W. A. Bartlett, Administrator of W. H. Peet, deceased, to make a true and perfect inventory and account of sales of all the real estate and all the goods and chattels, rights and creditors of the deceased, which have or shall come to his possession or knowledge and the same do exhibit into the Probate Court of said county within three months after the date hereof and do well and truly administer according to law all real estate that may be sold for payment of the debts of said deceased which shall at any time come to the possession of the said administrator or to the possession of any other person for him.

And further do make a true and just account of all his said administration within two years after the date hereof, and all the rest and residue of the said proceeds of said real estate, goods, chattels and credits which shall be found remaining upon account, the same being first examined and allowed by the Judge of Probate shall deliver and pay to such person as the same shall be due unto; and shall obey all lawful orders of said Probate Court touching the administration of said estate committed to him and shall faithfully execute the trust reposed in him as such administrator according to
284 law, then this obligation to be void and of no effect; otherwise to remain in full force and virtue.

WM. A. BARTLETT. [SEAL.]
WILLIAM BEAL. [SEAL.]
J. W. PATTON. [SEAL.]
J. B. FAIN. [SEAL.]
HENAM GUNTER. [SEAL.]
N. H. PAYNE. [SEAL.]

Signed, sealed and delivered in the presence of;
JAS. C. AXLEY,
Probate Judge.

William Beal makes affidavit that he is worth over and above the exemption by law, and his indebtedness, the sum of six thousand dollars.

Henam Gunter makes affidavit that he is worth over and above the exemption by law and his indebtedness, $4,000.

N. H. Payne, makes affidavit that he is worth over and above the exemption by law and his indebtedness, $2,000.

J. B. Fain, makes affidavit that he is worth over and above the exemption by law and his indebtedness, $1,000.

D. C. Ghormley, makes affidavit that he is worth over and above the exemption by law and his indebtedness, $1,000.

Mr. Fain makes affidavit that he is worth over and above the exemption by law and his indebtedness, $5,000.

STATE OF NORTH CAROLINA,
Cherokee County:

Superior Court.

Before the Clerk.

WM. A. BARTLETT, Administrator of W. H. Peet, Deceased,
against
EDWARD J. PEET, GEORGE SOUTELLE and Wife, SARAH H. P.;
SOLOMON BIXLEY and Wife, MARY H. P.

Petition to Sell Lands for Assets.

It appearing upon the affidavit in this case that the defend-
285 ants, Edward J. Peet, George Soutelle and wife Sarah H. P.,
Solomon Bixley (or Bixby), and wife Mary H. P., are non-
residents of this state, it is therefore ordered that publication be
made in the Cottage Visitor, a newspaper published in the County
of Henderson, for six successive weeks notifying the defendants to
appear before the clerk of the Superior Court of Law for the said
county, at his office in the Town of Murphy on the 5th day of June
next, and plead, answer or demur to said petition or judgment will
be taken pro confesso and the prayer of petition will be granted.

J. C. AXLEY,
Clerk of Superior Court Cherokee County.

Witness:

——.

WILLIAM A. BARTLETT, Admr., Plaintiff,
against
EDWARD J. PEET and Others, Defd.

Superior Court.

Before the Clerk.

Summons.

STATE OF NORTH CAROLINA:

To the Sheriff of Cherokee County, Greeting:

You are hereby commanded to summons Edward J. Peet, George Soutell and wife, Sarah H. P., S. Soloman Bixley, and wife, Mary H. P., the defendant above named if to be found within your county, to appear before the clerk of the Superior Court for the County of Cherokee at the court house in Murphy on or before 5 day of June next and answer the complaint of the plaintiff.

And let them take notice that if they fail to answer the said complaint within the time prescribed by law, the plaintiff will apply to the court for the relief demanded in said complaint.

Herein fail not, and of this summons made due return.

Given under my hand and seal of the said court this 3rd day of March, 1871.

J. C. AXLEY,
Clerk of Superior Court Cherokee County.

Sheriff return: Due search made and not found in my County.

A. S. HILL, *Sheriff.*
By R. B. HARPER, *Deputy.*

286 STATE OF NORTH CAROLINA,
Henderson County:

This day personally appeared before me, C. M. Pace, Clerk of Superior —, Wm. H. Bowen and made oath that he is foreman of the Cottage Visitor office, a paper published in Henderson County, and that the above advertisement in the case of Wm. A. Bartlett, Administrator of W. H. Peet, against Edward J. Peet and others has been inserted weekly for six successive weeks in said paper, commencing at No. 19.

WM. H. BOWEN.

Sworn to before me this 9th day of June, 1871.

C. M. PACE, *Clerk.*

STATE OF NORTH CAROLINA,
Cherokee County:

Superior Court of Law, 12th Judicial District.

Before the Clerk.

To the Honorable Court Aforesaid:

The petition of William A. Bartlett, Administrator of William H. Peet, deceased, against Edward J. Peet, George Soutell and wife Sarah H. P., Solomon Bixley and wife, Mary H. P., heirs at law of W. H. Peet;

Respectfully showeth to the court that sometime during the year 1864, his intestator died. That petitioner was appointed his administrator by James C. Axley, Judge of Probate for said County and State on the 9th day of November, 1870. Petitioner further shows that from the best information he has been able to obtain the debts due from his intestator amount to about ten thousand dollars. That the charges of administration will probably amount to five or six hundred dollars. That there was no personal property belonging to petitioner's intestator in the county and state aforesaid.

Your petitioner further shows that his intestator died seized and possessed in fee simple of the following tracts of land, to wit:

Grant number.	Tract number.	District number.	Containing — number acre.
2988	....	9	214
2916	....	9	640
2336	1035	10	14800
2913	....	..	475
2912	....	..	640
2907	....	..	640
2906	....	10	640
2903	....	11	640
287			
2981	....	9	300
2944	....	..	640
2920	....	10	50
2955	....	5	200
2987	....	..	400
2972	....	5	420
2989	....	..	640
2936	....	5	50
2966	....	10	500
2915	....	..	640
2965	....	5	640
2962	....	..	300
2968	....	10	125
2964	....	10	300
2948	1	10	640

2939	....	10	150
2985	....	..	237
2944	....	5	70
2896	....	5	200
2945	....	5	640
2899	....	..	640
2930	....	5	400
2933	....	5	500
2931	....	..	440
2600	....	..	19
2990	....	5	125
2898	....	5	64
2901	....	8	48
2923	....	5	62
2907	....	..	440
2958	....	..	640
2910	....	11	450
2959	....	11	640
2932	....	..	640
2924	....	5	640
2936	....	5	194
2934	....	5	200
2925	....	5	381
2897	....	5	180
2928	....	5	100
2943	....	5	640
2979	....	..	640
2973	....	5	200
2927	....	5	100
2929	....	3	200
2939	....	2	640
288			
2938	....	2	640
2926	....	..	640
2940	....	10	640
2941	....	5	400
2974	....	..	640
2896	....	..	200
2950	....	10	3000
2904	....	11	100
2982	....	5	102
2980	....	10	640
2983	....	11	640
2967	....	11	640
2977	....	5	50
2922	....	5	557
2971	....	..	200
2969	....	10	1500
2975	....	11	640

2978	....	5	100
2942	....	..	203
2917	....	9	640
2908	....	..	640
2905	....	11	640
2911	....	11	640
2914	....	5	222
2919	....	9	640
2969	....	..	640
2961	....	9	313
2957	....	9	640
2947	....	10	540
2953	....	..	640
2963	....	..	640
2946	....	10	640
2970	....	10	640
2998	....	5	500
2902	....	5	200
2916	....	10	640
2952	....	10	640
2951	....	10	640
2956	....	11	1000
2921	....	10	640
2512	....	1	50

All of the above mentioned lands lying and being in the County of Cherokee, and are worth about 12½ cents per acre.

Your petitioner further showeth unto your honor that a sale of a portion if not all of the lands heretofore mentioned is necessary to pay the debts of his intestator.

289 Your petitioner therefore prays this honorable court to grant him a license to sell the lands mentioned or so much of them as may be necessary to pay off the debts of his intestator, on such terms, time and places as may seem meet and proper, and petitioner further prays this honorable court to cause notice together with a copy of this petition to be issued to and served upon the heirs at law above named, commanding them to be and appear before the clerk of the Superior Court of Cherokee County on the 5th day of June, 1871, to show cause if any they can why the prayer of petitioner shall not be granted.

F. P. AXLEY,
Att'y for Petitioner.

William A. Bartlett, being duly sworn says that he has read the foregoing petition and knows the contents thereof, that the facts therein set forth are true so far as the same are stated of his own knowledge and those facts stated on information he believes to be true.

WM. A. BARTLETT.

Sworn to and subscribed this 1st day of April, A. D. 1871, before me.

____ ____,
A Commissioner for the State of North Carolina.

Cherokee County, Superior Court of Law.

Before the Clerk.

WILLIAM A. BARTLETT, Adm'r of W. H. Peet, Dec'd,
against
EDWARD J. PEET and Others, Heirs at Law of W. H. Peet.

This cause coming on to be heard upon the petition of W. A. Bartlett, Administrator of Wm. H. Peet, dec'd, and there being no answer or plea filed thereto or objection made on the 5 day of June, 1871, it is ordered, adjudged and decreed by the court that William A. Bartlett, administrator have a license to sell the lands mentioned and described in the petition, or so much thereof as will be sufficient to pay the debts, charges of administration, &c., of said estate, and that he be authorized to sell said lands at private
290 sale for cash, or that he sell the same at public auction to the highest bidder; if at public auction, after notice published for thirty days, at the court house door in Murphy and four other public places in Cherokee County, requiring the purchaser to pay one-half of the purchase money in cash at the sale, and secure the remainder by bond payable in six months from the day of sale, with good security, and therefore the said William A. Bartlett shall report his proceedings to this court. This 5 day of June, 1871.

JAS. C. AXLEY,
Probate Judge.

NORTH CAROLINA,
Cherokee County:

Before the Judge of Probate for said Court.

WILLIAM A. BARTLETT, Adm'r of W. H. Peet, Dec'd,
against
EDWARD J. PEET and Others, Heirs at Law of W. H. Peet.

Decree for Sale.

This cause coming on to be heard upon the petition of William A. Bartlett, administrator of Wm. H. Peet, deceased, and it appearing to the court that all proper parties are made to said proceeding, and service having had by publication, and there being no answer or plea filed to said petition or objection made to the granting the prayer thereof. It is therefore ordered, adjudged and decreed by the court that William A. Bartlett, administrator of W. H. Peet, have a license to sell the lands mentioned and described in the

petition, or so much thereof as will be sufficient to pay the debts of said estate and charges of administration and that he be authorized to sell said lands at private sale for cash or that he sell same at public auction to the highest bidder, and if at public sale, after notice published for thirty days at the court house door in Murphy, and four other public places in Cherokee County, requiring purchaser to pay one-half of the purchase money in cash at the time of sale, and secure the remainder by bond payable in six months with interest from the day of sale, with good security, and thereupon
the said William A. Bartlett, administrator of W. H. Peet,
291 shall report his proceedings to this court.

In witness whereof, I, J. C. Axley, Judge of Probate for said County of Cherokee, have set my hand at office in Murphy, on this 5 day of June, A. D. 1871.

J. C. AXLEY, *C. S. C.*

In the Probate Court, Cherokee County.

W. A. BARTLETT, Adm'r of W. H. Peet,
against
E. I. PEET and Others, Heirs at Law of W. H. Peet, Dec'd.

By virtue of and in pursuance of a license issued from the Probate Court of Cherokee County, I have sold the lands mentioned and described in the petition and license to sell the same, — D. W. Belding, Dudley W. Strickland and Henry Lewis at private sale for the sum of fifteen thousand dollars, one-half to be paid in cash and the remainder six and twelve months' time with interest at 6 per cent., with lien upon the land until paid, and I further report that in my opinion the lands have brought a fair and adequate price. July 9th, 1881.

W. A. BARTLETT,
Adm'r of W. H. Peet,
By F. P. AXLEY, *Att'y.*

STATE OF NORTH CAROLINA,
Cherokee County:

Superior Court.

Before the Clerk.

W. A. BARTLETT, Admr. of W. H. Peet, Dec'd.,
against
E. J. PEET and Others.

Personally appeared before me, Jas. C. Axley, clerk of the Superior Court of said county, James W. Coop, Robert A. Akin and N. G. Howell, who after being by me duly sworn says that they are acquainted with the county and much of the lands in the counties of

Cherokee and Graham as well as a portion of the lands described in the petition and order of sale, and that they believe that
292 the price sold for, to wit, $15,000 is a fair valuation for the said lands.

J. W. COOPER.
N. G. HOWELL.
R. A. AKIN.

Sworn to and subscribed before me this 22 day of July, 1881.
J. C. AXLEY, *C. S. C.*

In the Probate Court, Cherokee County.

W. A. BARTLETT, Adm'r of W. H. Peet,
against
E. J. PEET and Other-, Heirs at Law of W. H. Peet.

Decree Confirming Sale and for Title.

This cause coming on for further orders and upon inspection of the report of W. A. Bartlett, administrator of W. H. Peet, dec'd, and of affidavit filed — the sale of lands made on the 9 day of July, 1881, — D. W. Belding, Dudley W. Strickland and Henry Lewis, and it appearing to the satisfaction of the court that the lands have been sold for a fair and adequate price. It is therefore ordered, adjudged and decreed by the court that upon the payment of the sum of seven thousand five hundred dollars in cash as set forth in said report, and the full and ample security of the remainder of seven thousand five hundred dollars with interest at 6 per cent upon the time mentioned in said report that W. A. Bartlett, administrator of W. H. Peet, dec'd, make title to said D. W. Belding, Dudley W. Strickland and Henry Lewis with proper covenants to assure to them a title in fee simple.

Given under my hand at office in Murphy, this 22 day of July, 1881.

J. C. AXLEY,
Judge of Probate.

293 In the Probate Court, Cherokee County.

W. A. BARTLETT, Adm'r of W. H. Peet,
ag't
E. J. PEET and Others, Heirs at Law of W. H. Peet.

Order Amending Decree of Sale.

On motion of counsel for pl'ff the decree of sale in this cause is amended by adding thereto the name of J. W. Cooper, Henry Stix, Nathan Stix and Louis Krohn, as purchasers of the land men-

tioned and described in the petition and license of W. A. Bartlett, administrator of W. H. Peet, and that title be made to said parties herein mentioned as well as the petition in the original decree. This 12th day of Nov., 1881.

J. C. AXLEY, *C. S. C.*

STATE OF MAINE:

Governor of the State of Maine to all who shall see these presents, Greeting:

Know ye that by the records in the office of the Secretary of State it appears that James B. Dascomb, of L. Kawhegan, in the County of Somerset was on the fourteenth day of September, A. D. 1868, elected Judge of Probate within and for the County of Somerset, for the term of four years commencing on the first day of January, A. D. 186*0*. And that his acts and attestations as such are entitled to full faith and credit.

In testimony whereof I have caused the seal of the state to be hereunto affixed. Given under my hand at Augusta this twenty-second day of October in the year of our Lord, one thousand eight hundred and seventy, and in the ninety-first year of the independence of the United States of America.

By the Governor:

[SEAL.]

T. T. STACY,
Dpt. Secretary of State.

To James C. Axley, Probate Judge, Cherokee County, North Carolina:

We, the undersigned, next of kin and heirs at law of Wm. H. Peet, dec'd, do hereby renounce all right and claim to administer the effects of said Peet, dec'd, in North Carolina, and do hereby
294 authorize and request you to appoint William A. Bartlett, administrator of said estate.

Sworn under our hands this 21st day of October, 1870.

EDWARD J. PEET.
SARAH H. P. SOUTELL.
MARY H. P. BIXLEY.

STATE OF MAINE,
County of Somerset:

On this twenty-first day of October, A. D. 1870, before me, James B. Dascomp, Judge of Probate within and for the said County of Somerset, personally appeared Edward J. Peet and Sarah H. P. Soutell, both residents of Norridgewock in said County of Somerset and made oath to the foregoing instrument, and I certify that it has been proven to me that said Edward J. Peet and Sarah H. P. Soutell together with Mary H. P. Bixley, of Kingston, in the State of New Hampshire, constitute the next of kin of the said Wm. H. Peet, dec'd, and are his only legal heirs.

In testimony whereof I have hereunto set my hand and seal of

said Probate Court the day and year in this certificate first above written.

JAMES B. DASCOMBE,
Judge of Probate.

STATE OF NEW HAMPSHIRE,
Rockingham:

I, N. A. Shute, a notary public in and for the county and State aforesaid, do hereby certify that May H. P. Bixley, personally known to me as the same person whose name is subscribed to the annexed instrument of writing as having executed the same, appeared before me this day in person and acknowledged that she signed, sealed and delivered the said instrument of writing as her full and voluntary act and for the uses and purposes therein set forth.

Given under my hand and notarial seal this twenty-fifth day of October, A. D. 1870.

[S. L.] N. A. SHUTE,
Notary Public.

STATE OF NORTH CAROLINA,
Cherokee County:

I, Jas. C. Axley, Clerk of the Superior Court in and for said county, do hereby certify that the foregoing is a true transcript as appears from the record and papers on file in my office in the above entitled action.

Given under my hand and official seal at office in Murphy, the 26th day of May, 1885.

[SEAL.] JAS. C. AXLEY, *C. S. C.*

295 EXHIBIT NO. 2 TO DEPOSITION OF D. W. BELDING.

Filed Nov. 23, 1897. J. T. Carter, Deputy Clerk.

EXHIBIT NO. 3 TO DEPOSITION OF D. W. BELDING.

Know all men by these presents; that whereas on the 9th day of November, A. D. 1870, William A. Bartlett applied to the Probate Court of Cherokee County, State of North Carolina, to be appointed administrator of the estate of William H. Peet, deceased, and was on said day, by said court, appointed such administrator, and took the oath and gave bond as required by said court, and

Whereas, afterwards, said administrator filed his petition in the Court of Probate for Cherokee County, North Carolina, against Edward J. Peet, George Soutell and wife, Sarah H. Peet Soutell, Solomon Bixly and wife, Mary H. Peet Bixly, sole heirs at law, praying said court to issue a license to him as administrator for the sale of so much of the real estate belonging to the estate of said William H. Peet as might be necessary to pay all the decedent's debts, and the costs of administration;

Whereas, afterwards, on the 5th day of June, A. D. 1871, a decree was entered in said court finding that all proper parties had been made to the proceedings, and service had by publication, and that no answer or objection had been made to the granting of the prayer of the petition. And ordering said William A. Bartlett, administrator to sell the lands mentioned and described in the petition (and hereinafter described) at private sale for cash, or at public sale after publication for 30 days for one-half cash, balance in six months secured by bond with interest from day of sale. And report his proceedings to said court.

And on the same day an order for the sale of said real estate issued to said William A. Bartlett, administrator. And afterwards said administrator reported to said court that he had, in pursuance of the order of said court, sold said real estate to D. W. Belding, Dudley W. Strickland and Henry Lewis at private sale for the sum of fifteen thousand dollars; one-half cash the balance on 6 and 12 months' time with 6 per cent. interest, with a lien upon the lands until paid, and that in his opinion the lands had brought a fair and adequate price.

And afterward, to wit, on the 22d day of July, 1881, a decree was entered in said court finding that said administrator had sold said real estate for a fair and adequate price, and ordering that
296 upon the payment of $7,500.00 in cash and the full and ample security of the remainder of $7,500.00, with interest at 6 per cent., upon the terms mentioned in said report, the said William A. Bartlett, administrator, make title to D. W. Belding, Dudley W. Strickland and Henry Lewis, with proper covenants to assure to them a title in fee simple.

And afterwards it was ordered that said administrator make deed to said real estate to the following named parties and in the proportions named herein, to wit: To Dudley W. Strickland a one-sixth part, to Henry Lewis a one-sixth part, to D. W. Belding a one-sixth part; to J. W. Cooper a one-twelfth part, to Henry Stix a one-sixth part, to Nathan Stix a one-sixth part, to Louis Krohn a one-twelfth part.

Now, know ye, that I, the said Wm. A. Bartlett, administrator of the estate of William H. Peet, deceased, as aforesaid, by virtue of said premises, and of the power in me vested, and for and in consideration of the sum of fifteen thousand dollars, one-half of which sum I acknowledge to have received from the purchasers above named, and the remaining half secured by notes and a vendor's lien on said real estate, do hereby sell and convey unto D. W. Belding an undivided one-sixth part of the following described real estate; to J. W. Cooper, an undivided one-twelfth; to Henry Stix an undivided one-sixth; to Henry Lewis, an undivided one-sixth, to Dudley W. Strickland, an undivided one-sixth part of said real estate, and to Nathan Stix an undivided one-sixth part, and to Lewis Krohn an undivided one-twelfth, and to their heirs and assigns forever, the following described real estate, to wit: Situate in Clay County (formerly Cherokee County, North Carolina.

Grant No. 2938.

District No. 2. On the headwaters of Eagle Fork of Shooting Creek:

Beginning on a black oak tree in the line of Entry No. 6158, and runs with its line S. 58 E. 20 poles to a hickory corner of said entry;
Thence S. 30 E. 46 poles to a chestnut tree in the line of Entry No. 6005;
Thence N. 40 E. with its line 100 poles to a black oak corner of said Entry No. 6005;
Then S. 60 E. 111 poles to a chestnut oak;
Then N. 70 E. 65 poles to a white oak, the beginning corner of Entry No. 6100;
Then N. 35 E. 26 poles to a white oak in a ridge;
297 Then N. 4 W. 36 poles to a white oak;
Then N. 20 W. 106 poles to a white oak, northwest corner of said entry No. 6100;
Then N. 72 E. 60 poles to a white oak by a trail;
Then N. 120 poles to a stake;
Then W. 370 poles to a stake;
Then S. 212 poles to a stake, the northwest corner of entry No. 2390;
Then S. 45 E. 110 poles to the beginning.

Entered this 9th day of October, 1856.

Grant No. 2939.

District No. 2. On the waters of Tusquitta Creek:

Beginning on a chestnut tree standing on the S. E. side of the dividing ridge between Cumpasco Creek and Tooney's Creek, and runs S. 45 E. 100 poles to a chestnut tree on the east side of said ridge;
Then N. 45 E. 512 poles to a stake;
Then N. 45 W. 200 poles to a stake;
Then S. 45 W. 512 poles to a stake;
Then S. 45 E. 200 poles to the beginning.

Entered 14th day of July, 1856.

The following described real estate in Graham County (formerly Cherokee County), North Carolina:

Grant No. 2903.

District No. 11. On the Waters of Tennessee River:

Beginning on a sassafras tree near an old trail and small branch, and runs N. 10 degrees E. 352 poles to a stake;
Then E. 226 poles to a stake;
Then S. 10 degrees W. 452 poles to a stake;

Then W. 226 poles to a stake;
Then N. 10 degrees E. 100 poles to the beginning.

Entered September 1, 1853.

Grant No. 2904.

District No. 11. On the waters of Panther Creek:

Beginning on a double chestnut tree standing near the head of one of the branches of Panther Creek, and runs west 104 poles to a dogwood corner of 1950;
Then with the line of 1945 S. passing the S. E. corner of said number 400 poles to a stake;
Then E. 400 poles to a stake on the county line;
Then with said line north 400 poles to a stake on said line;
298 Then W. 296 poles to the beginning.

Entered September 1, 1853.

Grant No. 2905.

District No. 11. On the waters of Wolf Creek:

Beginning on a chestnut tree standing on the line of No. 416, and runs with said line S. 154 poles to a stake and corner of said number;
Then with said line N. 55 E. 100 to a stake, corner of said number on the line of No. 11;
Then with that line S. 80 poles to the S. E. corner of said number;
Then with that line W. 140 poles to a black oak corner of said number;
Then S. 100 poles to a stake;
Then E. 300 poles to a stake;
Then N. 215 poles to a stake;
Then W. 245 poles to the beginning.

Entered September 1, 1853.

Grant No. 2906.

District No. 10. On the waters of Tennessee River:

Beginning on a spruce pine the N. E. corner of No. 2341 and the bank of Tennessee River, opposite the mouth of Hazel Creek, and runs up the river with its meanders to a stake on the bank of the river;
Then S. 226 poles to a stake;
Then W. 252 poles to a stake;
Then N. 226 poles to the beginning.

Entered September 1, 1853.

Grant No. 2908.

District No. 10—On the waters of Santeatly Creek:

Beginning on a bush on the line of a corner near an old trail; and runs S. 40 E. 218 poles to a stake;
Then S. 70 W. 320 poles to a stake;
Then N. 40 W. 320 poles to a stake;
Then N. 70 E. passing a corner of No. 2020, 320 poles to a Spanish oak, corner of said No.;
Then S. 40 E. 102 poles to the beginning.

Entered September 1, 1853.

Grant No. 2909.

District No. 9—On the waters of Mountain Creek:

Beginning on a chestnut tree standing near the trail leading from Cheoah to E. Delozars, and runs N. 30 W. 320 poles to a stake;
299
Then S. 55 W. 320 poles to a stake;
Then S. 30 E. 320 poles to a stake;
Then N. 55 E. 320 poles to a stake;
Then N. 55 E. 320 poles to the beginning.

Entered September 1, 1853.

Grant No. 2910.

District No. 11—On the waters of Steacoh creek:

Beginning on a chestnut tree the S. W. corner of No. 1958, and runs with said line E. 320 poles to a chestnut oak;
Then S. 160 poles to a black oak on the county line;
Then with said line and its meanders 214 poles to a black oak on said line;
Then S. 50 W. 154 poles to a hickory;
Then N. 320 poles to the beginning.

Entered September 1, 1853.

Grant No. 2911.

District No. 11—On the waters of Panther creek;

Beginning on a poplar standing on the bank of Panther Creek, and runs S. 368 poles to a stake;
Then E. 272 poles to a stake;
Then N. 272 poles to a stake;
Then N. passing the S. W. corner of No. 1947 at 168 poles 368 poles to a pine corner of said number;
Then with that line W. 272 poles to the beginning.

Entered September 1, 1853.

Grant No. 2912.

District No. 11—On the waters of Tennessee river near the shallow ford above Andrew Maynesses on said run:

Beginning on a chestnut tree N. E. corner of No. 1960 and runs S. 20 degrees E. 226 poles to a stake;
Then E. 452 poles to a stake;
Then N. 20 degrees W. 226 poles to a stake on the bank of Tennessee river;
Then down the river with its various meanderings to the beginning.

Entered September 1, 1853.

Grant No. 2913.

District No. 11—On the waters of Tennessee river:

Beginning on a spruce pine Hayse's Mill Creek and runs S. 15 W. 294 poles to a hickory on the line of No. 8, old survey;
Then N. 75 W. 213 poles to a post oak on the line of 1208;
300 Then with that line N. 30 E. 288 poles to a hickory on the bank of Tennessee river;
Then up the river with its meanders to the beginning.

Entered September 1, 1853.

Grant No. 2915.

District No. 11—On the waters of Panther Creek:

Beginning on chestnut the S. E. corner of No. 2086, and runs with the line of No. 1945, S. 120 poles to a dogwood on said line;
Then E. 320 poles to a stake;
Then N. 320 poles to a stake;
Then W. 320 poles to the N. E. corner of 2086;
Then with that line S. 200 poles to the beginning.

Entered September 1, 1853.

Grant No. 2916.

District No. 9—On the waters of Snow Bird Creek:

Beginning on a chestnut tree and runs S. 64 W. 273 poles to a stake:
Then S. 65 E. 320 poles to a stake;
Then S. 65 E. 320 poles to a stake;
Then N. 64 E. 370 poles to a stake;
Then N. 65 W. 320 poles to a stake;
Then S. 64 W. 97 poles to the beginning.

Entered September 1, 1853.

Grant No. 2917.

District No. 9—On the waters of Snow Bird river:

Beginning on a chestnut tree corner of No. 1998, and runs S. 53 degrees W. 226 poles to a maple;
Then N. 452 poles to a stake;
Then N. 53 E. 226 poles to a stake on the line of No. 1954;
Then with that line S. 452 poles to the beginning.

Entered September 1, 1853.

Grant No. 2919.

District No. 9:

Beginning on a hickory, the N. W. corner of No. 34, and N. 45 E. 30 poles to a white oak of No. 41;
Thence with that line W. 304 poles to the N. W. corner of No. 1772;
Thence S. 37 E. with the line of No. 811, passing the S. E. corner of said No. at 100 poles, 350 poles to a stake;
Thence E. 304 poles to a stake;
Thence N. 15 W. 193 poles to a corner of 359;
301 Thence S. 59 W. 37 poles to a corner of No. 534;
Thence with that line N. 28 W. 127 poles to the beginning.

Entered September 1, 1853.

Grant No. 2920.

District No. 10—On the waters of Santeatley creek:

Beginning on a locust stake, the S. E. corner of No. 392, and runs with said line S. 33 E. 32 poles to a forked hickory on said line;
Thence N. 74 E. 52 poles to a double maple on a rock;
Thence N. 33 W. 134 poles to a hickory;
Thence S. 74 W. 52 poles to two chestnuts on the line of No. 392;
Thence with that line to the beginning.

Entered September 1, 1853.

Grant No. 2921.

District No. 10—On the waters of Tennessee river:

Beginning on a chestnut tree on the bank of the Tennessee river above Maneas' and runs up the river with its meanders to a chestnut tree;
Thence S. 20 E. 320 poles to a stake;
Thence S. 60 W. 320 poles to a stake;
Thence N. 20 W. 320 poles to the beginning.

Entered September 1, 1853.

Grant No. 2937.

District No. 10—On the waters of Santeatley creek:

Beginning on a Spanish oak in a low gap and running S. 70 W. 320 poles to a Spanish oak;
Then S. 70 E. 370 poles to a hickory;
Then N. 225 poles to the beginning.

Entered December 29, 1854.

Grant No. 2940.

District No. 10—On the waters of Santeatly creek:

Beginning on a beech and running thence N. 20 W. 81 chains to a beech;
Thence N. 70 E. 80 chains to a chestnut;
Thence S. 20 E. 81 chains to a post;
Thence S. 70 W. 80 chains to the place of beginning.

Entered December 29, 1854.

Grant No. 2946.

District No. 10:

Beginning on a chestnut tree, corner of No. 2107, and runs
302 N. 80 E. 320 poles to a mountain oak, corner of No. 5057;
Thence S. 20 E. 320 poles to a corner of No. 5055;
Thence S. 85 W. 320 poles to a corner of No. 5056;
Thence N. 20 W. 320 poles to the beginning.

Entered March 29, 1856.

Grant No. 2947.

District No. 10:

Beginning on the S. E. corner of No. 400, and runs N., passing the N. E. corner of said No. at 10 poles, 170 poles to a hickory;
Thence W. 600 poles to a cucumber, N. E. corner of No. 4456;
Thence S. 170 poles to a stake;
Thence E. 600 poles to the beginning.

Entered March 29, 1856.

Grant No. 2948.

District No. 10:

Beginning on a mountain oak, the S. E. corner of No. 5055, and runs S. 20 E. 320 poles to a stake;
Thence N. 80 E. 320 poles to a corner of a former number;
Thence N. 20 W. 320 poles to a corner of No. 5055;
Thence with the line S. 80 W. 320 poles to the beginning.

Entered March 29, 1856.

Grant No. 2949.

District No. 10:

Beginning on a stake and beech on the state line and runs N. 30 E. 320 poles to a cherry on the bank of a branch;
Thence N. 45 W. 320 poles to a mountain oak on the state line;
Thence with the state line and its meanders to the beginning.

Entered March 29, 1856.

Grant No. 2950.

District No. 10—On the waters of Santeatley creek:

Beginning on a Spanish oak, corner of No. 386, and runs with that line S. 10 E. 140 poles to a corner of No. 4457;
Thence with that line W. crossing Santeatley at 30 poles, 340 poles to a large poplar, corner of said No.;
Thence S. 70 poles to a stake;
303 Thence W. 600 poles to a cucumber, corner of a former number;
Thence with that line N. 20 E. 900 poles, to a corner of said number;
Thence N. 60 E. 140 poles to a corner of said No.;
Thence S. 65 E. 140 poles to a Spanish oak;
Thence S. 80 W. 320 poles to a stake;
Thence S. 30 W. 320 poles to a hickory;
Thence S. 80 poles to the beginning.

Grant No. 2951.

District No. 10:

Beginning on a chestnut and water oak, corner of No. 5051, and runs S. 20 E. 320 poles to a mountain oak near an old trail;
Thence N. 80 W. 320 poles to a corner of No. — ;
Then N. 20 W. 320 poles to a spruce pine, corner of No. 5051;
Thence with that line S. 80 E. 320 poles to the beginning.

Entered March 29, 1856.

Grant No. 2952.

District No. 10:

Beginning on a chestnut tree and stake on the state line, and runs with said state line and its meanders N. 25 E. 320 poles to three sarvice trees on said line;
Thence S. 20 E. 320 poles to a spruce pine;
Thence S. 25 W. 320 poles to the N. E. corner of No. 5052;
Thence with that line to the beginning.

Entered March 29, 1856.

Grant No. 2956.

District No. 11—On the head of Steacoa Creek:

Beginning on a chestnut tree near the head of Steacoa creek, and runs west 400 poles to a locust;
Thence N. 400 poles to a hickory;
Thence E. 400 poles to a locust, corner of a former No.;
Thence S. 400 poles to the beginning.

Entered September 1, 1853.

Grant No. 2957.

District No. 9—On the waters of Snow Bird creek:

Beginning on a Spanish oak the S. W. corner of 1897, runs with the line of No. 1040, and runs S. 53 W. 452 poles to a black oak corner of No. 1042;
Thence N. 226 poles to a stake;
Thence N. 53 E. 452 poles to a stake;
304 Thence S. 226 poles to the beginning.

Entered September 1, 1853.

Grant No. 2959.

District No. 11:

Beginning on a poplar standing near the head of the flat branch and runs N. 24 poles to a post oak;
Then W. passing the S. E. corner of 1950 at 160 poles 320 poles to a stake,
Then S. 320 poles to a stake;
Then E. 320 poles to a stake;
Then N. 296 poles to the beginning.

Entered September 1, 1853.

Grant No. 2960.

District No. 9—On the waters of Snow Bird:

Beginning on a birch, a corner of No. 1038, and the northeast corner of No. 1039, and runs N. 90 poles to a stake;
Then N. 53 E. 412 poles to a stake;
Then S. 412 poles to a stake;
Then S. 53 E. 412 poles to a stake;
Then N. 312 poles to the beginning.

Grant No. 2961.

District No. 9—On the waters of Long Creek:

Beginning on a black oak, the beginning corner of No. 1, old survey, and runs with that line N. passing the N. W. corner of said No. at 180 poles, 222 poles to a pine;

Then W. 96 poles to a stake and pointers on the line of a former No.;
Then with that line S. 86 poles to a chestnut, corner of said number;
Then W. 202 poles to the beginning corner of said No., on the line of a former number;
Then with that line S. 160 poles to a rock corner of No. 1954;
Then with that line E. 202 poles to a black oak, the beginning corner of No. 342;
Then with that line N. 50 E. 14 poles to a chestnut on said line;
Then E. 80 poles to the beginning.

Entered May 8, 1855.

Grant No. 2963.

District No. 10—On the waters of West Buffalo:

Beginning on a chestnut tree and runs S. 53 degrees W. 36 poles to a Spanish oak;
305 Then N. 452 poles to a stake;
Then N. 53 degrees E. 226 poles to the N. W. corner of tract No. 2022;
Then with that line S. 452 poles to the S. W. corner of said number;
Then S. 53 degrees W. 190 poles to the beginning.

Grant No. 2964.

District No. 10:

Beginning on a white pine on the bank of Cheoah river, and runs W. 300 poles to a black oak, corner of No. 1740;
Then S. 160 poles to a stake;
Then E. 300 poles to a stake on the bank of Cheoah river;
Then down the river with its meanders to the beginning.

Entered September 1, 1853.

Grant No. 2966.

District No. 10—On the waters of Santeatley creek:

Beginning on a Spanish oak, corner of No. 386, and runs N. 45 E., crossing Santeatley 226 poles to spruce pine, on the bank of Lard creek;
Then down the creek with its meanders 80 poles to a stake on the line of No. 42 on the bank of the creek;
Then with that line S. 30 E. crossing the creek 54 poles to a corner of No. 42;
Then with said line N. 56 E. 63 poles to a locust, corner of said number;
Then with the line of a former number N. 56 E. 80 poles to a Spanish oak on the line of said No.;
Then S. 30 E. 100 poles to a Spanish oak on the top of a high ridge;

Then S. 50 W. 40 poles to a locust, corner of a former old survey;
Then with that line S. 160 poles to a survey corner of said number;
Then 440 poles to a stake and pointers on the line of No. 386;
Then with that line N. 120 poles to the beginning.

Grant No. 2967.

District No. 11—On the waters of Panther Creek:

Beginning on a stake in the fork of Panther creek and runs E. 160
poles to the S. E. corner of No. 20 a chestnut;
306 Then S. 320 poles to a stake;
W. 320 poles to a stake;
Then N. 320 poles to a chestnut, the S. W. corner of No. 20;
Then E. 160 poles to the beginning.
Entered September 1, 1853.

Grant No. 2968.

District No. 10—On the waters of Long Creek:

Beginning on a stake and Spanish oak, the N. E. corner of No. 1,
old survey, and runs N. 2 poles to a chestnut;
Then with a former line W. 90 poles to a pine on a former line;
Then with that line N. 42 poles to a pine on said line;
Then E. 234 poles to a Spanish oak corner of No. 1943;
Then with that line S. 220 poles to a corner of No. 542;
Then with that line N. 50 W. 90 poles to a corner of said number;
Then N. 30 W. 135 poles to the beginning.

Grant No. 2969.

District No. 10—On the waters of Stanteatley creek:

Beginning on a stake and cucumber, on the north bank of Santeatley
creek near an old trail, and runs W. 320 poles to a buckeye;
Then N. 20 W. 640 poles passing two former corners to a mountain
oak;
Then N. 40 E. 320 poles to a Spanish oak on the top of a mountain;
Then S. 20 E. 915 poles to the beginning.
Entered Dec. 29, 1854.

Grant No. 2970.

District No. 10—On the waters of Santeatley creek:

Beginning on a Spanish oak, the S. W. Corner of No. 392, and runs
with the said line N. 33 E. 127 poles to a hickory on the line
of No. 386;
Then with that line S. 80 W. 68 poles to a stake corner of said
number;
Then with said line N. 10 W. 40 poles to a stake in a stump on said
line;

Then W. crossing Santeatley creek at 30 poles, 340 poles to a large poplar;
Then S. 240 poles to a hickory corner of 2020;
Then with that line S. 70 E. coming to Santeatley at 24 poles;
Then down the same with its meanders, crossing said creek
307 at 50 poles, 332 poles to a black oak on the line of No. 392;
Then with that line N. 33 E. passing a corner of said number at 66 poles, 127 poles to the beginning.

Entered December 29, 1854.

Grant No. 2974.

District No. 10—On the waters of Santeatley:

Commencing on the northeast corner of 1308 and running thence S. 70 W. with M. Fain's line 113 chains;
Thence N. 20 W. 57 chains to a post and pointers;
Thence N. 70 E. 113 chains to a beech;
Thence S. 20 E. 57 chains to the place of beginning.

Entered January 6, 1855.

Grant No. 2975.

District No. 11—On the Waters of Archmouse Branch:

Beginning on a chestnut on the line of No. 1, old survey, and runs with said line N. 44 poles to a hickory, on said line, and S. E. corner of No. 1959;
Then with that line W. 150 poles to a corner of 1950;
Then with that line S. 320 poles to a stake on the line of 1947;
Then E. 44 poles to a corner of said number;
Then S. 300 poles to a stake on said line;
Then E. 300 poles to a stake on the county line;
Then with said line N. 370 poles to the S. E. corner of said No. 7;
Then with that line W. 200 poles to the beginning.

Entered September 1, 1853.

Grant No. 2976.

District No. 10: On the waters of Santeatley creek:

Beginning on a stake and back on the state line S. W. of the Stratton improvement, and runs N. 30 E. 320 poles to a cherry;
Then S. 50 E. crossing Santeatley at 200 poles, 320 poles to a spruce pine;
Then S. 30 W. 320 poles to a beech on the state line;
Then with said line and its meanders to the beginning.

Entered March 29, 1856.

Grant No. 2979.

District No. 10:

Beginning on the Tennessee line N. of Strattons commencing on a beech and running thence S. 48 W. 143 chains to a chestnut;

308 Thence E. 170 chains to a spruce pine;
Thence N. 42 W. 100 chains to the place of beginning.

Entered June 1, 1853.

Grant No. 2980.

District No. 10: On the waters of Tennessee river:

Beginning on a chestnut tree and runs S. 120 poles to a stake;
Then S. 45 E. 452 poles to a stake;
Then N. 276 poles to a stake;
Then N. 45 W. 452 poles to a stake;
Then S. 106 poles to the beginning.

Entered September 1, 1853.

Grant No. 2981.

District No. 9: On the waters of Snow Bird creek:

Beginning on a stake and white oak, the S. W. corner of No. 374 and runs with that line north 55 W. 180 poles to a black, the N. W. corner of said number;
Then S. 64 W. 280 poles to a stake;
Then S. 55 E. 180 poles to a stake on the line of No. 1982;
Then with that line N. 64 E. 280 poles to the beginning.

Entered September 1, 1853.

Grant No. 2983.

District No. 11: On the waters of Steacoh creek:

Beginning on a stake and locust, the S. W. corner of No. 413, and runs E. 320 poles to a chestnut oak;
Then S. 320 poles to a chestnut oak;
Then W. 320 poles to a chestnut on a ledge of rocks;
Then N. 320 poles to the beginning.

Entered September 1, 1853.

Grant No. 2336.

District No. 10:

Beginning on a beech tree on the state line where the Hanover Mountain strikes said line, near a corner of No. 5051, and runs with said line S. 80 E. 320 poles to a mountain oak;
Then with the line of No. 4455, north 40 E. 320 poles to a Spanish oak;
Then N. 45 E. 28 poles to two water oaks;

Then E. 92 poles to a large rock on the top of the second high peak of the Hangover;
Then down the ridge with its meanders to a service tree, on the bank of the Cheoah river;
309 Then down said river and its meanders to the Tennessee river;
Then down said river and its meanders to a corner of No. 611 at the mouth of Slick Rock creek and the state line;
Then up said creek with said line to the top of the mountain to a locust on said line;
Then with said line and its meanders to the beginning.

Entered June 1, 1853.

The following described real estate in Cherokee county, and state of North Carolina:

Grant No. 2896.

District No. 5: On the waters of Beaver Dam creek:

Beginning on a black oak on a former line and runs W. 6 poles to a Spanish oak of said number;
Then N. 160 poles to a stake;
Then E. 200 poles to a stake;
Then S. 160 poles to a former corner;
Then W. 154 poles to the beginning.

Entered June 1, 1853.

Grant No. 2897.

District No. 5: On the waters of Rhea's Branch:

Beginning on a chestnut oak, the S. W. Corner of No. 134, and runs S. 160 poles to the N. W. corner of Reeves survey;
Then with that line E. 180 poles to the beginning corner of No. 134;
Then with said line N. 160 poles to the N. E. corner of No. 134;
Then W. 180 poles to the beginning.

Entered June 1, 1853.

Grant No. 2898.

District No. 5: On the waters of Beaver Dam Creek:

Beginning on a pine standing on the line of No. 128 and runs with said line S. 24 poles to a post oak, the N. E. corner of No. 267;
Then with that line W. 343 poles to a stake in said line;
Then N. 72 poles to a stake in the line of No. 1406;
Then with that line E. 343 poles to a black oak in the line of No. 129, and the S. E. corner of No. 1406;
Then with the line of No. 129 S. 48 poles to the beginning.

Entered June 1, 1853.

310

Grant No. 2899.

District No. 5: On the waters of Beaver Dam:

Beginning on a chestnut oak standing on the S. side of a mountain marked with the letter "B," and runs S. 20 W. 252 poles to a black oak in the line of No. 124;
Then E. 320 poles to a stake;
Then N. 20 E. 320 poles to a stake;
Then W. 320 poles to a stake;
Then S. 20 W. 68 poles to the beginning.

Entered June 1, 1853.

Grant No. 2900.

District No. 5: On the Unicoy Mountain:

Beginning on a chestnut on the line of No. 131, and on the state line, and runs N. with the state line and the meanders of the mountain to a hickory in the line of No. 131;
Thence with that line S. 36 E. 184 poles to the beginning, being bounded all around with other lines.

Entered March 12, 1853.

Grant No. 2901.

District No. 8: On the waters of Campmeeting Branch:

Beginning on a post oak and runs north 20 W. 130 poles to a post oak;
Then E. 75 to a sourwood;
Then N. 35 poles to an old corner;
Then N. 20 E. 4 poles to an old corner;
Then S. 150 poles to a stake in the state line;
Then 45 poles to the beginning.

Entered June 22, 1853.

Grant No. 2902.

District No. 5:

Beginning on a locust the S. E. corner of No. 85, and the beginning corner of No. 1789, and runs with that line E. 178 poles to the S. E. corner of said No.;
Then S. 172 poles to a stake;
Then W. 178 poles to a corner of No. 1987;
Then with that line N. 172 poles to the beginning.

Entered September 1, 1853.

Grant No. 2907.

District No. 6: B:

311 Beginning on a black oak near the wolf way ground and the Sheoah road leading from Valley river, and runs south 1 pole to a stake;

Then E. 258 poles to a chestnut oak;
Then N. 420 poles to two small chestnuts;
Then W. 258 poles to a chestnut;
Then S. 420 poles to the beginning.

Entered September 1, 1853.

Grant No. 2914.

District No. 5:

Beginning on a hickory the S. W. corner of J. Morris lots, and runs S. with the line of No. 1397, 197 poles to a birch corner of said number;
Then E. 180 poles to the S. W. corner of No. 1938,
Then with that line N. 197 poles to a post oak, corner of Moore's Survey;
Then with that line W. 180 poles to the beginning.

Entered September 1, 1853.

Grant No. 2918.

District No. 5:

Beginning on a black oak the S. E. corner of the Rose tract and runs with that line N. 47 W. 67 poles to a hickory corner of No. 1713;
Then with that line E. passing a corner at 80 poles 280 poles to a stake;
Then S. 316 poles to a stake;
Then W. 280 poles to the N. E. corner of No. 1937;
Then N. 210 poles to the southeast corner of a former survey;
Then E. 30 poles to the beginning.

Entered September 1, 1853.

Grant No. 2922.

District No. 5:

Beginning on a black oak corner of Jemison's tract; and runs N. 80 E. 20 poles to a hickory;
Then N. 20 W. 60 poles to a cucumber;
Then W. 60 poles to a Spanish oak;
Then N. 26 poles to a locust;
Then W. 20 poles to a chestnut;
Then N. 34 poles to a Spanish oak;
Then W. 30 poles to a chestnut;
Then N. 100 poles to a Spanish oak;
Then W. 126 poles to a stake;
Then S. 228 poles to Burgers corner;
Then N. 95 poles to a locust;
312 Then S. 182 poles to a chestnut;
Then E. 168 poles to a chestnut oak;
Then N. 75 E. 160 poles to a dogwood;
Then N. 10 E. 44 poles to a sourwood;

Then S. 70 E. 22 poles to a hickory;
Then N. 96 poles to the beginning.

Entered October 2, 1853.

Grant No. 2923.

District No. 5: On the waters of Beaver Dam creek:

Beginning on a post oak, the N. W. corner of J. W. Brook's 200 acre lot, and runs N. on that line, W. 160 poles to a stake on said line;
Then S. 80 poles to a stake;
Then N. 75 E. 165 poles to a former corner of a former number;
Then with that line N. 45 poles to the beginning.

Entered September 20, 1853.

Grant No. 2924.

District No. 5: On the waters of Tellico River:

Beginning on a stake on the state line, crosses the little Bald Mountain, and runs with said line N. 50 E. 452 poles to a stake;
Then S. 226 poles to a stake;
Thence S. 50 W. 452 poles to a stake;
Then N. 226 poles to the beginning.

Entered December 7, 1853.

Grant No. 2925.

District No. 5:

Beginning on a chestnut and running S. 24 poles to a poplar;
Then W. 218 poles to a laurel bush;
Then N. 360 poles to a white oak;
Then E. 64 poles to a stake on the line of a former survey;
Then S. with said line 184 poles to a corner of said survey;
Then E. 254 poles with said line to a stake;
Then S. 156 poles to the beginning.

Entered January 2, 1854.

Grant No. 2926.

District No. 5:

Beginning on a locust, the N. W. corner of No. 2071, and runs with said line S. 226 poles to the S. W. corner of said number,
313 Then W. 454 poles to a stake;
Then N. 226 poles to a stake on the state line,
Then with said line E. 452 poles to the beginning.

Entered September 1, 1853.

Grant No. 2927.

District No. 5:

Beginning on a hickory corner of No. 131 and runs N. 40 poles to a stake on the line of No. 925;
Thence with that line, passing the corner of said number 90 poles to a stake;
Thence S. 180 poles to a stake;
Thence E. 90 poles to a stake;
Thence N. 140 poles to the beginning.

Entered November 9, 1853.

Grant No. 2928.

District No. 5: On the waters of Beaver Dam creek:

Beginning on a hickory the N. E. Corner of J. B. Evan's survey, that was surveyed on the 8th of November, 1853, and running thence E. 24 poles to a locust on J. Brysons corner;
Thence N. with the W. line of J. Bryson 106 poles to a Spanish oak;
Thence E. 80 poles to Bryson's N. E. corner;
Thence N. 45 W. 150 poles to a chestnut;
Thence W. 60 poles to a large rock and small oak;
Thence S. 122 poles to a hickory on Bryson's line;
Thence E. 60 poles to black oak;
Thence S. 90 poles to the beginning.

Entered November 11, 1853.

Grant No. 2929.

District No. 3: On the waters of Beaver Dam Creek:

Beginning on a chestnut oak the N. E. corner of No. 944, and runs N. 176 poles to a stake, corner of No. 207;
Thence W. 180 poles to a stake;
Thence S. 176 poles to a stake;
Then E. 180 poles to the beginning.

Entered November 11, 1853.

Grant No. 2930.

District No. 5:

Beginning on a black gum corner of No. 138, and runs W. passing an old corner at 16 poles, 180 poles to a black oak, on the line of No. 142;
314 Then N. 120 poles to a chestnut corner of an old number; Then with that line W. 140 poles passing a former corner still W. 60 poles to a stake;
Then N. 150 poles to a stake;
Then E. 380 poles to a stake;
Then S. 200 poles to the beginning.

Entered October 14, 1853.

Grant No. 2931.

District No. 5: On the waters of Tellico river:

Beginning on a chestnut and running thence N. 20 E. 270 poles to Tellico river;
Then down the river 180 poles to state line;
Then with the state line S. 57 W. 240 poles to a stake;
Then S. 220 poles to a stake;
Then N. 73 E. 300 poles to the beginning.

Entered February 25, 1854.

Grant No. 2932.

District No. 5: On the waters of Beaver Dam Creek:

Beginning on a white oak corner of Nos. 129 and 130, and running thence S. 160 poles to a stake;
Then W. 452 poles to a stake;
Then N. 180 poles to a stake;
Then W. 64 poles to an old corner;
Then N. 190 poles to Hunt's line;
Then S. 70 E. 160 poles to a chestnut on Bryson's corner line;
Then N. 20 E. 90 poles to Bryson's corner;
Then S. 70;
Then E. 110 poles to a black oak;
Then N. 16 poles to a stake;
Then E. 90 poles to stake;
Then S. 40 poles to a stake;
Then E. 110 poles to a white oak;
Then S. 160 poles to the beginning.

Entered September 1, 1853.

Grant No. 2933.

District No. 5:

Beginning on the I. Ingraham's hickory corner and running thence N. 23 E. 116 poles to a chestnut;
Then N. 80 poles to the corner of No. 2810;
Then E. 200 poles to a black oak, by rock cliff;
Then N. 10 E. 240 poles to a hickory;
Then N. 45 W. 90 poles to a locust corner of No. 2558;
Then S. 60 W. 480 poles to corner of said No.;
315 Then S. 46 E. 320 poles to the beginning.

Entered September 1, 1853.

Grant No. 2934.

District No. 5: On the waters of Beaver Dam Creek:

Beginning on a black oak, N. E. corner of No. 1273, and runs with said line S. 33 W. 253 poles to a stake; S. E. of said No.;
Thence S. 45 E. 126½ poles to a stake;

Thence N. 33 E. 253 poles to a corner of No. 1275;
Thence with that line N. 45 W. 126½ poles to the beginning.

Entered October 7, 1853.

Grant No. 2935.

District No. 5:

Commencing on the corner of lot No., and running thence N. 40 poles to a post and pointers;
Thence N. 90 poles to a blackwood;
Thence S. 16 poles to a chestnut;
Thence N. 73 W. 146 poles to a post;
Thence N. 20 E. 60 poles to a Spanish oak;
Thence S. 68 E. 36 poles to an oak bush;
Thence S. 16 poles to an old corner;
Thence E. 330 poles to a hickory;
Thence S. 30 W. 62 poles, to a pine stake;
Thence W. 110 poles to the beginning.

Entered July 20, 1854.

Grant No. 2936.

District No. 5: On the west fork of Beaver Dam creek:

Beginning on the northwest corner of the first lot of land that was run for Clark Rogers, S. B. Rhea, and J. B. Evans, on a Spanish oak, and running thence W. 160 poles to a chestnut oak;
Thence S. 30 W. 208 poles to a post oak and pointers;
Thence E. 160 poles to a hickory;
Thence S. 28 poles to a black gum;
Thence N. 80 E. 18 poles to a locust;
Thence N. 20 E. 253 poles to the beginning.

Entered December 13, 1854.

Grant No. 2941.

District No. 5:

Beginning on the N. W. corner of No. 2776 and runs S. with its line 226 poles to its S. W. corner;
316 Then W. 280 poles to a stake;
Then N. 226 poles to a stake on the state line;
Then E. to the beginning.

Entered September 1, 1854.

Grant No. 2942.

District No. 5: On the waters of Chambers Branch:

Beginning on a Spanish oak near the S. E. corner of John Ellis' lot, and runs with the line W. 140 poles to a Spanish oak, corner of No. 68;

Then with the line of an old survey, S. 160 poles to a corner of Naugh's lot;
Then with that line E. 140 poles to Naugh's line;
Then N. 45 E. 140 poles to hickory, corner of No. 2825;
Then with that line S. 25 W. 122 poles to the beginning.

Entered July 10, 1854.

Grant No. 2943.

District No. 5: On the waters of the main Tellico river:

Beginning at a chestnut and running thence S. 75 W. 64 chains to a poplar;
Thence N. 15 W. 64 chains to a Spanish oak;
Thence N. 75 E. 100 chains to a spruce pine;
Thence S. 15 E. 64 chains to a linn;
Thence S. 75 W. 36 chains to the place of beginning.

Entered December 26, 1855.

Grant No. 2944.

District No. 5:

Commencing on a hickory the W. corner of E. Robert's tract of land, and runs W. 80 poles to a chestnut oak;
Then N. 45 W. 60 poles to a locust;
Then W. 82 poles to a locust;
Then S. 40 poles to a cucumber;
Then S. 20 E. 60 poles to a hickory;
Then N. 80 E. 162 poles to a Spanish oak;
Then N. 45 E. 35 poles to the beginning.

Entered December 13, 1854.

Grant No. 2945.

District No. 5: Near the head waters of Tellico river:

Beginning on a Spanish oak on the top of the mountain and running thence S. 15 W. 100 chains to a poplar;
Thence N. 75 E. 64 chains to a chestnut;
Thence S. 15 E. 100 chains to a black oak;
317 Thence S. 75 W. 64 chains to the place of beginning.

Entered December 26, 1854.

Grant No. 2953.

District No. 6: On the head waters of King's Creek:

Beginning on a chestnut tree on the line of No. 1948, and runs with that line W. 66 poles to a chestnut on the line of No. 1954;
Thence with that line N. 20 poles to a rock on the line of No. 542;
Thence with that line N. 50 E. 98 poles to a locust corner of said number;

Thence N. 302 poles to a red oak;
Thence E. 220 poles to a chestnut;
Thence S. 380 poles to a white walnut;
Thence N. 254 poles to the beginning.

Entered September 1, 1853.

Grant No. 2954.

District No. 6:

Beginning on a stooping chestnut near a spring and runs S. one pole to a stake;
Thence W. 210 poles to a pine;
Thence N. 500 poles to a black oak on a former line;
Thence E. 202 poles to a corner of a former number;
Thence N. 50 E. 90 poles to a corner of said number;
Thence S. 270 poles to a former corner;
Thence with that line W. 200 poles to a corner of the same;
Thence S. 160 poles to the S. W. corner of said number;
Thence E. 200 poles to a pine;
Thence S. 105 poles to a maple;
Thence W. 46 poles to a corner of a former number;
Thence with that line S. 24 poles to the beginning.

Entered September 1, 1853.

Grant No. 2955.

District No. 5:

Beginning on a hickory, the N. E. Corner of No. 70, and runs N. 80 poles to S. W. corner of No. 70;
Thence with that line E. passing the S. E. corner of said No. and S. W. corner of No. 85, 177 poles to a stake;
Thence S. 183 poles to a stake;
Thence W. 177 poles to the N. E. corner of No. 70;
Thence N. 103 poles to the beginning.

Entered September 1, 1853.

318 Grant No. 2958.

District No. 6:

Beginning at a stake and hickory on the line of No. 1948 near the bank of a creek and runs N. 376 poles to two chestnuts;
Then E. 164 poles to a white oak on the side of a mountain;
Then S. 376 poles to a black oak;
Then W. 264 poles to the beginning.

Entered September 1, 1853.

Grant No. 2962.

Districts Nos. 6 and 9:

Beginning on a chestnut tree and chestnut oak near an old trail on the line of No. 1942, 100 poles N. of the S. E. corner of said No. and runs E. 200 poles to two chestnut oaks;

Then N. 240 poles to a chestnut;
Then 200 poles to a chestnut on the line of No. 1943;
Then with that line S. 240 poles to the beginning.

Entered September 1, 1853.

Grant No. 2965.

District No. 5: On the waters of Beaver Dam creek:

Beginning on the N. E. corner of No. 921 a chestnut oak and runs S. 55 W. 246 poles to a chestnut, passing the N. W. corner of No. at 148 poles;
Then with the line of No. S. 50 E. passing the S. E. corner of No. at 80 poles, 480 poles to a stake;
Then N. 35 E. 246 poles to a stake;
Then N. 50 W. with the line of No. 921, 480 poles to the beginning.

Entered June 1, 1853.

Grant No. 2971.

District No. 5: On the waters of Beaver Dam creek:

Beginning on a chestnut, the N. W. corner of Fleming's survey, and runs E. 114 poles to the S. W. corner of John Ingraham's survey;
Then with that line N. 270 poles to a stake;
Then W. 135 poles to a stake;
Then S. 270 poles to a stake;
Then E. 21 poles to the beginning.

Entered June 23, 1853.

319 Grant No. 2972.

District No. 5:

Beginning on a maple the N. E. corner of E. Robert's and running thence N. 45 W. 182 poles to a maple;
Then E. 327 poles to a chestnut;
Then N. 100 poles to a black oak;
Then E. 120 poles to a maple;
Then S. 320 poles to a sassafras;
Then N. 80 W. 300 poles to the beginning.

Entered October 2, 1853.

Grant No. 2973.

District No. 5: On the waters of Beaver Dam creek:

Beginning on a locust standing on the state line and runs S. 33 W. 252 poles to a stake;
Then N. 45 W. 127 poles to a stake;
Then N. 33 E. 252 poles to a locust on a state line;
Then with said line N. 45 E. 120 poles to the beginning.

Entered June 1, 1853.

Grant No. 2977.

District No. 5:

Beginning on a white oak on the S. W. corner of James Jenkson's, and running thence with his line N. 40 W. 46 poles to a black oak and hickory;
Thence N. 50 E. 63 poles to a hickory and rock;
Thence S. 40 E. 126 poles to a Spanish oak;
Thence S. 50 W. 63 poles to a black jack;
Thence N. 40 W. 80 poles to the beginning.

Entered June 21, 1854.

Grant No. 2978.

District No. 5:

Beginning on the S. W. corner of M. L. Weeks' 100 acre tract on Hiwassee river, and runs down said river to M. L. Berry's pine corner, 44 chains to a pine;
Then N. 30 E. 20 chains to a black oak;
Then N. 45 E. 45 chains to a hickory;
Then S. 45 E. 77 chains to a hickory;
Then S. 32 chains to the river;
Then down the river 53 chains to the beginning.

Entered December 29, 1854.

Grant No. 2982.

District No. 5:

Beginning on a hickory the S. W. corner of No. 86, and runs with said line E. 122 poles to a hickory the S. E. corner of said number;
320 Then S. 116 poles to a birch in a branch;
Then W. passing the N. E. corner of No. 85 at 86 poles, 122 poles to a black oak, the S. E. corner of Fleming's lot;
Then with that line N. 90 poles to a sourwood corner of said No.;
Then with that line W. 180 poles to the N. W. corner of said number;
Then N. 80 E. 180 poles to the beginning.

Entered September 1, 1853.

Grant No. 2984.

District No. 5: On the waters of Beaver Dam creek:

Beginning on a stake, the S. E. corner of No. 135 and runs S. 135 poles to a locust on the side of a mountain;
Then W. 270 poles to a stake;
Then N. 135 poles to a stake;
Then E. 270 poles to the beginning.

Entered June 23, 1853.

Grant No. 2985.

District No. 5: On the waters of Beaver Dam creek:

Beginning on a black oak standing at or near a corner of the Bryson or Moore tract and runs N. 35 E. 100 poles to a hickory on said line;
Then E. 80 poles to a chestnut;
Then N. 162 poles to a locust on the line of No.;
Then with that line W. 300 poles to a corner of the Moore tract;
Then S. 120 poles to a corner of old tract;
Then with that line S. 85 W. 160 poles to the beginning.

Entered June 23, 1853.

Grant No. 2986.

District No. 5: On the waters of Cane creek:

Beginning on a stake and hickory on the line of No. 79 and runs with that line N. 52 E. 300 poles to a stake;
Then S. 160 poles to a stake;
Then S. 52 W. 250 poles to a stake on the Brabson line;
Then with that line N. 46 poles to a corner of said number;
Then with that line S. 52 W. 50 poles to a pine on said line;
Then N. 116 poles to the beginning.

Entered September 1, 1853.

Grant No. 2987.

District No. 5:

Beginning on a poplar the N. W. corner of No. 129, and
321 runs with former line E. 340 poles to a stake on a former line;
Then N. 180 poles to a state;
Then W. 348 poles to a stake;
Then S. 180 poles to the beginning.

Entered October 1, 1853.

Grant No. 2988.

District No. 5:

Commencing on a hickory and thence E. 200 poles to a pine;
Thence N. 172 poles to a black oak;
Thence N. 70 W. 194 poles with Colvert's line;
Thence N. 40 W. 50 poles to a white oak;
Thence S. 25 E. 80 poles to a black oak;
Thence S. 65 W. 80 poles to McFoy's line;
Thence S. 18 E. 84 poles to Murphy's line;
Thence S. 65 E. 32 poles to the beginning.

Entered October 1, 1853.

Grant No. 2989.

District No. 5: On the waters of Beaver Dam creek:

Beginning on a stake and N. W. corner of No. 925 and runs E. 320 poles to the N. E. corner of said number;
Then with that line S. 20 W. 160 poles to a stake on said line;
Then E. 160 poles to the S. W. corner of a former number;
Then S. 20 W. 252 poles to a stake;
Then W. 300 poles to a stake;
Then N. 320 poles to the beginning.

Entered November 9, 1853.

Grant No. 2990.

District No. 5: On the waters of Beaver Dam creek:

Beginning on a stake and pine on E. Thompson's line, and runs 100 poles to the S. E. corner;
Then with Hollenhead's line S. 200 poles to a stake;
Then W. 100 poles to a stake;
Then N. crossing Beaver Dam 200 poles to the beginning.

Entered November 11, 1853.

To have and to hold the same, with the appurtenances, to the said Henry Lewis, D. W. Strickland, D. W. Belding, J. W. Cooper and Henry Stix, Nathan Stix, and Lewis Krohn, their heirs and assigns forever, as fully and completely as said William A. Bartlett, administrator of the estate of William H. Peet, deceased, by virtue
322 of said proceedings, orders, etc., and of the statute in such case made and provided, may, can or should convey the same.

In witness whereof the said William A. Bartlett, administrator as aforesaid, has hereunto set his hand and seal, the 31st day of December, A. D. one thousand eight hundred and eighty-one.

[SEAL.] WM. A. BARTLETT,
Administrator of Estate of Wm. H. Peet.

(All interlineations which appear in this deed on page 2 in these words, "to Nathan Stix a one-sixth part, to Louis Krohn a one-twelfth part," "and to Nathan Stix an undivided one-sixth part, and to Louis Krohn an undivided one-twelfth," on page 19 in these words, "Nathan Stix and Louis Krohn," were made before the signing, sealing and delivering of this deed.)

STATE OF LOUISIANA,
City of New Orleans:

Be it remembered that on this second day of January, in the year of our Lord one thousand eight hundred and eighty-two, before me, George A. Hess, a duly appointed and qualified commissioner of the state of North Carolina, in and for the state of Louisiana, at the city of New Orleans, personally appeared at my office in said city of New

Orleans the above named William A. Bartlett, administrator of the succession or estate of the late William H. Peet, and acknowledged the due execution of the foregoing deed of conveyance as his act and deed in his said capacity as administrator of the estate of said William H. Peet, for the purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my official seal as a commissioner of North Carolina, at New Orleans, Louisiana, this second day of January, in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.] GEO. A. HESS,
Commissioner.

STATE OF NORTH CAROLINA,
Cherokee County:

OFFICE OF JUDGE OF PROBATE,
January the 11th, 1882.

I, Jas. C. Ashby, Judge of Probate in and for said county, do hereby adjudge that the foregoing deed is duly acknowledged and in due form. Therefore let the same deed and certificate thereto be registered. Given under my hand and seal of our Superior Court of law at office in Murphy, the date above written.

[SEAL.] JAS. C. ASHBY,
Judge of Probate.

323 The foregoing deed and certificate came to hand the 11th day of January, 1882, and was duly registered in the register's office of Cherokee county, North Carolina, in Book R, page 342, on this 12th day of January, 1882.

R. A. AKIN,
Register of Deeds for Cherokee County.

Register's fee, $11.85.

NORTH CAROLINA,
Graham County:

In the Probate Court.

February 11th, 1882.

I, John G. Tatham, Judge of Probate in and for the county and state aforesaid, do hereby adjudge that the foregoing deed has been acknowledged in due form of law before Geo. A. Hess, Commissioner of Affidavits. Therefore let the said deed, together with certificate of com. be registered in our county of Graham, date hereinbefore written.

JOHN G. TATHAM,
Probate Judge, Graham County.

NORTH CAROLINA,
Graham County:

OFFICE REGISTER OF DEEDS, *February 11th*, 1882.

The foregoing deed, together with certificates came to hand on the 11th day of February, 1882, and was by me duly registered in the Register's office in said county, in Book B, beginning on page 131 and ending on page 151.

W. F. MANNEY,
Register of Deeds, Graham County.

STATE OF NORTH CAROLINA,
Clay County:

In the Probate Court.

February 18", 1882.

I, O. W. Sanderson, Judge of Probate in and for the county and state aforesaid, do hereby adjudge that the foregoing deed is duly acknowledged and in due form. Therefore let the said deed and certificates be registered in our said county of Clay.

G. W. SANDERSON,
Probate Judge, Clay County, N. C.

STATE OF NORTH CAROLINA,
Clay County:

OFFICE REG. OF DEEDS, *Feb'y 20th*, 1882.

The foregoing deed came to hand Feb'y 18", 1882, and was duly registered in this office, Feb'y 20", 1882, in Book C, beginning on page 332 and ending on page 351.

G. M. FLEMING,
Register of Deeds, Clay County.

324 EXHIBIT NO. 4 TO DEPOSITION OF D. W. BELDING.

This indenture made this eighth day of January, A. D. 1895, by and between Louis Krohn (widower), of Cincinnati, Hamilton County, Ohio, and Thomas F. McGary and Nettie Belding McGary, his wife, of Grand Rapids, Kent County, Michigan, parties of the first part, and Robert N. Archer, of Cincinnati, Hamilton County, Ohio, as trustee, party of the second part;

Witnesseth: That the said parties of the first part for and in consideration of one hundred dollars to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and consideration of the agreement and covenants of a certain contract this day entered into by the parties hereto, and deemed a part hereof, have granted, bargained, sold, remised, released, conveyed, aliened and confirmed, and by these presents do hereby grant,

bargain, sell, remise, release and confirm unto the said party of the second part for life, remainder over to his successors in trust created by this deed and said contract, appointed in the manner provided in said contract forever, all their right, title and interest in the following described property:

All the timber now standing, growing and being on the following described tracts, pieces and parcels of land, situated on land embraced within the county of Graham (formerly Cherokee) and state of N. C., and being and including all the standing timber now on the lands purchased by the said Belding Lumber Company of North Carolina, on the 3rd day of August in the year of our Lord one thousand eight hundred and eighty-nine, less such as has been subsequently cut therefrom.

All the timber on tract No. 2022 on the waters of Buffalo, lying between 1865 and 1972, containing five hundred and forty (540) acres and purchased from the Belding Lumber Company by Fain and Beal.

Also all timber on the following described pieces of land, viz.: (Numbers only given in this deed—for description of grants see deed of 931, December, 1881, from William A. Bartlett, Adm'r., to D. W. Belding, J. W. Cooper, Henry Stix, Henry Lewis, Dudley W. Strickland, Nathan Stix and Lewis Krohn):

Grants numbers 2903, 2904, 2905, 2906, 2908, 2910, 2911, 2912, 2913, 2915, 2916, 2917, 2919, 2921, 2937, 2940, 2946, 2947, 2948, 2949, 2950, 2951, 2952, 2956, 2957, 2959, 2960, 2961, 2963, 2964, 2966, 2967, 2968, 2969, 2970, 2974, 2975, 2976, 2980, 2981, 2983, 2336:

325

Grant No. 94.

District No. 11: On the waters of West Stecoh:

Beginning at a chestnut, southeast corner of No. 754, and runs west with the line of same fifty-four (54) poles to a chestnut in the line of No. 256;
Then south with that line, one hundred and twenty-six (126) poles to a stake in said line;
Then east sixty-three (63) poles to a stake;
Then north one hundred and twenty-six (126) poles to a hickory in the line of No. 754;
Then to the beginning.

Entered May 23, 1853.

Grant No. 42.

District No. 11: On the waters of Stecoh:

Beginning at a pine in the line of No. 9 and runs north thirteen (13) west eighty (80) poles to a white oak on a hill side;
Then north sixty-seven (67) east one hundred (100) poles to two chestnuts, near the top of a ridge;

2 7 7

Then south thirteen (13) east eighty (80) poles to a pine;
Then south sixty-seven (67) west one hundred (100) poles to the beginning.

Entered March 21, 1853.

Grant No. 2935.

District No. 11: On the waters of West Stecoah:

Beginning at a chestnut on the west side of a branch and runs west fifty-four (54) poles to chestnut in the line of No. 256;
Then with that line north one hundred (100) poles to a stake in said line;
Then east fifty-four (54) poles to the beginning corner of No. 30;
Then with that line east twenty-six (26) poles to a stake in said line;
Then south one hundred (100) poles to a birch in the branch;
Then west twenty-six (26) poles to the beginning.

Entered May 23, 1853.

Grant No. 2936.

District No. 11: On the waters of West Stecoah:

Beginning at a hickory on the line of No. 256, runs south seventy (70) west sixty-three (63) poles to a hickory;
Then south one hundred and twenty-six (126) poles to a stake;
326 Then north seventy (70) east sixty-three (63) poles to a stake in the line of No. 256;
Then with that line north one hundred and twenty-six (126) poles to the beginning.

Entered May 23, 1853.

Grant No. 2438.

District No. 11: On the waters of West Stecoah:

Beginning at a pine standing at the line of No. 30 and 755, and runs with the line of No. 30 north one hundred and twenty-six (126) poles to a stake, in said line;
Then east sixty-three (63) poles to a stake;
Then south one hundred and twenty-six (126) poles to a spruce pine;
Then west sixty-three (63) poles to the beginning.

Entered May 23, 1853.

Grant No. 1853.

Entry No. 1787, containing fifty acres.

Grant No. 1864.

District No. 11: On the waters of Panther creek:

Beginning at a hickory and runs north seventy (70) west eighty (80) poles, crossing Panther creek at eighteen poles to a pine at the line of No. 784;
Then with that line north twenty (20) east two hundred (200) poles to a stake;
Then south seventy (70) west eighty (80) poles to a stake on the line of No. 750;
Then with that line south twenty (20) west two hundred (200) poles to the beginning.

Entered June 1, 1853.

Grant No. 5360.

Entry No. 683, containing one hundred (100) acres.

Grant No. 86.

District No. 11: On Wolf's creek:

Beginning at a pine standing on a mountain side between Wolf creek and Yellow creek and runs north seventy-seven (77) east ninety (90) poles to a pine in a ledge of rocks;
Then south forty-two (42) west one hundred and eighty (180) poles to a stake;
Then south seventy-seven (77) east ninety (90) poles to a stake;
327 Then north forty-two (42) one hundred and eighty (180) poles to the beginning.

Entered May 12, 1853.

Grant No. 87.

District No. 9: On the waters of Stecoah creek:

Beginning at a chestnut tree standing on the line of No. 684, and runs with said line north thirty-eight (38) degrees east one hundred and eighty (180) poles to a stake;
Then north seventy-five (75) west ninety (90) poles to a stake;
Then south thirty-eight (38) west one hundred and eighty poles to a stake; in the line of No. 1775;
Then with that line south seventy-five (75) east ninety (90) poles to the beginning.

Entered May 1, 1853.

Grant No. 47.

District No. —:

Beginning at a black oak and hickory, the northwest corner of No. 2945, and runs with said line north forty-five (45) east one hundred and eighty (180) poles to a stake on said line;

Then north forty-five (45) west ninety (90) poles to a stake;
Then south forty-five (45) east ninety (90) poles to the beginning.

Entered July 22nd, 1854.

Grant No. 85.

District No. —: On Stecoah creek:

Beginning on a hickory on the line of No. 9 and runs with said line north twelve (12) poles to a chestnut;
Then west one hundred and eighty (180) poles to a stake;
Then south ninety (90) poles to a stake;
Then east one hundred and eighty (180) poles to the southwest corner of No. 9, north seventy-eight poles to the beginning.

Entered August 24, 1853.

Grant No. 1761.

District No. 11: On the waters of Yellow creek:

Beginning at white ash and runs north seventy (70) west across Yellow creek at 18 poles to a pine;
Then north twenty (20) east one hundred (100) poles to a pine;
328 Then south seventy (70), east eighty (80) poles to a hickory;
Then south twenty (20) east one hundred (100) poles to the beginning.

Entered March 18, 1853.

Grant No. 4.

District No. 11: On the waters of Tennessee river:

Beginning at a chestnut tree standing near a bluff, near the Tennessee river and near the mouth of Yellow creek and runs south fifty (50) west, crossing Yellow creek at twenty (20) poles and crossing the same at sixty-six (66) poles, and crossing the same at seventy-six (76) poles and again at one hundred and thirty-six (136) poles, one hundred and eighty-four (184) poles to the southeast corner of No. 397;
Then with that line north twenty (20) east ninety (90) poles to a stake in said line;
Then north fifty (50) east one hundred and eighty-four (184) poles to a stake;
Then south twenty (20) east ninety (90) poles to the beginning.

Grant No. 3500.

District No. 11: On the waters of Yellow creek:

And runs with the line of No. 750 south fifty (50) west crossing Yellow creek at twenty (20) poles and the second time at seventy-six (76) poles and crossing the same at one hundred and thirty-six (136) poles and crossing one hundred and eighty-four (184) poles to the southeast corner of No. 397;

Then south fifty-five (55) east ninety (90) poles to a stake;

Then north fifty (50) east one hundred and eighty-four (184) poles to a stake;

Then north fifty (50) west ninety (90) poles to the beginning.

Entered.

Grant No. 96.

District No. 11: On Tennessee river:

Beginning at a chestnut tree near the southwest corner of No. — and runs west sixty-three (63) poles to a chestnut;

Then north one hundred and twenty-six (126) poles to a stake;

Then sixty-three (63) poles to a stake;

Then south one hundred and twenty-six (126) poles to the beginning.

Entered June 1, 1853.

329 Grant No. 99.

District No. 9: On Yellow and Stecoah creeks:

Beginning on a black oak and runs south seventy-seven east ninety (90) poles to a stake in the line of No. 586;

Then north fifty-five (55) east one hundred and eighty (180) poles to a stake;

Then north 77 west ninety (90) poles to a stake;

Then south fifty-five (55) west one hundred and eighty (180) poles to the beginning.

Entered June 1, 1853.

Grant No. 98.

District No. 11:

Beginning at a white ash tree, standing on or near the divide between Yellow creek and Stecoah creek and Wolf creek, and runs north fifty (50) east ninety (90) poles to a black oak;

Then north forty (40) west one hundred and eighty (180) poles to a stake;

Then south fifty (50) west ninety (90) poles to a stake;

Then south forty east passing the northeast corner of No. 746 at twenty (20) poles, and the southeast corner of said tract at one hundred and sixty poles (160) one hundred and eighty (180) poles to the beginning.

Entered June 1, 1853.

Grant No. 101.

District No. —: On Slick Rock creek:

Beginning on a stake and pine tree, the southwest corner of No. 445 and runs south fifty-three (53) east two hundred and twenty-six (226) poles to a stake;

Then north twenty-five (25) east four hundred and fifty-two (452) poles to a stake;

Then north fifty-three (53) west two hundred and twenty-six (226) poles to a black gum, the southeast corner of No. 445;

Then with that line south fifty-five (55) west four hundred and fifty-two (452) poles to the beginning.

Entered April 6, 1853.

Grant No. 92.

District No. 11: On Tennessee river:

Beginning on a chestnut tree, the northeast corner of No. 2581, and runs with said line south forty-five (45) east passing the southeast corner of said No. at eighty (80) poles, three hundred and twenty poles (320) to a stake;

330 Then north ten (10) east three hundred and twenty (320) poles to a stake;

Then north forty-five (45) west three hundred and twenty (320) poles to a stake;

Then south ten (10) west three hundred and twenty (320) poles to the place of beginning.

Entered September 5, 1853.

Grant No. 95.

District No. 11: On Tennessee river:

Beginning on a chestnut tree near the northeast corner of No. 1062, and runs south thirty (30) west two hundred and twenty-six (226) poles to a stake;

Then east four hundred and fifty-two (452) poles to a stake.

Then north thirty (30) east two hundred and twenty-six (226) poles to a stake;

Then west four hundred and fifty-two (452) poles to the beginning.

Entered September 5, 1853.

Grant No. 93.

District No. 11: On a large branch that empties into Yellow creek:

Beginning at a white oak and runs north ninety (90) poles to a hickory in a hollow;

Then east crossing a branch at one hundred and twenty-eight (128) poles, one hundred and seventy-nine (179) poles to a black oak;

Then south crossing a branch at forty-eight (48) and fifty-two (52) poles, ninety (90) poles to a Spanish oak;
Then west one hundred and seventy-nine (179) poles to the beginning.

Entered May 23rd, 1853.

Grant No. 90.

District No. —: On the headwaters of the Meeting House branch, running into Tennessee river:
Beginning at a chestnut, and runs north seventy (70) east forty-four (44) poles to a hickory;
Then north twenty-eight (28) east one hundred and thirty-four (134) poles to a stake;
Then north seventy (70) west one hundred and twenty (120) poles to a stake;
Then south thirteen (13) west passing the northeast corner of No. 748 at seventeen (17) poles one hundred and thirty-four poles to a black oak in the line of 748;
331 Then south seventy (70) east ninety (90) poles to the beginning.

Entered May 21, 1852.

Grant No. 91.

District No. 11: On Tennessee river, Tuskeega creek:
Beginning on a hiskory on the line of No. 1607, and runs north thirty (30) west forty-three (43) poles to a Spanish oak;
Then north thirty-five (35) east one hundred and twenty-six (126) poles to a stake;
Then South thirty (30) east sixty-three (63) poles to a stake;
Then South thirty-five (35) west one hundred and twenty-six (126) poles to a pine, corner of No. 1607;
Then with that line north thirty (30) west twenty (20) poles to the beginning.

Entered June 1, 1853.

Together with all the water rights and privileges and franchises thereunto belonging or in anywise appertaining.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, and all the estate, right, title, interest, claim, and demand, whatsoever of the said party of the first part, either in law or in equity of, in and to the above bargained premises with the hereditaments and appurtenances.

Together with all the rights of every name and nature acquired by, through or under a conveyance of this date from Milo M. Belding and Emily C. Belding.

To have and to hold the said premises above described with the

appurtenances unto the said parties of the second part, their successors and assigns in trust.

In testimony whereof the said parties of the first part have hereunto signed their names, affixed their seals the day and year above written.

LOUIS KROHN. [SEAL.]
THOMAS F. McGARRY. [L. S.]
NETTIE BELDING McGARRY. [L. S.]

Signed, sealed and delivered in presence of

TESSA DUNCAN,
As to T. F. and Nettie Belding McGarry.
GEO. ENCHOLS,
LOUIS KROHN,
D. HEINSHERING,
As to Louis Krohn.

332 STATE OF OHIO,
County of Hamilton, ss:

Be it remembered that on — day of January, A. D. 1895, the subscriber, a notary public in and for said county, personally came Louis Krohn, and acknowledged the signing and sealing of the foregoing instrument to be his free act and deed.

In testimony whereof I have hereunto set my hand and affixed my seal on this the 31st day of January, A. D. 1895.

D. HEINSHEIMY, Jr.,
Notary Public in and for said Hamilton County, Ohio.

STATE OF OHIO,
County of Hamilton:

I, John B. Peaslee, clerk of the court of Common Pleas, a court of record within and for the county aforesaid, do hereby certify that it appears of record in this office that D. Heinsheimy, Jr., whose name is subscribed to the annexed instrument was at the time of taking such proof or acknowledgment, a notary public in and for said county duly commissioned and qualified, and duly authorized to administer oaths to take acknowledgments, &c.

And further that I am well acquainted with the handwriting of said D. Heinsheimy, Jr., and verily believe that the signature to the said certificate or proof of acknowledgment is genuine. I further certify that said instrument is executed and acknowledged according to the laws of the state.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Cincinnati, this 31st day of January, 1895, A. D.

[L. S.]

JOHN B. PEASLEE, *Clerk.*
By W. S. SARGEN, *Deputy.*

STATE OF MICHIGAN,
County of Kent, ss:

On this 11th day of January, A. D. 1895, before me, a notary public in and for said county, personally came the above named Thomas F. McGarry, and Nettie Belding McGarry, his wife, known to me to be the persons who executed the foregoing instrument, and acknowledged the same to be their act and deed.

[L. S.] TESSA DUNCAN,
Notary Public, Kent County, Michigan.

STATE OF MICHIGAN,
County of Kent:

I, Franklin D. Eddy, clerk of said county (and ex-officio clerk of the Circuit Court thereof, being the court of record having common law jurisdiction) do hereby certify that Tessa Duncan, Esq., before whom the above and foregoing instrument appears to have been acknowledged, is and was at the time of taking such acknowledgment and the certificate thereof, a notary public, within and for said county, duly commissioned, qualified and sworn, and authorized by *the within and for said county duly commissioned, qualified and sworn and authorized by* the laws of said state, to take such acknowledgment and to certify the same; and I further certify that I am acquainted with the handwriting of the said Tessa Duncan and believe her signature appended to the above certificate of acknowledgment to be genuine, and that the said instrument is executed and acknowledged according to the laws of the state of Michigan.

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In witness whereof I have hereunto set my hand and affixed seal at the city of Grand Rapids, this 16th day of January, A. D. one thousand eight hundred and ninety-five.

FRANK D. EDDY, *Clerk*, [L. S.]
By FRED N. EDDY, *Deputy.*

NORTH CAROLINA,
Graham County:

The foregoing certificate of D. Heinsheimy, a notary public of Hamilton county, Ohio, with the notarial seal attached, and John B. Peaslee, clerk of the court of common pleas, with his official seal attached, and the certificate of Tessa Duncan, a notary public of Kent county, Michigan, with his notarial seal attached, and Franklin D. Eddy, ex-officio clerk of the Circuit court and his official seal attached, have been exhibited before me, the same are adjudged to be in due form and according to law.

Therefore let the foregoing instrument, with all the certificates be registered. This 16th day of March, 1895.

T. A. CARPENTER, *C. S. C.*

Registered this 21st March, 1895.

W. F. MAUNEY,
Register of Deeds.

STATE OF NORTH CAROLINA,
County of Graham:

I, W. F. Mauney, register of deeds in and for the county and state aforesaid, do hereby certify that the foregoing and within is a true copy of a deed, made by Louis Krohn, of Cincinnati, Ohio and Thomas F. McGarry, and Nettie Belding McGarry, of Grand Rapids, Michigan, to Robert N. Archer, of Cincinnati, Ohio, as appears of record in the office of register of deeds, in Graham
334 county, state of North Carolina, in Book "H" and at pages 80 to 102 inclusive.

In witness whereof I have hereunto set my hand and affixed the seal of my said office, at office in Rahlinsville, on this 5th day of February, A. D. 1896.

[SEAL.]

W. F. MAUNEY,
Register of Deeds.

Exhibit No. 4 to deposition of D. W. Belding.
Filed No-. 23, 1897. J. T. Carter, deputy clerk.

Said witness, R. N. ARCHER, of lawful age, being duly sworn, deposed as follows:

Q. 1. What is your age, residence and occupation?

A. Age 56 years; residence Cincinnati, O.; and occupation lumbering.

Q. 2. Are you the same R. N. Archer who is defendant in this case?

A. I am.

Q. 3. Are you the same R. N. Archer to whom the timber on what is known as the Big Survey was conveyed by Louis Krohn and T. F. McGarry and wife by deed, copy of which is filed as Exhibit No. 4 to deposition of D. W. Belding in this cause?

A. I am.

Q. 4. After the execution of said deed and before this suit was brought, did you make any arrangements for cutting any of the timber from the Big Survey and if so, whom did you employ for that purpose?

A. I made arrangements to cut timber from the Big survey and had D. S. Ballow in my employ and through him contracts were let to parties whose names I can not now recall, for cutting timber on the survey named.

Q. 5. Please state whether you authorized Mr. Ballow to have any timber cut west of Slick Rock Creek?

A. No, I did not authorize him to have any cut on the west side.

Q. 6. Please state whether or not you stated to Mr. Ballow anything about the west line of the Big Survey running up Slick Rock creek and cautioned him about cutting west of Slick Rock creek?

A. I told him from best information I had the line crossed the river at or near mouth of Slick Rock creek and it followed
335 up the creek, and for him to be careful and not cut any timber down near mouth of creek on west side, as Capt. Cooper owned some land there, left side going up, and to be careful

and not get on other property that he would have trouble over, and that the best timber grew on north side of mountain, and that it was such timber as I wanted him to work in.

Q. 7. Then if any timber was cut by any contractors working under Ballow on Little Slick Rock creek west of Main Slick Rock creek for purpose of building wagon road or building a cabin, or if cabin was built by these men in the forks of these two creeks, state whether it was done with your authority or with your knowledge, if it was done?

A. It was not done with my knowledge or by my authority.

Q. 8. Do you know of your own knowledge whether or not as a matter of fact it has been done?

A. I do not.

Cross-examined by solicitor for complainant:

Q. 1. Was your contract with Mr. Ballow in writing?

A. He was an employé of mine working by the month, and it was not in writing.

Q. 2. Have you heard from any source that timber was cut on west side of Slick Rock Creek and cabin built there by the men under Ballow?

A. I haven't heard that any timber was cut, but my son told me he saw the ashes of a cabin on that side of the creek.

Q. 4. Was that cabin built by the men under Ballow?

A. I could not say.

Q. 5. Have you heard from any source that that cabin was built by men under Ballow?

A. Only general, that Ballow's men built cabin on the west side of creek.

Q. 6. Was your son up in that neighborhod?

A. Yes, sir, about four weeks ago.

Q. 7. This cabin was built from timber cut east of Slick Rock creek, wasn't it?

A. I do not know.

Q. 8. Have you not heard that it was?

A. No, sir.

Q. 9. In your answer in this case you claimed that you had right to cut timber east of Slick Rock Creek and up to top of Hangover Lead, did you not?

A. I do not remember what claims we made in our answer now, but presume they will show for themselves.

336 Re-examination:

Q. 1. You claim to the timber to the boundary of the Big Survey?

A. I do.

Q. 2. You have no personal knowledge as to the boundary line of that survey or the state line, but have understood that state line crosses the river at or near Slick Rock and runs some distance up the creek, but do you know anything further as to details?

A. Yes; I do not.

Further saith not.

R. N. ARCHER.

Subscribed and sworn to this 28th day of September, 1897.

[J. T. Carter, United States Commissioner, Eastern District of Tennessee.]

J. T. CARTER, *U. S. Com'r.*

Filed Sept. 30, 1897. J. T. Carter, deputy clerk.

Next witness, EDWARD T. SANFORD, of lawful age, being duly sworn, deposed as follows:

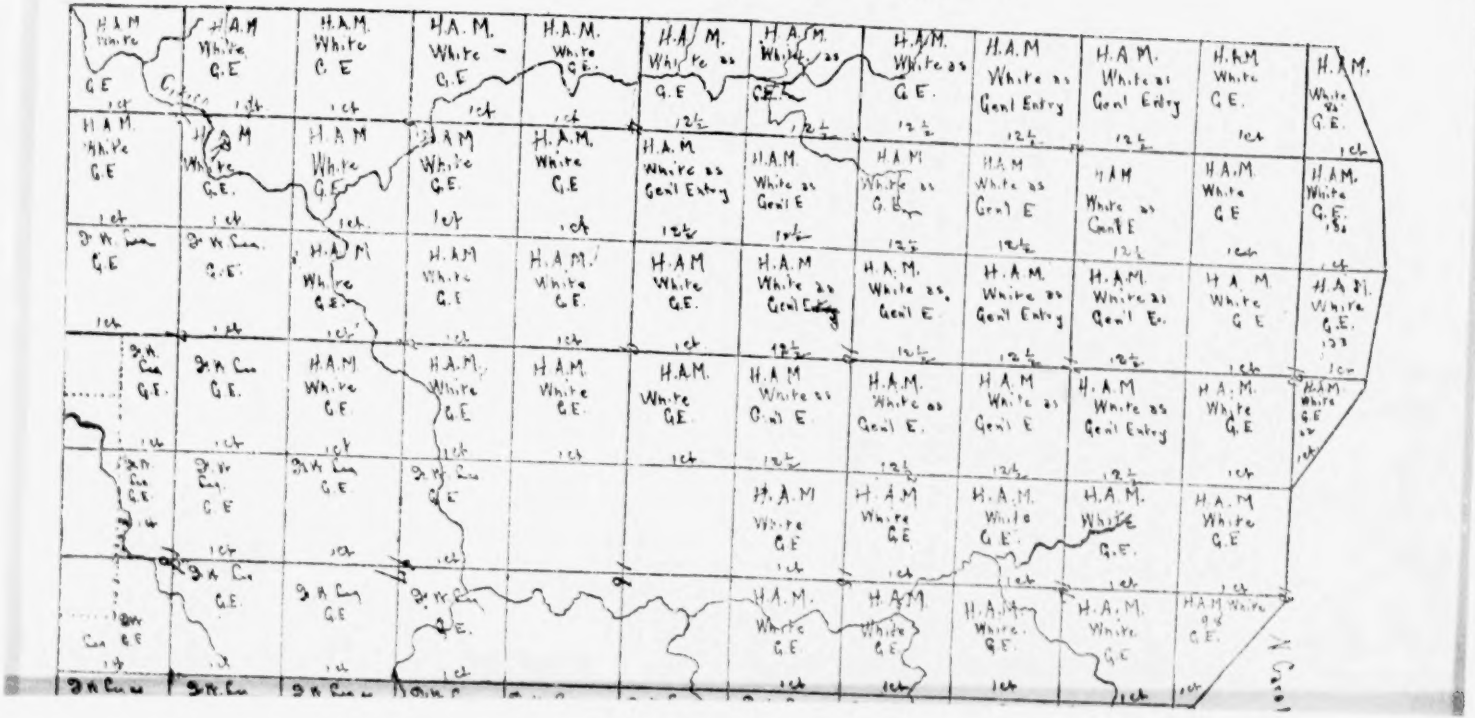
I am 33 years of age, live in Knoxville, Tenn., am practicing lawyer and a member of the firm of Lucky, Sanford & Tyson, solicitors in this case. Some months ago, when in Nashville, Tenn., I went personally to the office of the secretary of the state of Tennessee, to see if I could find the report of the Tennessee Commissioners who ran the state line between Tennessee and North Carolina in 1821 and their plat of same; I was informed by the secretary of state that there was no such report or map in his office and that the same had been lost, mislaid prior to his coming into office, in the confusion that had attended the preservation of papers in the office, probably during the war. I herewith file as Exhibit No. 1 to this deposition, certified copy of Range 6 E. Fractional Township 1, S. of Ocoee District, Tennessee, being the fractional township, immediately south of fractional township, of which a certified copy
337 of the map of which is filed as Exhibit A to deposition of T. E. H. McCroskey in this cause.

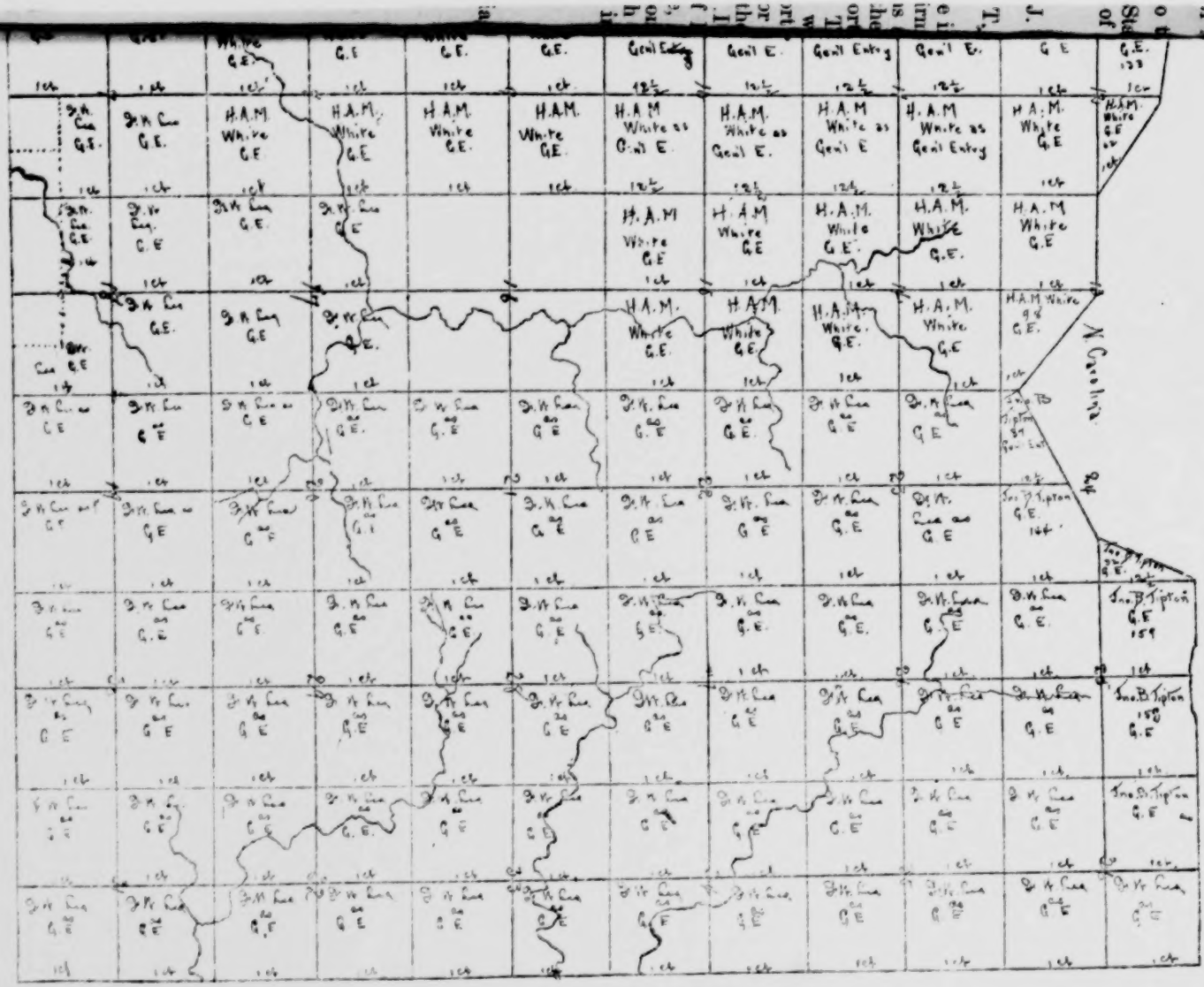
EDWARD T. SANFORD.

(Here follows diagram, marked page 337*a*.)

Exhibit "E" to deposition Edward T. Sanford.

Filed Sept. 30, 1897. J. T. Carter, deputy clerk.


H.A.M. White G.E.
H.A.M. White as Genl Entry
H.A.M. White as Genl E.
H.A.M. White as Genl Entry
H.A.M. White as Genl E.
H.A.M. White as Genl Entry
H.A.M. White as Genl



I certify that the above is a true and correct copy of the original map of fractional township 1 South Range 6 East of the Basis line, Ocoee District, Tennessee, now in my office.

T. J. Knox,
Register & Entry Taker,
Ocoee Land Dist.

Subscribed and sworn to before me this 28 day of September, 1897.

[J. T. Carter, Eastern District of Tennessee, United States Commissioner.]

J. T. CARTER,
U. S. Com'r, Eastern District of Tennessee.

Cross-examination waived by solicitors for compl't.

Filed Sept. 30, 1897. J. T. Carter, deputy clerk.

Said witness, L. D. TYSON, of lawful age, being duly sworn, deposed as follows:

Q. 1. State your age, residence and occupation?
A. Age 34; occupation lawyer; residence Knoxville, Tenn.
Q. 2. Are you a member of the firm of Lucky, Sanford & Tyson?
A. I am.
Q. 3. Have you recently been to Raleigh, N. C. and made search in the office of the secretary of state to find original report of the N. C. commissioners who ran the state line between North Carolina and Tennessee in 1821, and the plat filed by them with their report, and if so, with what result?
A. I have. I went to sec'ty of state of North Carolina and asked him for this report and the plat, and he informed me that he had no such report or plat in his office and that the best information that he could get was that both report and plat were burned when the state capitol of North Carolina was burned about the year 1831. Nevertheless the secretary of state and I made a complete and thorough search through the records of his office and every
338 place where it was thought possible that this report and plat might be found, extending over a period of two days, but they could not be found.

Cross-examination waived. L. D. TYSON.

Subscribed and sworn to before me this 28 day of September, 1897.

[Seal of Commissioner.]

J. T. CARTER,
U. S. Com'r, Eastern District of Tennessee.

Filed Sept. 30, 1897. J. T. Carter, deputy clerk.

Bill of Costs.

Witness H. P. Hyde, 3 days' attendance at 1.50	$4 50
77 miles at 5c	3 85
Reuben Carver, 3 days' attendance	4 50
77 miles at 5c	3 85
Total	$16 70

Paid by Lucky, Sanford & Tyson.

In the Circuit Court of the United States for the Eastern District of Tennessee, Northern Division.

No. 1056. In Equity.

CHAS. HEBARD
vs.
D. W. BELDING et al.

The Separate Answer to R. N. Archer to the Bill of Complaint Filed Against Him and Others in the Above Entitled Cause.

This defendant, not waiving his plea heretofore filed and now and at all times hereafter saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is material or necessary for him to make answer unto, answering says:

I.

It is true that respondent is a citizen and resident of Cincinnati, Hamilton county, Ohio.

339 II.

This respondent denies that the complainant is the owner in fee of about 40,000 acres of land lying in the Northern Division of the Eastern District of Tennessee in the Eastern portion of Monroe county, adjoining the North Carolina state line, as alleged in the bill, and denies that complainant has tenants scattered over said land who have small enclosures as alleged, and denies that complainant has title to the said land derived from the state of Tennessee by due and regular grants and mesne conveyances and descent as alleged, and shows to the court that a large portion of the land claimed by complainant does not lie and has never lain in the state of Tennessee and the title thereto could not be derived from the state of Tennessee.

It is true that the co-defendants of this respondent with others, claim to own and do own, as he is advised, a large body of land containing 20,000 acres or more in Graham county, North Carolina, by grants and title derived from the state of North Carolina and the state line is a boundary of a portion of said land.

It is true that there is in this suit a contention as to the true location of the state line and that this contention involves many thousands of acres of timber lands of great value for lumbering and other purposes.

III.

This respondent shows to the court that through conveyances from his co-defendants and others and their assigns, that there was con-

veyed to this defendant on Jan'y 8th, 1895, the timber then standing, growing and being upon a large portion of the land thus owned by his co-defendants, this conveyance being made to this defendant in trust in accordance with a certain contract of even date with said deed and that he is now the equitable owner of said timber for the purposes of said trust. Among other lands upon which the timber was thus conveyed to this defendant, is a certain tract of land in Graham county, North Carolina, described in North Carolina Grant No. 2336 in District No. 10, as follows:

"Beginning on a beech tree on the state line where the Hangover mountain strikes said line near a corner of No. 5051 and runs with the said line south eighty (80) east three hundred and twenty (320) poles to a mountain oak; then with the line of No. 4455 north forty (40) east three hundred and twenty (320) poles to a Spanish oak; then north forty-five (45) east twenty-eight (28) poles to two water oaks; then east ninety-two (92) poles to a large rock in the
340 top of the second high peak of the Hangover; then down the ridge with its meanderings to a sarvice tree on the bank of Cheoah river; then down said river and its meanders to the Tennessee river; then down said river and its meanders to a corner of No. 611 to the mouth of Slick Rock creek and the state line, then up said creek with said line to the top of the mountain to a locust on said line, then with said line and its meanders to the beginning."

This respondent denies that before the institution of this suit under authority of said deed and contract, this defendant had entered upon and was cutting and preparing to remove valuable, merchantable timber from any land belonging to the complainant and shows to the court that he had entered upon and was cutting and preparing to remove timber solely from the land transferred to him by his co-defendants as above shown, the land upon which he had entered and from which he was preparing to remove timber being wholly within the above mentioned grant No. 2336.

IV.

It is true that the land in dispute between complainant and defendants includes a large portion of the land drained by the waters of Slick Rock creek but respondent denies that said creek has its source in the mountains west of the main or leading mountain which forms the dividing line between North Carolina and Tennessee or that said creek empties into the Little Tennessee river about one-half mile below or west of the point where the state line crosses the river and shows to the court that said creek has its source east of the dividing line between North Carolina and Tennessee and that for some distance above its mouth, to wit, a little over five miles, said line between Tennessee and North Carolina runs up said Slick Rock creek and the state line leaves Little Tennessee River on the south at the mouth of said Slick Rock creek.

It is true that certain spurs from Hangover form the east side or rim of the land drained by Slick Rock creek but defendant denies that it is higher or more nearly straight than any other mountain in that vicinity or that the Fodder Stack lead and its spurs and

ridges forming the rim of the basin on the west are smaller and lower than the Hangover Mountain.

341

V.

It is true that in 1821 joint commissioners were appointed by the state of North Carolina and Tennessee to locate and establish the line between the said two states and that said commissioners pursuant to their appointment did locate and establish the state line, but this respondent does not admit that the location of the state line as established by the commissioners is in all things correctly copied in complainant's bill and reserves the right to show any inaccuracies by reference to the original statutes setting out said line. The portions of said line now in dispute are those described as "from the Tennessee river to the main ridge, and along the extreme height of same to the place where it is called Unicoi or Unaka mountain."

Respondent denies that the state line crosses the Tennessee river about one-half a mile above and north east of the mouth of Slick Rock creek or that the old marked line clearly shows this. He denies that said line lies as alleged in the bill, along the Hangover lead and denies that the true location of said line is as claimed by the complainant, and shows to the court that said state line leaves the Little Tennessee river at the mouth of Slick Rock creek and runs up Slick Rock creek for a distance of more than five miles, then running up a ridge to the Big Fodder Stack, and then with the main top of Big Fodder Stack ridge to the junction with Hangover lead.

Respondent denies that Hangover is the most direct southwesterly course from Little Tennessee river; denies that it is higher than any other ridge or spur in that section; denies that it is the main ridge from Tennessee river to the Unicoi or Unaka mountain; denies that the commissioners located and established the line along Hangover lead; denies that the old marked line still exists as marked by the commissioners in 1821 along Hangover lead; denies that this is or was the true state line as established by the commissioners and denies that Slick Rock creek basin lies entirely within the boundary of the state of Tennessee and shows to the court on the contrary that the commissioners ran and marked the line in 1821 for a considerable distance up Slick Rock creek and thence to the Big Fodder Stack and along said ridge and that said line answers the description of the line in the statutes defining same and is the line on which the old marked trees now exist. This defendant does not insist upon the location of the state line as stated in complainant's bill and for the reasons alleged, but insists that the true location of said line is as above set forth. This defendant admits the allegations in the bill in reference to the purchase of lands from the Cherokee In-

342 dians and the laying out of the Ocoee District and shows to the court that the surveys of the Ocoee Land District do not extend east of Slick Rock creek for the reason that the surveyors well knew that the land east of Slick Rock creek was not included in the state of Tennessee, and this defendant relies upon the maps of said Ocoee Land District as showing the true location of the state line.

Respondent does not admit the allegations of the bill in reference

to the grants issued to H. A. M. White west of Slick Rock creek or the present ownership of same by complainant and demands strict proof of same so far as material.

Respondent denies that the land east of Slick Rock creek was not entered or granted until 1882 and that the title remained in the state of Tennessee until that date, and denies that H. M. or T. E. H. McCroskey made any valid entries of said lands as alleged or that they have ever obtained valid grants for said lands or that complainant is now the owner of same and shows to the court that at the time that said McCroskeys made their entries and obtained their alleged grants to said land, the title to said land was not in the state of Tennessee and had never been in the state of Tennessee but was then in respondents' co-defendants to whose vendors it had been granted many years before by the state of North Carolina.

VI.

Respondent denies that complainant has had tenants living upon the lands in Slick Rock creek basin as alleged and that he has had possession of the lands sued for since 1882 as alleged through said tenants or that he is now in actual occupation and possession of the same through said tenants and employés.

VII.

The facts as to the removal of timber by this defendant are that at the time of the execution of the deed conveying the timber to this defendant as before stated, he was authorized under the contract entered into at said time to take and remove said timber and was engaged in cutting and removing the timber at the time complainant's first suit was brought and he was enjoined therefrom, to his damage many thousands of dollars but that he never claimed the right to cut or remove timber outside of the boundaries of the deed made to him as set forth, and that he was not engaged in cutting timber
343 west of the true state line between North Carolina and Tennessee as above set forth and had not authorized any agents or employés to cut timber west of said state line. It is true that complainant filed a bill in the chancery court of Monroe county and that the same was removed to this honorable court, as stated in the bill.

VIII.

Respondent denies that complainant is in the sole and undisputed occupation of the lands in dispute, by his tenants and employés, denies that he has committed or threatened to commit any trespass upon any lands of complainant and shows that the defendants at the time this bill was filed, were in actual occupation of all the lands in dispute in this cause east of the true state line as above set forth. It is true that the matters in controversy in this cause exclusive of interest and costs exceed many times in value $5,000.00. It is true that this respondent refuses to recognize the rights and title of complainant east of the true state line but it is not true that this respondent at the time the bill was filed was preparing, intending or

threatening to cut timber on complainant's land or that he had caused any pretended surveys to be made, but it is true that the various records and maps both in the public offices of Tennessee and North Carolina show that the land in dispute east of the true state line as above shown, is in North Carolina. Respondent denies that he has done anything whatever in the premises contrary to equity and good conscience or to the wrongful injury and oppression of complainant.

IX.

Respondent again avers that the true state line between Tennessee and North Carolina as established in 1821 is as above shown, that since the establishment of said state line in 1821 the state of Tennessee has had no jurisdiction thereof and had no right to grant same and that the title to same had been in the state of North Carolina, that said state line has been recognized by both the states of Tennessee and North Carolina and that the true line as fixed by the commissioners as above shown, has been acquiesced in by the state of Tennessee and that jurisdiction over same has been continuously asserted by the state of North Carolina without dispute on the part of the state of Tennessee and avers that the title of the defendants derived from North Carolina grants are valid and that the
344 pretended grants from the state of Tennessee are in all things null and void by reason of the fact that the state of Tennessee had no title to the lands in dispute at the time of the alleged and pretended grants.

X.

Further answering, this respondent says, that the title both legal and equitable to the lands described in the bill is in him and the other defendants; that he, with his co-defendants, have been in peaceable, continuous, adverse possession thereof, in person and by those through whom they claim, for more than twenty years before complainant's bill was filed, claiming title thereto in fee; and should the court hold the lands in dispute to lie in Tennessee, which is denied, this defendant relies upon and pleads said twenty year possession; and also pleads that he and his co-defendants have had seven years' actual, continuous, adverse possession of said lands and timber before complainant's bill was filed; and should the court hold the lands in dispute to lie in Tennessee, he pleads the Statute of Limitations of Tennessee for seven years in her bar of said bill.

XI.

And further answering, this respondent shows that he and his co-defendants have had in person and through those through whom they claim actual, continuous and adverse possession of the land described in complainant's bill and timber thereon, for more than twenty years before the filing of this bill, holding by conveyances, devises, North Carolina grants and other assurances of title, purporting to convey to this defendant and his co-defendants an estate in fee to said land and timber and vesting in them a good and indefeasible title in fee to the lands and timber in question, in and

through said deeds and others assurances of title, and possession thereunder, and in the event the court should hold the lands in dispute to lie in Tennessee, which is denied, he also pleads and relies on the Statutes of Limitations of Tennessee of seven years in bar of said suit.

XII.

This defendant and his co-defendants, and those under whom they claim, have been in the actual possession of the lands and timber involved in this suit, for more than twenty years before the filing of this bill, and hereby invokes the protection of the Statutes of Limitations.

345

XIII.

And this respondent further answering, says that he denies any and all other matters or things in said bill contained, material or necessary for him to make answer to, and not herein and hereby well or sufficiently answered unto confessed and avoided, traversed or denied, either to the knowledge and belief of this defendant; all of which matters and things this defendant is ready to verify, maintain and prove as this Honorable Court shall direct, and humbly prays that said bill may be dismissed as to this defendant, with his reasonable cost and charges in his behalf most wrongfully sustained; that his title to the lands in controversy may be affirmatively adjudicated and determined.

LUCKY, SANFORD & TYSON, *Solicitors.* R. N. ARCHER.

(Endorsed:) Charles Hebard vs. D. W. Belding, et al. Answer of R. N. Archer. Filed Mar. 29, 1898. J. T. Carter, deputy clerk.

CHARLES HEBARD
vs.
D. W. BELDING et al.

This cause came on for further orders on this the 30th day of March, 1898, before the Honorable Charles D. Clark, judge, &c., and thereupon it is ordered that the cause be and hereby is referred to Asbury Wright, Esq., of Roane County, Tennessee, as Special Master, who will, from the proof on file and such other proof as shall be offered by the parties, report to the court the true state line between the states of Tennessee and North Carolina from the Little Tennessee river to the junction of the Hangover and Fodder Stack Ridges, as run and located by the commissioners of the states of North Carolina and Tennessee in 1821, and confirmed by the respective legislatures of said states. The said referee will employ a disinterested surveyor to go upon the premises and make survey of said line and a plat showing his surveys, and such other facts as the referee shall deem necessary to a full understanding of the questions involved, unless the referee shall be satisfied that he can prop-

erly investigate and report upon the location of said line from the surveys already made and the plats already filed and the
346 proof in the cause. He will make and file his report as early as practicable. He will give notice to the solicitors of the parties and afford them an opportunity to be heard upon the questions on which he is required to report, and will also give them notice of the filing of his report.

O. K.

WEBB & McCLUNG,
Sol's for Compl't.
LUCKY, SANFORD & TYSON,
Sol's for Def'ts, Except Cooper.

(Endorsed:) In the U. S. Circuit Court at Knoxville. Chas. Hebard against D. W. Belding, et al. Order appointing Spl. Master Entd. Journal "Q" p. 508. Filed 30 day of M'c'h 1898. J. T. Carter, dep. clerk.

STATE OF NORTH CAROLINA:

No. 2784.

Know ye that for and in consideration of the sum of twenty-one dollars, 71 cents paid into our treasury by A. Siler have given and granted and by these presents do give and grant unto A. Siler a tract of land containing six hundred and forty acres, lying and being in the county of Cherokee, Section No. — in District No. —, it being part of the land lately acquired by treaty from the Cherokee Indians and sold in obedience to an act of the General Assembly of this state; bounded as follows, viz: On the waters of Tennessee river, beginning on a stake and spruce pine near the Panther Den on the state line and on the bank of Slick Rock creek and runs S. 53 degrees E. two hundred and twenty-seven poles to two black gums, then S. 25 degrees W. four hundred and fifty-two poles to a pine on the side of a mountain, then north 53 degrees West two hundred and twenty-seven poles to a white oak on the state line, then with said line and its meanders four hundred and fifty-two poles to the beginning. Entered 28th April, 1856, as by the plat hereunto annexed doth appear, together with all woods, waters, mines, minerals, hereditaments and appurtenances to the said land belonging or appertaining. To hold to the said A. Siler, his heirs and assigns forever, yielding and paying to us such sums of money yearly or otherwise as our General Assembly from time to time may direct. Provided always that the said grantee shall cause this grant to be registered in the register's office of our said county of Cherokee within twelve months from the date hereof, otherwise the same shall be void.
347 In testimony whereof we have caused these our letters to be made patent and our great seal to be hereto affixed. Witness John W. Ellis, Esqr., our governor, captain general and commander

in chief at Raleigh the 24th day of January, in the eighty-third year of our Independence and in the year of our Lord, 1859.

JOHN W. ELLIS, *Gover.*

By command,
RUFUS H. PAGE,
Secretary of State.

The foregoing deed was registered in Book (H) page 675, March the 7th day, 1859.

B. S. BRITTAIN, *R. C. C.*

STATE OF NORTH CAROLINA,
Cherokee County:

I, Thomas C. McDonald, register of deeds of Cherokee county of the state of North Carolina, do hereby certify that the foregoing is a true and perfect copy of the grant No. 2784 to A. Siler as the same appears on book "H" page 675 of the records of my said office and of the certificate of the registration of the same.

Given under my hand and seal of office at office in Murphy, of Cherokee county aforesaid on this the 9th day of October, 1897.

[SEAL.]

(Endorsed:) Grant No. 2784 to A. Siler, copy No. 1056. In the U. S. Circuit Court at Knoxville. Chas. Hebard against D. W. Belding, et al. Filed Jun. 4, 1898. J. T. Carter, deputy clerk.

MURPHY, N. C., *May 4th*, 1853.

J. J. Turnbill.

No. 611.

Entered 300 Acres, May 4th, 1853.

John J. Turnbill & Co., enters three hundred acres of land in Cherokee county, North Carolina; beginning at a stake on the bank of Tennessee river on the state line and the mouth of Slick Rock creek and running up said creek with said state line and various courses for complement.

May 4th, 1853.

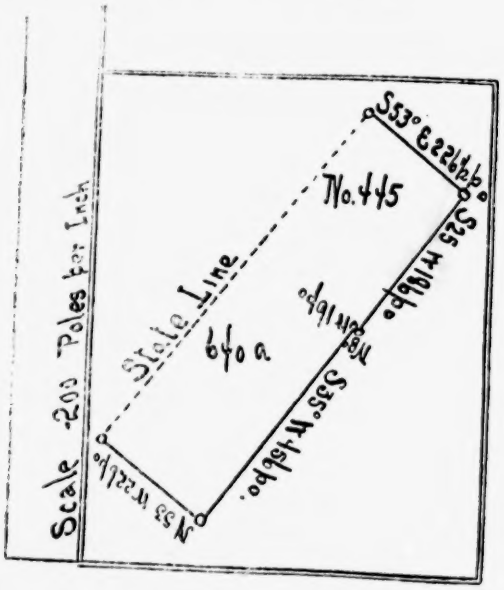
Wt. Isud. May 17th, '53. JOHN J. TURNBILL.

348 NORTH CAROLINA,
Cherokee County:

I, Thomas C. McDonald, register of deeds and ex-officio entry taker in and for said county and state do hereby certify that the foregoing is a true copy of the entry by John J. Turnbill as appears on entry book of my office.

Given under my hand and seal at office this 9th day of Oct., 1897.
[SEAL.]
THOS. C. McDONALD,
Register of Deeds and ex-Officio Entry Taker.

(Endorsed:) A copy of entry No. 611 J. J. Turnbill Entry No. 611 to be filed No. 1056. In the U. S. Circuit Court at Knoxville. Chas. Hebard against D. W. Belding et al. Copy of Entry No. 611. Filed Jun. 4, 1898. J. T. Carter, deputy clerk.



STATE OF NORTH CAROLINA,
Cherokee County:

By virtue of a warrant, No. 445 issuing from entry taker's office of said county and state, I have surveyed for J. M. Lyle, a tract of land in said county and state, beginning on a stake and spruce pine on the bank of Slick Rock Creek & on the state line and runs S. 53 degrees E. two hundred and twenty-six & one-half poles to
349 two black gums, then S. 25 degrees W. one hundred & eighty-six poles to a maple on the side of a ridge, thence N. 80 degrees W. Sixteen poles to a black gum, thence S. 35 degrees W. four hundred & fifty-six poles — a pine on the south side of a mountain, then N. 53 W. two hundred and twenty-six poles to a stake in the state line, then with said line four hundred and fifty-two poles to the beginning. Surveyed May 24th, 1853.

J. W. C. PIERCY, *C. S.*

S. E. TIPTON, &
S. E. HUDSON, } *C. B.*
J. H. BRYSON, *Marker.*

STATE OF NORTH CAROLINA,
Cherokee County:

I, T. C. McDonald, register of deeds, do hereby certify that the foregoing is a true copy of the survey made of entry No. 445 in Cherokee county. Given under my hand and seal of Office of the 27th May, 1898.

T. C. McDONALD,
Reg'r Deeds & ex-Officio Entry Taker.

(Endorsed:) Plat & certificate of survey of entry, No. 455. No. 1056. In the U. S. Circuit Court at Knoxville. Chas. Hebard against D. W. Belding, et al. Filed June 4, 1898. J. T. Carter, Deputy Clerk.

No. 101.

STATE OF NORTH CAROLINA:

Know ye, that we, for and in consideration of the sum of eighty (80) dollars and — cents paid into the treasury by J. W. Cooper, assignee, have given and granted and by these presents do give and grant unto J. W. Cooper, assignee, a tract of land containing six hundred and forty (640) acres, lying and being in the county of Graham (formerly Cherokee), Section No. —, in District No. —, warrant No. 479, it being part of the land lately acquired by a treaty from the Cherokee Indians, and sold in obedience to an act of the general assembly of this state, bounded as follows, viz.: On Slick Rock creek. Beginning on a stake and Pine tree the S. W. corner of No. 445 and runs S. 53 E. 226 poles to a stake, then N. 25 E. 452 poles to a stake, then N. 53 W. 226 poles to a black gum, the S. E. corner of No. 445, then with that line S. 25 W. 452 poles to the beginning, as by the plat hereunto annexed doth appear,
350 together with all woods, waters, mines, minerals, hereditaments and appurtenances, to the said land belonging or appertaining, to hold to the said J. W. Cooper, assignee, heirs and assigns forever: Yielding and paying to us such sums of money yearly or otherwise as our general assembly from time to time may direct and promising obedience to all acts of the general assembly now existing or hereafter to be enacted concerning the passage of fish in the waters of the said premises: Provided, always, that the said grantee shall cause this grant to be registered in the register's office of our said county of Graham within twelve months from the date hereof, otherwise the same shall be void. Entered 6 April, 1853.

In Testimony whereof, we have caused these our letters to be made patent, and our great seal to be hereunto affixed.

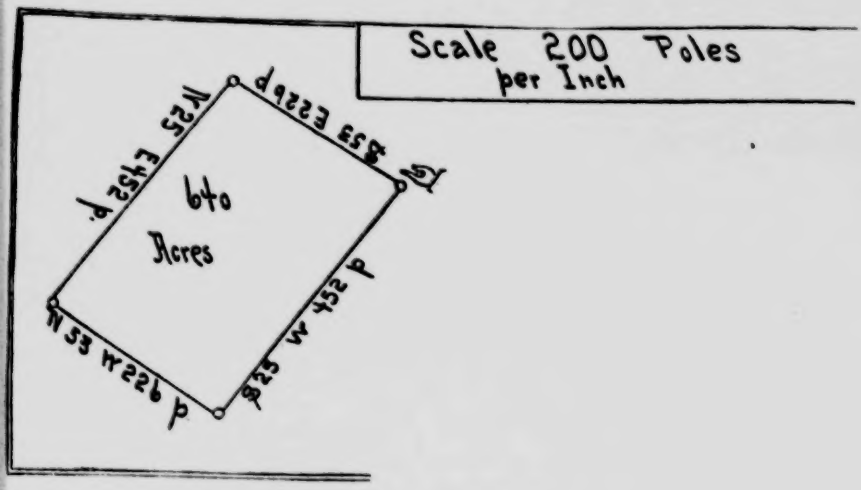
Witness, Thomas J. Jarvis, Esq., our governor and commander-in-chief, at Raleigh, the 6 day of September, in the one hundred

and seventh year of our independence, and in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.] THOS. J. JARVIS, *Governor.*

By Command:

W. L. JAUNDEY,
Secretary of State.



351 STATE OF N. CAROLINA,
Cherokee County:

By virtue of a warrant, No. 479, issuing from the entry taker of said county, I have surveyed for Harry B. Morris a certain tract of land lying in said county on the waters of Slick Rock creek. Beginning on a stake & pine tree the S. W. corner of No. 445 & runs S. 53 E. two hundred & twenty-six poles to a stake, then N. 25 E. four hundred & fifty-two poles to a stake, then N. 53 W. two hundred & twenty-six poles to a black gum the S. E. corner of No. 445, then with that line S. 25 W. four hundred & fifty-two poles to the beginning containing six hundred and forty acres more or less. Surveyed May 25th, 1853.

(Endorsed:) North Carolina, Graham County; Office Register of Deeds. The within state grant came to hand on the 2nd day of May and was duly registered in the register's office of Graham county, Book B, page 272. W. F. Manney, Register of Deeds. No. 101. J. W. Cooper, assignee. 640 acres, Graham county. Recorded in the office of the secretary of state, in Book 170, on page 464. W. L. Jaundey, Secretary of State. No. 1056. In the U. S. Circuit Court at Knoxville. Chas. Hebard against D. W. Belding, et al. Filed June 4, 1898. J. T. Carter, Deputy Clerk.

No. 9120.

639.

John Blackburn, enters as general enterer 15 acres of land the N. E. fr. quarter of fr. Section 23, in fr. town 2 N. and range 6 E. of the basis line in the Ocoee District, beginning at the N. W. corner of said quarter section.

Entered by act of 1854, cent per acre.

July 8, 1869.

I certify that this is a true copy as appears of record in my office, this March 29", 1898.

T. J. KNOX,
Entry Taker & Register Ocoee Dist., Tenn.

352

No. 9119.

Jno. Blackburn enters as general enterer, 4 acres of land, the N. E. fr. quarter of fr. section 35, in fr. town 2 N., and range 6 E. of the basis line in the Ocoee district, beginning at the S. W. corner of said quarter section.

Entered by act of 1854, cent per acre.

July 8, 1869.

I certify that this is a true copy as appears of record in my office, this March 29", 1898.

T. J. KNOX,
Entry Taker & Register Ocoee Dist., Tenn.

No. 9118.

Jno. Blackburn enters as general enterer, 6 acres of land, the S. E. fr. quarter of fr. section 36, in fr. town 2 N. and range 6 E. of the basis line in the Ocoee district, beginning at the S. W. corner of said quarter section.

Entered by act of 1854, cent per acre.

July 8, 1869.

I certify that this is a true copy as appears of record in my office, this March 29", 1898.

T. J. KNOX,
Entry Taker & Register Ocoee Dist., Tenn.

No. 9117.

Jno. Blackburn, enters as general enterer, 51 acres of land, the S. W. fr. quarter of fr. section 36, in fr. town 2 N. and range 6 E. of the basis line in the Ocoee district, beginning at the S. W. corner of said quarter section.

Entered by act of 1854, cent per acre.

July 8, 1869.

I certify that this is a true copy as appears of record in my office, this March 29", 1898.

T. J. KNOX,
Entry Taker & Register Ocoee Dist., Tenn.

(Endorsed.) No. 1056. In the U. S. Circuit Court at Knoxville. Chas. Hebard against D. W. Belding, et al. Filed June 4, 1898. J. T. Carter, Deputy Clerk.

STATE OF NORTH CAROLINA:

No. 8573.

Know ye, that we, for and in consideration of the sum of — R. L. Cooper, assignee, have given and granted, and by these presents do give and grant unto the said R. L. Cooper, assignee, a tract
353 of land containing six hundred and forty (640) acres, lying and being in the county of Graham (formerly Cherokee), it being part of the land acquired by treaty from the Cherokee Indians bounded as follows, viz: On Slick Rock Creek, beginning on a chestnut oak, standing on the line of No. 445 and runs N. 53 degrees W. 126 poles to a stake on the state line, then with that line S. 35 degrees W. 200 poles to a pine on the state line, then S. 36 poles to a poplar on the state line S. 53 degrees E. 426 poles to a stake, then N. 35 degrees E. 226 poles to a stake on the line of No. 479, then with that line N. 53 degrees W. 273 poles to the beginning as by the plat hereunto annexed doth appear, together with all woods, waters, mines, minerals, hereditaments and appurtenances, to the said land belonging or appertaining; to hold to the said R. L. Cooper, assignee, heirs and assigns, forever. Yielding and paying to us such sums of money yearly or otherwise, as our general assembly from time to time may direct, and promising obedience to all acts of the general assembly now existing, or hereafter to be enacted, concerning the passage of the fish in the waters of said premises.

Entered 12" March, 1853.

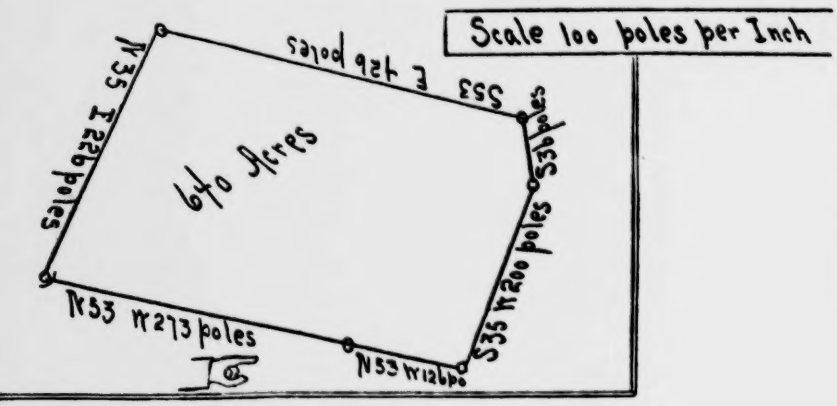
In witness whereof, we have caused these letters to be made patent, and our great seal to be hereunto affixed.

Witness, Alfred M. Scales, Esq., our governor and commander-in-chief, at Raleigh, the 26" day of May, in the one hundred and twelfth year of our independence and in the year of our Lord one thousand eight hundred and eighty-eight.

[SEAL.] A. M. SCALES, *Governor.*

By command:

W. L. JAUNDEY,
Secretary of State.



354 STATE OF NORTH CAROLINA,
Cherokee County:

By virtue of a warrant No. 269, issuing from the entry taker of said county. I have surveyed for James H. Bryson & Gideon Morris, a certain tract of land lying in said county on the waters of Slick Rock Creek, beginning on a chestnut oak standing on the line of No. 445 & runs N. 53 degrees W. one hundred & twenty-six poles to a stake on the state line, then with that line S. 35 degrees W. two hundred poles to a pine on the state line, then south thirty-six poles to a poplar on the state line, then S. 53 degrees E. four hundred and twenty-six poles to a stake, then N. 35 degrees E. two hundred & twenty-six poles to a stake on the line of No. 479, then with that line N. 53 degrees W two hundred and seventy-three poles to the beginning, containing six hundred and forty acres more or less. Surveyed May 25th, 1853.

J. W. C. PIERCY, *C. S.*

C. B. S. P. TIPTON. }
ROBERT STRUTON. } PIERCY, *Mer.*

I hereby certify that the foregoing is a true copy of the original now before me, this Feb. 10, 1888.

SAMUEL W. LOVINGOOD,
County Surveyor of Cherokee County, North Carolina.

(Endorsed:) Entry No. 269. No. 8573. R. L. Cooper, Assignee 640 acres. Graham county. Recorded in the office of the secretary of state in Book 178, on page 332 W. L. Jaundey, secretary of state. Registered in the register's office of Graham county, N. C., in Book "E" of deeds on page 420, this 20th September, 1888. W. F. Manney, Reg. of Deeds. No. 1056. In the U. S. Circuit Court at Knoxville. Chas. Hebard against D. W. Belding, et al. Filed June 4, 1898. J. T. Carter, Deputy Clerk.

1.

Deed—Dated Aug. 3, 1889. Registered in Graham county, N. C., in Book "F," at pages 56 to 75, on the 20th day of Aug., 1889, for tract or entry of land No. 1035, grant, Grant No. 2336, and other lands in Graham county.

Milo M. Belding, Alvah N. Belding, David W. Belding, Henry Stix, Nathan Stix, David M. Hyman, Caleb S. Bragg, The
355 estate of Nathan Newberg, James W. Cooper, by Louis Krohn, their attorney in fact, and Louis Krohn individually, to The Belding Lumber Company, of North Carolina, a mercantile corporation, organized and doing business pursuant to the laws of Kentucky.

2.

Deed—Dated Feb'y 1st, 1892, registered in Graham county, N. C., in Book "G," at pages 104 to 125, on the 9th day of March, 1892, for entry No. 1035, grant No. 2336 & other lands in Graham Co., N. C.

The Belding Lumber Company of North Carolina, a corporation organized and doing business under, and in pursuance of the laws of the Commonwealth of Kentucky, by its president and secretary, duly authorized by a resolution of the stockholders of said company to James Stewart Crosby.

(This deed is signed as follows: "Belding Lumber Company, by D. W. Belding, president.")

Also 2.

The following deed seems to have been annexed and follows the foregoing in the registration:

Deed—Dated Feb'y 1st, 1892. Registered in Graham county, N. C., in Book "G," at pages 125 to 128, on the 9th day of March, 1892, for entry No. 1035, Grant 2336, and other lands in Graham county, N. C.:

Milo M. Belding, Alvah N. Belding, David W. Belding, Henry Stix, Nathan Stix, Caleb S. Bragg, estate of Nathaniel Newberg, James W. Cooper, David M. Hyman, Louis Krohn, their attorney in fact, and Louis Krohn, individually, to The Belding Lumber Company, a corporation organized under and in pursuance of the Laws of the commonwealth of Kentucky.

3.

Deed—Dated Feb'y 6th, 1892. Registered in Graham county, N. C. in Book "G," at pages 149 to 171, on the 23rd day of
356 April, 1892, for entry No. 1035 & other lands in Graham county, North Carolina.

James Stewart Crosby & Wife, Emma Crosby, to The Crosby Lumber Company, a corporation organized under and in pursuance of the laws of the state of Michigan.

Another Deed.

Deed—Dated Feb'y 6th, 1892. Registered in Graham county, N. C., in Book "H," at pages 392 to 413, on the 4th day of June, 1896, for entry No. 1035 & other lands in Graham county, North Carolina:

James Stewart Crosby & wife, Emma Crosby, to The Crosby Lumber Company, a corporation organized under and in pursuance to the laws of Michigan.

(The consideration of this deed seems to have been "45,000 shares of the capital stock of the party of the second part.")

4.

Deed—Dated May 5th, 1893, registered in Graham county, N. C., in Book "G," at pages 417 to 436, on the 15th day of May, 1893, for entry No. 1035 & other entry of land in Graham county, N. C.

The Crosby Lumber Co., a corporation creating and existing under and by virtue of the laws of the state of Michigan, and doing business in the states of Michigan, North Carolina and Tennessee, and having its principal office in the city of Grand Rapids, county of Kent, and state of Michigan, to Milo M. Bedring.

(This deed is signed as follows: "The Crosby Lumber Co., by D. W. Belding, Prest.")

5.

M. M. Belding to Rob't N. Archer.

Bill of sale, dated Nov. 7th, 1893, registered in Graham county, N. C., in Book "G," at pages 500 & 501, on the 23 day of Nov., 1893.

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6.

Deed—Dated Jan. 8, 1895, registered in Graham county, in Book "H," at pages 59 to 79, on the 19th day of March, 1895:

Milo M. Belding & wife, Emily C. Belding, to Louis Krohn & Thomas F. McGary.

7.

Deed, to hold in trust, dated Jan. 8, 1895, registered in Graham county, N. C., in Book "H," at pages 80 to 102, on the 21st day of March, 1895.

Louis Krohn, widower, Thomas F. McGary & wife, Nettie Belding McGary, to Robert N. Archer, trustee.

(Endorsed:) Abstract of title papers for J. W. Cooper. No. 1056. In the U. S. Circuit Court at Knoxville. Chas. Hebard against D. W. Belding, et al. Filed June 4, 1898. J. T. Carter, Deputy Clerk.

UNITED STATES OF AMERICA,
Eastern District of Tennessee:

The President of the United States of America to J. W. Fletcher, Greeting:

Know ye, that we, in confidence of your prudence and fidelity, have appointed you commissioner, and by these presents do give you full power and authority diligently to examine upon their corporal oaths or affirmations, before you to be taken Jas. McDaniel, Jno. Dockery, Jas. Whitaker, W. P. Phillips, W. P. Jones, M. L. Brittain, J. W. King, H. S. Hayes and Stephen Whitacker as witnesses on the part of the defendants, in a certain cause now pending undetermined in the Circuit Court of the United States for the Eastern District of Tennessee, in the Sixth Circuit, wherein Chas. Hebard is complainant and D. W. Belding, et al., are respondents.

And we do hereby require you, before whom such testimony is taken, to reduce the same to writing, and to close it up under
358 your hand and seal, directed to the clerk of our said court at Knoxville; and that you return the same when executed as above directed, annexed to this writ, with the title of the cause indorsed upon the envelope thereof, in to the said Circuit Court before the judges thereof, with all convenient speed.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Knoxville, in the said district, this 16th day of June, in the year of our Lord one thousand eight hundred and ninety-eight.

[SEAL.]

HENRY O. EWING, *Clerk,*
By J. T. CARTER,
Deputy Clerk, U. S. Circuit Court,
Eastern District of Tennessee.

(Endorsed:) No. 1056. In the U. S. Circuit Court at Knoxville, Tenn. Commission Chas. Hebard vs. D. W. Belding, et al. Issued June 16, 1898. Henry O. Ewing, Clerk. Filed June 20, 1898. J. T. Carter, Deputy Clerk.

Notice.

CHAS. HEBARD
vs.
D. W. BELDING et als.

T. E. H. McCroskey, Esq.:

On Friday, June 17th, 1898, at 8 o'clock [sic.] m., and succeeding days, if necessary, at the home of Jas. Whitaker, near Andrews, N. C., we will take the depositions of James McDaniel, John Dockery, James Whitaker, W. P. Phillips, W. P. Jones, M. L. Brittain, J. W. King and H. S. Hayes, and at the home of Stephen Whitaker, near Andrews, we will take the deposition of said Whitaker, all of said

depositions to be used as evidence in behalf of the defendants upon the trial of the above named cause.

This June 14th, 1898.

LUCKY, SANFORD & TYSON,
Sol's for Def'ts, Except Cooper.

Filed June 20, 1898. J. T. Carter, Deputy Clerk.

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Copy.

No. 908 B.

JUNE 14, 1898.

Major T. E. H. McCroskey, Madisonville, Tenn.

DEAR SIR: Enclosed find notice for taking depositions in the state line case on Friday, June 17, 1898, near Andrews, N. C.

Will you kindly acknowledge service of notice, and oblige.

Yours very truly,

(Signed) LUCKY, SANFORD & TYSON.

MADISONVILLE, TENN., *June* 15, 1898.

E. T. Sanford, Esq., Knoxville, Tenn

DEAR SIR: Yours of 14th enclosing notice to take proof at or near Andrews, N. C., on the 17th to be used in case of Hebard vs. Belding, et al., is received. I can not acknowledge service. I have other business engagements for that date, and the time is too short to make any change. It has been a week or more since the court granted you the continuance, and I feel that you should have given us at least the time the law grants us. I return the papers to you.

Very truly,

T. E. H. McCROSKEY.

In the Circuit Court of the United States for the Eastern District of Tennessee, Sitting at Knoxville, Tennessee.

In Equity.

CHAS. HEBARD
vs.
D. W. BELDING et als.

The Deposition of Jas. McDaniel, M. L. Brittain, John Doekery. Jas. Whitaker, W. P. Phillips, and W. P. Jones, taken in behalf of all the def'ts, except J. W. Cooper, at the home of Jas. Whitaker, near Andrews, N. C., on Friday, June 17, 1898, *commencing at* 8 *o'clock a. m. and the deposition of Stephen Whitaker taken on said date at his home near said Andrews, N. C., pursuant*
360 *to notice to counsel for complainant, hereto attached, copy of letter from Lucky, Sanford & Tyson, to T. E. H. McCroskey, dated June* 14*th*, 1898, *and reply of T. E. H. McCroskey to E. T. Sanford, dated June* 15, 1898, *all of which are hereto attached; said depositions taken before J. W. Fletcher in pursuance to commission to him directed, hereto annexed. Being taken in the presence of E. P. McQueen and Edward T. Sanford of counsel for defendant, except J. W. Cooper, neither the complainant or his counsel being present.*

Said witness JAS. MCDANIEL of lawful age, being duly sworn, deposes as follows:

Q. 1. What is your age and where do you live?

A. I am 77 years old and live about 4 miles from Murphy, N. C., and 25 miles from here. I have lived in this country over sixty years.

Q. 2. What is your business?

A. I am a farmer, have a small farm, do nothing else.

Q. 3. Did you ever know Wm. Allen and Wm. Gravis?

A. Yes, I knew them both.

Q. 4. How long did you know them?

A. I knew Wm. Gravis over fifty years and I knew Allen as long as he stayed in this country, some fifteen years.

Q. 5. Are they both dead?

A. I know Gravis to be dead and I understand Allen is.

Q. 6. How close did you live to these gentlemen?

A. I lived about two miles from Allen, and ¾ of a mile from Gravis.

Q. 7. Were either or both of them with the parties or commissioners from Tennessee and North Carolina who ran the state line in 1821?

A. I personally don't know but Wm. Gravis told me that he was along and carried provisions for the party, and it was reported in the neighborhood that Allen was along also and carried provisions.

Q. 8. If either of them ever told you how the commissioners ran

the line south of the Little Tennessee river, that is how they crossed the river, and where they ran and located the line after crossing the river, please state what they told you.

A. Mr. Gravis told me that they crossed at Talaskee ford or some name like that, and then come up the river to Slick Rock Creek, then ran up the Creek to the forks of the creek, then up a ridge between the forks of the creek to the top of the mountain and the main lead, and then along the main lead of the mountain.

361 Q. 9. How far do you live from the land in question?

A. About twenty or twenty-five miles.

Q. 10. How long have you been living where you do now?

A. I lived there fifty-eight years ago and have been living there all the time with the exception of two or three years.

Q. 11. What has been the general understanding in that section of the country as to the state line in reference to Slick Rock Creek?

A. Has been the general understanding that it ran up Slick Rock Creek.

Q. 12. Did you talk to Gravis more than once about this matter?

A. Gravis worked for me in making iron for some time, and we often talked about this state line. We hunted together and he boarded with me while burning coal for the iron. I didn't hunt much. He would describe to me how the state line ran. He also spoke to me about the line running along the Laurel Top and the Main Lead.

Compl't excepts to all statements of the witness McDaniel as to conversations had by him with Wm. Allen and Wm. Gravis, and others upon the ground that they are incompetent.

WEBB & McCLUNG, *Sol's.*

Q. 13. You never had any talk with Allen about the line?

A. No.

Q. 14. Did you ever hear of Thos. Tatham being in the party with the commissioners who ran the line?

A. Yes, I think I have heard that he was along. I think that was the general report.

And further the deponent saith not.

JAMES McDANIEL.

Subscribed and sworn to before me this 17th day of June, 1898.

J. W. FLETCHER, *Com.*

Jas. McDaniel, 1 day's attendance 20 miles travel one way.
Filed June 20, 1898. J. T. Carter, Deputy Clerk.

362 Said witness, JOHN DOCKERY of lawful age, being duly sworn, deposes as follows:

Q. 1. How old are you and where do you live?

A. I am 62 years old and live on Hanging Ivy Creek in Cherokee County, N. C., have lived there 52 years.

Q. 2. What is your occupation?

A. I am a farmer.

Q. 3. How far do you live from this land in question?

A. I live about thirty miles from the mouth of Slick Rock Creek.

Q. 4. Do you know where Tallassee Ford is?

A. Yes.

Q. 5. Does the old Indian town of Tallassee, commonly called the Tallassee Old Town, lie up or down the river from Tallassee Ford?

A. I understand that it lies up the river between the Ford and the state line.

Q. 6. Did you know Wm. Allen and Wm. Graves?

A. Yes, I have known them ever since I was ten years old. Allen was a sort of kin folks of mine. Both of them married kin folks of mine.

Q. 7. How far did you live from them?

A. Our farm and Allen's lacked about a quarter of a mile of joining, the houses were about a mile apart. Graves lived some two miles from me.

Q. 8. Do you know whether Allen or Graves were of the party with the commissioners of Tenn. & N. C., who ran the state line in 1821?

A. Allen told me he carried rations for the party, and Graves told me that he was along, but I do not know in what capacity, I do not recollect of his telling me.

Q. 7. Was there any general understanding in the community that they were along with the party?

A. Yes, it was the general understanding that they were along.

Q. 8. Were you ever with either of these persons in the mountain?

A. Yes, I have been with both of them in the mountains hunting.

Q. 9. Did you ever have any conversations with either Allen or Graves about the state line run by the commissioners?

A. Yes, both of them.

Q. 10. State when and where it was?

A. It was out there on what they said was the state line while we were hunting. My conversation with the old man Graves was while we were down by Tellico River, he told me about the state
363 line down there, but he told me nothing about the line on Slick Rock. My conversation with Allen was when we were on the main mountain near Jeffries and he told me that they went down to Tallassee Ford and crossed and then came up to Slick Rock and ran the line of Slick Rock Creek.

Q. 11. How much time have you spent in the mountains?

A. Before the war I was in the mountains every year with cattle during the summer season, and hunted in the mountains every fall, and since the war have been there nearly every year but not so far as before.

Q. 12. What has been the general understanding in the community during all these years as to where the state line was in reference to Slick Rock Creek?

A. The general understanding was that it ran up Slick Rock Creek and along the main divide by the Laurel Top.

Q. 13. When did you have the conversation with Allen that you have testified about?

A. It was before the war.

Q. 14. Are Wm. Allen and Wm. Graves both dead?

A. I helped bury Wm. Graves. Wm. Allen's brother married my sister and it is generally understood that Wm. Allen is dead. This is a family understanding.

Q. 15. Do you know John Deputy, Sr.?

A. Yes.

Q. 16. Did he ever tell you where the state line ran?

A. He came up to our camp over night several years ago and said the line did not run where McClelland run it, but ran up Slick Rock. This conversation took place while I was with McClelland who was running the line on past the Big Fodder Stack to the Little Fodder Stack, and Deputy said the line did not run that way, but that it turned off at Big Fodder Stack and ran down the ridge to Slick Rock Creek, and then down the creek. Deputy and a man named Denton showed us the line between the Laurel Top and Big Fodder Stack, the Laurel Top lies south of the junction of the Fodder Stack Lead and the Hangover.

Q. 17. When you were running the line with McClelland did you notice any old marked trees?

A. I saw old marked trees along between Laurel Top and Big Fodder Stack, some of them between the junction of the Hangover Fodder Stack leads and Big Fodder Stack but I did not see any old marked trees on the line McClelland ran beyond the Big Fodder Stack and passing the Little Fodder Stack to the river. I
364 am not a surveyor myself, and did not know that these old marks were state line marks, but they said they were.

Q. 18. Are you familiar with the mountain south of the junction of the Fodder Stack and Hangover Lead, and extending south of the Laurel Top and beyond the Tellico River?

A. Yes, that is the section of the country I have pastured my cattle in for fifty years.

Q. 19. What part of the mountain, if any, is called the Unaka or Unicoi Mountain?

A. I never heard it called the Unaka or Unicoi Mountain nearer the Little Tennessee river than the Beaver Dam Bald, which is southwest of the Tellico River. The main mountain on both sides of where the Unaka Turnpike road crosses the mountain to Tennessee, is called the Unaka or Unicoi Mountain, but is not called this beyond Beaver Dam Bald.

Q. 20. Did this land in question formerly lie in Cherokee Co., N. C.?

A. It did until Graham County was formed, which was cut off from Cherokee County since the war, and since then it has been in Graham Co.

Q. 21. How far do you live from this place, Andrews?

A. I live 23 miles from here.

And further the deponent saith not.

JOHN DOCKERY.

Subscribed and sworn to before me this 17th day of June, 1898.
J. W. FLETCHER, *Com.*

Compl't excepts to all statements of the witness Dockery as to conversations had by him with Wm. Allen and Wm. Graves, or others, upon the ground that the same are incompetent.
WEBB & McCLUNG, *Sol's.*

John Dockery, 1 day's attendance 23 miles travel one way.
Filed June 20, 1898, J. T. Carter, Deputy Clerk.

Said witness M. L. BRITTAIN of lawful age, being duly sworn, deposes as follows:

Q. 1. What is your age and residence?
A. I am 71 years old and live in Murphy, N. C., 16 miles from here.

365 Q. 2. Where did you live from 1851 to 1855?
A. At or near the present town of Robbinsville, N. C.
Q. 3. How far is that from the land in dispute?
A. About 20 miles.
Q. 4. What is and has been your occupation?
A. I now keep a private hotel, have been a farmer and merchant.
Q. 5. Were you ever in Slick Rock Basin with J. W. C. Piercy, the former county surveyor of Cherokee County?
A. Yes.
Q. 6. What was the purpose of your visit?
A. I had entered a quantity of lands and was there with him surveying them.
Q. 7. What, if anything, did Mr. Piercy tell you at that time in reference to the state line?
A. He told me that the line crossed the river at the mouth of Slick Rock Creek, and that the creek was the line. I was careful about this as I did not want to get my lands located over the state line and I located my entries up the river between Slick Rock Creek and the mouth of Chevah River.
Q. 8. Is Piercy living, if not, when did he die?
A. Mr. Piercy died in 1868, at about 70 yrs. of age.
Q. 9. Did Mr. Piercy do much surveying in that section?
A. Yes, a great quantity. He surveyed nearly all that country. He surveyed a great deal for me.
Q. 10. Do you know by general reputation in the community where the state line was, and if so, where?
A. Yes, in that section of the country Slick Rock Creek was by general reputation known as the state line.
Q. 11. Do you know the portion of the mountain that is called the Unaka or Unicoi Mountain, and if so, which?
A. It is called the Unaka or Unicoi on both sides of where the Unaka Turnpike road crosses the mountain from Murphy, N. C., into Tennessee.
Q. 12. As you go from the Unaka Turnpike toward the Little Tennessee River, how far is it called the Unaka or Unicoi Mountain?

A. As far as the Beaver Dam Bald and no farther as I have ever heard.

Q. 13. Do you know whether or not old man Thos. Tatham was one of the party with the commissioners from North Carolina and Tennessee, who ran the state line in 1821, and if so, how?

A. Only by general reputation and it is also my recollection that Mr. Piercy told me that Mr. Tatham had told him, that the
366 commissioners ran the line up Slick Rock Creek.

Q. 14. In what county of North Carolina does the land in dispute now lie, and in which did it formerly lie, assuming that it is in North Carolina?

A. It now lies in Graham County, formerly it laid in Cherokee County before the formation of Graham County.

And further the deponent saith not.

M. L. BRITTAIN.

Compl't excepts to all statements of the witness Brittain as to conversations had by him with Mr. Piercy or others, upon the ground that they are incompetent.

WEBB & McCLUNG, *Sol's.*

Subscribed and sworn to before me this 17th day of June, 1898.

J. W. FLETCHER, *Com.*

M. L. Brittain, 1 day attendance 16 miles travel one way.
Filed June 20, 1898. J. T. Carter, Deputy Clerk.

The said witness JAS. WHITAKER, of lawful age, being duly sworn, deposes as follows:

Q. 1. What is your age and residence?

A. I am 94 years old and live near Andrews, in Cherokee Co., N. C.

Q. 2. How long have you lived here?

A. I settled here in 1873 and have lived here ever since.

Q. 3. What has been your occupation?

A. Have been a farmer, and for a number of years was a justice of the peace for the county, and was also a commissioner of the county, postmaster for a while.

Q. 4. Did you know David Taylor?

A. Yes, Taylor was a friend of mine. I knew him from 1837 until he died, some forty years or more. He lived on a farm just the other side of Andrews from here.

Q. 5. Did he ever say anything to you about being one of the party with the commissioners from Tenn., and North Carolina who run the state line in 1821, if so what did he tell you?

367 A. Yes, he did.

Q. 6. What did he tell you?

A. He told me he was one of the party with the commissioners who run the line, but I don't remember of his saying in what position.

Q. 7. Did he tell you how the line ran in reference to Slick Rock Creek?

A. He told me it ran right up Slick Rock Creek and to the top of the mountain.

Q. 8. Did he tell you anything about how it ran after it got to the top of the mountain?

A. Yes, he said it ran along the top of the mountain until it came to the Long Ridge, they camped on the Long Ridge where some of the men got whiskey and became drunk, at this point they set up a stone and run the line south from there to the Georgia line.

Q. 9. Did he ever tell you that Thos. Tatham was one of the party?

A. I think he did, but can not say positively.

Compl't excepts to all statements of the witness Jas. Whitaker as to conversations had by him with David Taylor or others, upon the ground that they are incompetent.

WEBB & McCLUNG, *Sol's.*

And further the deponent saith not.

JAS. WHITAKER,
By J. W. FLETCHER.

Subscribed and sworn to before me this 17th day of June, 1898.
J. W. FLETCHER, *Com.*

Jas. Whitaker one day's attendance.
Filed June 20, 1898. J. T. Carter, Deputy Clerk.

The said witness W. P. JONES of lawful age, being duly sworn, deposes as follows:

Q. 1. What is your age and where do you live?
A. My age is 65 years, I live two miles from here.
Q. 2. What is your occupation?
A. A farmer.
Q. 3. How long have you been living where you now live?
A. Have been living there 28 years.
Q. 4. Where were you living before?
368 A. I have been living in the same neighborhood since I came to this section, some fifty-one years ago.
Q. 5. Do you know the general understanding in the country in reference to where the state line run after it crossed the Tenn. river?
A. I have never been in that section, but have heard a great deal of talk about it and the general understanding has always been that it ran up Slick Rock Creek.
Q. 6. Did you know J. W. C. Piercy in his lifetime?
A. Yes, I knew him well, I have carried a chain for him on a great many of his surveys.
Q. 7. Did you ever hear him say anything about the state line in that section?

A. Yes, he always said it crossed the river at the mouth of Slick Rock Creek and ran up the Creek.

Q. 8. Did you know David Taylor who lived just the other side of Andrews?

A. Yes, I knew him well, he died about fifteen years ago, I should say.

Q. 9. Do you know the part of the mountain that is called the Unaka or Unicoi Mountain?

A. Yes, it is called Unaka or Unicoi about the point where the Unaka Turnpike crosses the mountain, from there to the Beaver Dam Bald and also in the lower part of the country.

And further deponent sayeth not.

W. P. JONES.

Subscribed and sworn to before me this 17th day of June, 1898.

J. W. FLETCHER, *Com.*

Compl't excepts to all statements of the witness W. P. Jones as to conversations with J. W. C. Pierce, also as the general understanding of his neighborhood because they are incompetent.

WEBB & McCLUNG, *Sol's.*

W. P. Jones 1 day's attendance.

Filed June 20, 1898. J. T. Carter, deputy clerk.

The said witness, W. P. PHILLIPS, of lawful age, being duly sworn, deposes as follows:

Q. 1. What is your age and residence?

A. I am 44 years old and live in Andrews, N. C.

369 Q. 2. What is your business?

A. Farmer.

Q. 3. How long have you lived in Andrews, N. C.

A. Was born and raised in Cherokee Co., and have lived in the county all my life except about (7) seven years and those I lived in Graham county, four years of the time in Robbinsville where I was deputy sheriff and jailer.

Q. 4. How far was where you lived in Graham Co. from Slick Rock creek?

A. About 16 miles.

Q. 5. Are you familiar with the Slick Rock region?

A. Yes, I know it well.

Q. 6. How large is Slick Rock creek?

A. It is a good sized creek, not a very big one nor very small, but what we call a good sized mountain creek.

Q. 7. Is the river opposite the mouth of Slick Rock creek and up above to where the Hangover lead comes to the river, rough or smooth, say for half mile above Slick Rock creek?

A. Rough, it has a great many large rocks in it.

Q. 8. When were you first up in the Slick Rock region?

A. About 17 years ago.
Q. 9. Was old man John Deputy up there then?
A. Yes.
Q. 10. Did he tell you where the state line ran?
A. Yes.
Q. 11. How did he say it ran?
A. He was standing by Slick Rock creek and pointing to it said the line ran up the creek to Fork Ridge. The Fork Ridge was the ridge leading up to the Big Fodder Stack.
Q. 12. Which side of the creek was Deputy then living on?
A. On the east side of the creek, in North Carolina as he said.
Q. 13. How did you happen to have this conversation with him?
A. He had been accused of stealing a bear and trap over in Jeffries west of the Fodder Stack and some parties threatened to prosecute him for it, he said they could not do it in North Carolina, as he lived in N. C. and the place where it was claimed he stole the bear was in Tenn. that he knew this, as the line between the states ran up the creek and that while he lived on the east side of the creek, the place from which the bear was said to have been taken, was on the west side.
Q. 14. Do you know what Deputy's general reputation was, and if so, what was it?
370 A. It was bad.
Q. 15. From his general reputation in the community would he be entitled to full faith and credit on oath?
A. I don't think he would.
Q. 16. Do you know Andrew and Marion Carriger?
A. Yes.
Q. 17. Are they alive?
A. Yes, I saw Marion about a month ago.

Further deponent sayeth not.

W. P. PHILLIPS.

Subscribed and sworn to before me this 17th day of June, 1898.
J. W. FLETCHER, *Com.*

W. P. Phillips, 1 day's attendance.

Filed June 20, 1898, J. T. Carter, deputy clerk.

The said witness, STEPHEN WHITAKER, of lawful age, being duly sworn, deposes as follows:

Q. 1. What is your age and residence?
A. I was 84 years old last February and reside at Andrews, N. C.
Q. 2. What is your occupation?
A. Farmer all my life.
Q. 3. How long have you been living here?
A. Have been living here since 1838, lived in Macon county before that.
Q. 4. Did you know old man Thos. Tatham and David Taylor?

A. Yes, I knew them both well. David Taylor was my father-in-law.

Q. 5. Did you ever hear them say anything about the state line in reference to Slick Rock?

A. I have often heard Thos. Tatham speak of being as I understood one of the commissioners who run the state line, that after they crossed the river they run the line up Slick Rock creek and he would laugh and tell me about how the party after getting to a certain point, all getting drunk and running a straight line to Georgia, and lost North Carolina, Ducktown, have often heard him joke and tell about it in crowds. Tatham and I were great friends and were often together and would often hear him speak about running the line and losing Ducktown to North Carolina. I have heard David Taylor say he was with the party who ran the line, but am not certain that I ever heard him say how the line run. I have often
371 heard J. C. W. Piercy say that Slick Rock creek was the state line, and that he would not survey lands west of Slick Rock creek, because he considered that the state line. He surveyed a great many tracts for me, he was one of the best surveyors in North Carolina, Tatham lived about two miles from me and Taylor about six miles. They have all been dead for seven years and were all old men when they died. I think Tatham died before Piercy, the general understanding has always been that the state line ran up Slick Rock creek.

And further the deponent sayeth not.

S. WHITAKER.

Subscribed and sworn to before me this 17th day of June, 1898.

J. W. FLETCHER, *Com.*

Compl't excepts to all statements of the witness Stephen Whitaker as to conversations had by him with David Taylor, Thos. Tatham and J. W. C. Piercy and also as to the general understanding in the neighborhood upon the ground that the same are incompetent.

WEBB & McCLUNG, *Sol's.*

S. Whitaker 1 day's attendance.

Filed June 20, 1898. J. T. Carter, deputy clerk.

The foregoing depositions were taken before me as stated in the caption and reduced to writing by me and I certify that I am not interested in the cause nor of kin or counsel to either of the parties and that I sealed them up and put them in the post-office at Murphy, N. C., without being out of my possession or altered after they were taken.

Given under my hand this 17th day of June, 1898.

J. W. FLETCHER,
Commissioner.

Commissioner's costs paid by Lucky, Sanford & Tyson $7.00, all other costs of these depositions paid by Lucky, Sanford & Tyson, including attendance and mileage of witnesses.

J. W. FLETCHER, *Com.*

The foregoing depositions of James Whitaker, John Dockery, Jas. McDaniel, W. P. Phillips, W. P. Jones, M. L. Brittain and Stephen Whitaker, are excepted to by complainant upon the
372 grounds that no sufficient notice was given to compl't or his solicitor of the taking of the same. This June 22, 1898.

T. E. H. McCROSKEY,
WEBB & McCLUNG,
Sol's for Compl't.

The foregoing exceptions are overruled by the clerk this June 23, 1898.

J. T. CARTER,
Deputy Clerk.

(Endorsed:) No. 1056. In the U. S. Circuit Court at Knoxville. Chas. Hebard against D. W. Belding, et al. Depositions of James McDaniel, John Dockery, M. L. Brittain, James Whitaker, W. P. Jones, W. P. Phillips, and S. Whitaker. Filed June 20, 1898. J. T. Carter, deputy clerk.

Cross-examination of the foregoing witness, John Dockery, by T. E. H. McCroskey, Esq., sol's. for compl't, at Dickey's Hotel, Murphy, N. C., Aug. 30, 1898, in presence of solicitors for all parties.

Cross-exam.:

I was along with McClelland when he undertook to locate the state line about 4 or 5 years ago. I was an axeman. I don't know how he happened to run the line. Ben Posey, a lawyer of Murphy, N. C., came and asked me to go. He paid me the money for going but I suppose he got it from the state. He told me the state paid it. I believe Posey was state senator at the time. We went to where the turnpike road crosses the Unaka mountain and from there to the Hiwassee river, then we came back to the turnpike and ran north east to the Tellico river, then we crossed the river and up what we called the state ridge to the Laurel Top, then on with the divide of the mountain by Jeffries to the Fodder Stack. I think we left the main mountain and took down a ridge before we got to the Fodder Stack, we didn't cross Slick Rock and crossed no water but went around the head of Slick Rock and on the highest divide to the river coming in about ¾ or a mile below the mouth of Slick Rock. We went down from the main ridge to strike the Fodder Stack, then went over the Big Fodder Stack, then by Dr. Crowden, then over the Little Fodder Stack. The last old marked line I saw was on a birch on the Big Fodder Stack about a mile after we left the main divide. I don't know whether it was a state line mark or not. I don't
373 know the state line mark. By this survey we put all the waters of Slick Rock creek in North Carolina. We marked

the line along and put up rock mile posts, I mean the hands did this and we established this as the state line between Tennessee and North Carolina. The parties who were along and assisted in the survey were John McClelland, Allen E. Fain, Wm. Watson, John Aikins, J. W. Palmer, R. W. Brittain, my son James Dockery, part of way that from Fains to the river and Sam Bryson and that is all I remember except Will Howell.

Re-examination:

The mark on the birch was the same kind of mark that we found all along on the trees from the Hiwassee river, but we found none beyond the Big Fodder Stack, some places the marked trees were thicker than others, especially they were thicker on the state ridge. The marks were three hacks with an axe. The marks were all alike; I looked particular as had a cousin that had killed a man and wanted to know where the line was, from where we turned down to Fodder Stack the main high ridge runs eastward towards the Cheoah. I went on it about a mile then, but I had been further out there hunting, I went out on this ridge for about a mile hunting for the line but couldn't find it, we hunted carefully, cutting down the trees we hit running with the transit so as to clear the path. I am not a surveyor. When we were on the McClelland survey we did not go down on Slick Rock creek at all hunting for the lines. I had no control of the party and nothing to do with where the line was located, McClelland was boss, McClelland is living and lives here in Murphy. I remember the marked holly tree on Tellico river.

And further deponent saith not.

JOHN DOCKERY.

Bill of costs John Dockery, attendance 1 day, 1.00, 14 miles 70c. $1.70 paid by Lucky, Sanford & Tyson.

Formal caption, certificate transmission and jurat waived and it is agreed that the attached depositions of James McDaniel and others, taken June 17, 1898, may be treated as if re-taken on proper notice with the addition of the cross-examination of John Dockery which is to be added to his original deposition and become part of same and may be read on the trial of this cause as if so re-taken and subject however, to all exceptions as to the competency, relevancy or materiality of the evidence which are reserved to the hearing.

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T. E. H. McCROSKEY,
Sols. for Compl't.
LUCKY, SANFORD & TYSON,
Sol's. Def'ts Except J. W. Cooper.

(Endorsed:) No. 1056. Chas. Hebard vs. D. W. Belding, et al. Depositions of James McDaniel, et al. Filed Sept. 1, 1898. J. T. Carter, deputy clerk.

In the United States Circuit Court at Knoxville.

In Equity.

CHAS. HEBARD
vs.
D. W. BELDING et al.

Deposition of C. C. Jones, Witness for Defendants, Taken by Consent June 8th, 1898, at the Offices of Lucky, Sanford & Tyson, in Knoxville, Tennessee, in the Presence of T. S. Webb, Solicitor for Complainant, and Counsel for Defendants Except J. W. Cooper.

Said witness, C. C. JONES, being duly sworn, deposes as follows:

Q. 1. State your age, residence and occupation.
A. 60 years old, Citico, Monroe county, Tennessee; farmer.
Q. 2. How long have you been living at your present residence?
A. About 30 years.
Q. 3. How far is your residence from the lands in dispute in this case, which are on the waters of Slick Rock creek?
A. About 21 or 22 miles.
Q. 4. Have you been familiar with said lands in general during said time?
A. Yes sir.
Q. 5. Were you acquainted with one Thomas Hensley?
A. Have known him for the same length of time, 30 years.
Q. 6. Is he now dead?
A. Yes, sir; he is dead.
Q. 7. State if you ever had any conversation with the said Hensley in his lifetime in reference to the survey of the eastern line
375 of Ocoee district in 1836-36, and state what he said about same, that is with reference to the eastern line in the neighborhood of Slick Rock creek and in reference to the state line.
A. Yes, sir. He said that in running the state line, when the commissioners came to the river, they went down the river and across and then went up the river to the mouth of Slick Rock creek and then ran up Slick Rock creek.
Q. 8. You mean the commissioners who ran the state line in 1821?
A. Yes, sir.
Q. 9. Now state what he said in reference to being one of the party who ran the east line of Ocoee District?
A. He said he knew the parties and was with the party some of the time, and that they went to the mouth of Slick Rock creek and stopped at the mouth of Slick Rock creek.
Q. 10. Did he say why they surveyed Slick Rock creek at the eastern line of the Ocoee District?
A. Said it was the state line.
Q. 11. Did he state the reason why they stopped at Slick Rock creek?

A. Said they stopped there because it was the state line.

(T. S. Webb, solicitor for complainant objects to the foregoing questions and answers as statements made by Thos. Hensley, for the reasons, 1st, that said testimony is hearsay and not competent for the purposes in this cause; 2nd, it is not shown that Thos. Hensley ran the state line in 1821 or that he knew where said state line was in connection with the running of same.")

Q. 12. What has been your understanding as to the location of the state line between Tennessee and North Carolina?

A. I always understood it run up that way.

(The foregoing question and answer as to the understanding of the witness as to reputation of state line, is objected to because incompetent.)

Q. 13. Do you know what has been the general understanding in reference to the location of the state line?

A. The general understanding by parties I know that lived on both sides of the line, was that it ran up Slick Rock creek.

Q. 14. How long can you remember that that has been the general understanding?

A. I was up in North Carolina about 25 years ago and from that time on until now.

376 Q. 15. Do you know one John Deputy, Sr.?

A. Yes, sir.

Q. 16. About how old a man is he now?

A. He must be near 75 or 80.

Q. 17. Did he formerly live in Tennessee?

A. Yes, sir.

Q. 18. Where?

A. On Citico creek.

Q. 19. How far from you?

A. From 8 to 10 miles.

Q. 20. Were you well acquainted with him?

A. Knew him well.

Q. 21. Did he leave that part of the country some years ago?

A. Yes, sir.

Q. 22. About how long?

A. Must be something like 15 or 16 years ago; am not positive as to exact time, but at least that.

Q. 23. Do you know the reason why he left?

A. Yes, sir.

Q. 24. Please state it?

A. He left on account of his conduct in several ways; towards his wife, beating her; falling out with his neighbors, knocking one of them in head with a gun, and for violation of the Internal Revenue Laws.

Q. 25. Before he left did he state to you where he was going and the reason?

A. Yes, sir.

Q. 26. What did he say?

A. Said he was going to North Carolina across the line, so that the officers of Tennessee could not reach him.

Q. 27. Where did he go after he left?

A. I suppose he went to North Carolina. He told me afterwards that he was living in North Carolina.

Q. 28. When was it when he told you he was living in North Carolina?

A. It was after he moved there.

Q. 29. Did he ever state to you since then that he has been living in North Carolina?

A. He told me since he moved there, that he was living in North Carolina.

Q. 30. Do you know whether he was living on the east bank of Slick Rock creek?

A. I do not know.

Q. 31. What was the general understanding in the neighborhood as to where John Deputy was living?

377 (Foregoing question objected to because hearsay and incompetent.)

A. North Carolina.

Q. 32. Were you acquainted with Deputy's general reputation and character in the neighborhood? Was it good or bad?

A. Bad.

Q. 33. From that general reputation and character would he be entitled to full faith and credit on oath?

A. I think not.

Q. 34. When did Hendley die and how old a man was he?

A. He died two years ago. He must have been near 90 years of age; it is my impression that he was a man of 55 or 60 when I first knew him 30 years ago.

Q. 35. When, if ever, did you first hear the claim that the state line ran up Hangover?

A. I have heard it talked about. I heard it two or three years ago.

Q. 36. Are you familiar with the writing of T. E. H. McCroskey, one of the solicitors of complainant in this cause?

A. I have had a great deal of correspondence with him.

Q. 37. I wish you would please examine the deed from S. P. Evans, clerk and master, to E. T. Gratz, dated December 19, 1887, and deed from A. B. McCorkle, —— Kline, to William Fleming and others, dated August 20, 1886, original deeds which are here shown you and state whether or not the body of said deeds are in the hand-writing of Mr. McCroskey, being deeds which are filed as exhibits to the deposition of Mr. McCroskey in this case?

A. I would take it to be his hand-writing?

Q. 38. Both of them?

A. Yes, sir.

Cross-examination by T. S. WEBB, solicitor, for complainant.

Q. 1. Mr. Jones, where did you live before you moved to Citico?
A. I lived across the river on the Henley estate, the first two years after I came to Tennessee?
Q. 2. Where did you come from to Tennessee?
A. South Carolina.
Q. 3. Have you ever been on the property in dispute on Hangover?
A. I have hunted up and down Slick Rock creek.
Q. 4. How often?
378 A. I stayed one week up there once hunting and camping.
Q. When was this?
A. That must have been 15 or may be 20 years ago.
Q. 6. Was Deputy living there at that time?
A. He was living *in* Citico creek.
Q. 7. Have you ever owned any lands in the disputed territory or had any interest in any lands there?
A. None whatever.

Further saith not.

C. C. JONES.

Sworn to and subscribed before me, this June 8th, 1898.
[SEAL.] E. H. KUNTZ,
Notary Public in and for Knox County, Tennessee.

47 miles *at* 2 days' attendance paid by Lucky, Sanford & Tyson.

(Endorsed:) Chas. Hebard vs. D. W. Belding, et al. Deposition of C. C. Jones. Filed June 20, 1898. J. T. Carter, deputy clerk.

In the United States Circuit Court, at Knoxville, Tennessee.

No. —. In Equity.

CHARLES HEBARD
vs.
D. W. BELDING et als.

Edward T. Sanford being duly sworn, makes oath and says, that he is one of the solicitors for the defendants in this cause, except the defts. J. W. Cooper and R. L. Cooper, that on the 7th day of June, 1898, affiant and E. P. McQueen, made a joint affidavit, a copy of which is hereto annexed marked exhibit "A"; that affiant's law firm Lucky, Sanford and Tyson sent said affidavit to T. A. Wright, Esq., Special Commissioner in this cause, with accompanying letter, copy of which letter is filed herewith as exhibit B to this affidavit; that they received in reply thereto a telegram from the said special commissioner, which is filed as Exhibit C, hereto; that affiant understood that leave had been granted to take depositions to either side as asked

for in said affidavit to wit, on three days' notice; that in the previous conduct of this cause no formal notice has been required for
379 taking depositions but each side had taken depositions with the other side upon actual notice, merely selecting a convenient date for such purpose; that counsel for complainant had not notified him that there would be any change in this regard; that Major T. E. H. McCroskey, counsel for complt., had stated at a former time in the presence of the special commissioners in reference to an extension of time for taking depositions, that he would take depositions at any time on actual notice; that the next day after the commissioner granted the above extension of time as shown by telegram J. L. Nichols, Esq., an associate solicitor in this case went to Andrews, North Carolina, for the purpose of seeing James Whitaker, the party therein mentioned, and of obtaining other testimony; that he returned and came to Knoxville on Monday, June 13th, giving affiant the names of witnesses he had seen and whose testimony would be material; that affiant thereupon went to the office of Webb & McClung, of counsel for complt., and notified Major Webb (T. S.) one of said firm, that the defendants would want to take the depositions of several witnesses at Andrews on Friday, June 17th, 1898, to which Major Webb replied, by requesting affiant to notify Major T. E. H. McCroskey, as said McCroskey wished to be notified and wanted to take the remaining proof; affiant thereupon sent Major McCroskey a letter in the name of his firm, enclosing notice to take depositions at Andrews on the 17th, sending same on the first mail leaving Knoxville for Madisonville, the residence of said McCloskey, after his conversation with Major Webb, the said train carrying mail leaving Knoxville early in the morning on Tuesday, June 14th, 1898, and reaching Madisonville about 11 o'clock Tuesday morning; affiant heard no word from said McCroskey, but saw the said McCroskey on Tuesday morning, just as affiant was starting for Andrews to take the depositions, at which time the said McCroskey stated that he could not be present at the taking of the depositions, and a few minutes later affiant received a letter from said McCroskey to the same effect; the aforesaid correspondence between affiant and his firm and the said McCroskey and the aforesaid notice are attached to the depositions of James McDaniel and others, filed in this cause on June 20th, 1898. Affiant thereupon offered with said McCroskey to take said depositions at any date that might be convenient, either on Saturday, June 18th, or Monday, June 20th, or to join with the complt. in asking for extension of time, so that a convenient date might be fixed for taking the said depositions, but all of these propositions the said McCroskey declined. Said McCroskey rode on
380 the train with affiant and E. P. McQueen, solicitor, as they went to take said depositions as far as Madisonville, and on the train for the first time disclosed to affiant that he objected to the notice and claimed that the notice was not sufficient. This was the first intimation that affiant had had that complt. objected to the notice or that his counsel demanded any formal notice whatsoever for taking depositions.

Affiant and said McQueen then proceeded to Andrews, North Caro-

lina, and took said depositions, according to the notice. Same were filed herein on June 20th, 1898.

Said depositions are in the opinion of affiant of great importance to defendants, —— ——, are material to the defense of the defendants in this cause, and it would work a great injustice to the defendants in this cause if they were compelled to go to trial without the benefit of said depositions.

EDWARD T. SANFORD.

Sworn to and subscribed before me, this the 23rd day of June, 1898.

[SEAL.] J. T. CARTER,
Dep. Clerk,
Notary Public in and for Knox County, Tennessee.

Filed June 23, 1898. J. T. Carter, Deputy Clerk.

(Endorsed:) No. 1056. In the U. S. Circuit Court at Knoxville. Chas. Hebard against D. W. Belding, et al. Affidavit of Edward T. Sanford. Filed June 23, 1898. J. T. Carter, Deputy Clerk.

EXHIBIT A.

Copy.

In United States Circuit Court at Knoxville.

In Equity.

CHARLES HEBARD
vs.
D. W. BELDING et al.

E. P. McQueen and Edward T. Sanford, being duly sworn, make oath and say, that they are of counsel for the defendants in this cause; that they have this day learned that one Samuel Whitaker, a resident of Andrews, Cherokee county, in the state of North Carolina, who is of advanced years, will testify that he was acquainted with Thos. Tatham, who was a surveyor with the party of
381 commissioners from Tenn. and N. Carolina, who ran the state line in 1821, and that he has heard the said Thos. Tatham say that they ran the state line up Slick Rock creek. Affiants further state that said Thomas Tatham is dead and they understand that all others of said party are now dead; that it is of great importance to the defendants in this cause to prove the aforesaid statement, that the said Whitaker is unable to travel, as they understand, and it will be necessary to take his deposition at Andrews, wherefore they pray that the time for taking proof in this cause may be extended ten days and they be allowed to take the deposition of the said

Whitaker and any other material witnesses upon three days' notice to adverse counsel.

This application is not made for delay, but because they believe it to be essential to justice.

(Signed) E. P. McQUEEN,
EDWARD T. SANFORD

Sworn to and subscribed to before me this the 7th day of June, 1898.

[NOTARY SEAL.] (Signed.) E. H. KUNTZ,
Notary Public in and for Knox County, Tennessee.

Filed June 23, 1898. J. T. Carter, Deputy Clerk.

EXHIBIT B.

Copy.

No. 908 B.

JUNE 7th, 1898.

Hon. T. A. Wright, Special Commissioner, Rockwood, Tenn.:

DEAR SIR: We enclose you affidavit of Mr. McQueen and our Mr. Sanford, asking for extension of time to take proof in the state line case.

We send same to-day, so that if you grant the request it would be necessary for you to come over Thursday. We just discovered this additional testimony to-day and take the first opportunity of making the application. We have notified Major Webb that we would make the application.

Kindly wire us on receipt of this letter, at our expense, and oblige,

Yours very truly,

L. S. W.

382 Filed June 23, 1898. J. T. Carter, Deputy Clerk.

(Endorsed:) No. 1056. In the U. S. Circuit Court at Knoxville. Chas. Hebard against D. W. Belding, et al. Affidavit of Edward T. Sanford. Filed June 23, 1898. J. T. Carter, Deputy Clerk.

Ex. C.

Western Union Telegraph Company.

60 Co. B. 19 Collect:
Received at Knoxville, Tenn., 9:50 a 6/8, 1898.
Dated Rockwood, Tenn., 8.

To Lucky, Sanford & Tyson:

Leave granted either side to take proof till June twentieth. Case will be heard twenty-third. Notify McCroskey.

T. A. WRIGHT.
Sp'l Comm'r.

In the United States Circuit Court, at Knoxville.

In Equity. No. —.

CHAS. HEBARD
vs.
D. W. BELDING et al.

In this cause it is admitted by the complainant in open court before the hearing of the cause before T. A. Wright, Esq., Special Commissioner: (1) That the defendants and those through whom they claim have paid continuously since 1860, taxes in North Carolina on the lands embraced in North Carolina grant No. 2336, dated December 19, 1860, to L. W. Gilbert and W. H. Peet, filed as exhibit H to the deposition of H. S. Hayes.

(2) That the main ridge of the mountain dividing Tennessee and North Carolina, does not begin to be called Unaka, Unacay or Unicoi Mountain until it reaches a point about fifteen (15) miles southwest of the junction of Hangover and Fodder Stack leads.

(3) That this agreement may be admitted in evidence on the hearing of this cause before the special commissioner and before the court with the same effect as if the facts herein admitted
383 were testified to in properly taken depositions, subject only to exceptions as to incompetency and relevancy.

This June 23rd, 1898.

CHAS. HEBARD,
By McCROSKEY & McCROSKEY,
Solicitors.

D. W. BELDING ET AL.,
Except J. W. Cooper and R. L. Cooper,
By LUCKY, SANFORD & TYSON,
Solicitors.

(Endorsed:) No. 1056. In the U. S. Circuit Court at Knoxville. Chas. Hebard against D. W. Belding, et al. Stipulation. Filed Aug. 6, 1898. J. T. Carter, Deputy Clerk.

In the United States Circuit Court, at Knoxville, Tennessee.

In Equity.

CHAS. HEBARD
vs.
D. W. BELDING.

E. P. McQueen and Edward T. Sanford, being duly sworn, make oath and say:

That they have, since the hearing in this cause before the special commissioner, Asbury Wright, Esq., discovered one R. B. Mashburn,

who has stated to them very material facts concerning the location of the state line in dispute in this cause, as shown in the affidavit of E. P. McQueen, dated August 10th, 1898, which is hereto attached and marked "Exhibit A."

That neither they nor their associate counsel had any means of discovering said Mashburn prior to said time, and the fact that he was not discovered and his information made known, to the defendants or their solicitors was not the result of any negligence or fault on the part of the defendants or their solicitors. They further state that his evidence would be of vital and material importance to the defendants in the hearing of this cause, and further state that the special commissioner has not yet filed his report in said cause, though he has notified the defendants that he has reached a conclusion adverse to the defendants and has sent them a copy of his report.

Affiant further states that on the hearing of this cause the special commissioner, on motion of the plaintiffs suppressed from the files the depositions of James McDaniel, M. L. Brittain, John Dockery,
James Whitaker, W. P. Phillips, W. P. Jones and Stephen
384 Whitaker, which were taken at Andrews, North Carolina, on the ground of informality of notice of taking said depositions, which are attached to this affidavit and marked "Exhibit B" thereon. These depositions are of very material importance to the defendants, both on the question of the reputation of the community as to the location of the state line and the proof of statements made by various parties who were with the surveying party that run the line, as to its location as run by the commissioners up Slick Rock creek, and other material facts appearing in said depositions.

They further file as "Exhibit C" to this affidavit, affidavit filed by Edward T. Sanford on the 23rd day of June, 1898, before the special commissioner showing the reason for the informality, if any, in said notice.

Wherefore, they pray that this cause may be re-opened and the same referred back to the special commissioner and that they may be allowed to take the deposition of said Mashburn and to re-take the depositions of the said witnesses whose depositions were suppressed and any other material witnesses, and that twenty days from this date be allowed to each side to take further evidence in the cause and that five days' notice to opposite counsel may be sufficient notice for taking such depositions.

E. P. McQUEEN.
EDWARD T. SANFORD.

Subscribed and sworn to before me by Edward T. Sanford and E. P. McQueen, this 10th day of August, 1898.

[SEAL.] E. H. WILSON,
Notary Public in and for Knox County, Tennessee,
Notary Public.

Fees paid, 50c., by Lucky, Sanford & Tyson.
E. H. WILSON.

In the United States Circuit Court, at Knoxville, Tennessee.

In Equity.

CHAS. HEBARD
vs.
D. W. BELDING.

EXHIBIT A.

E. P. McQUEEN, being duly sworn, makes oath and says:

That since the hearing in this cause before the special commissioner, Asbury Wright, Esq., he accidentally met, at Chat-
385 tanooga, Tennessee, one R. B. Mashburn, a man over sixty years of age, who is now a merchant in Ridgeville, Tennessee, and that in conversation the said Mashburn informed him that he (Mashburn) had lived for many years on Citico creek and Tallassee creek, Tennessee, about 8 and 15 miles respectively from Slick Rock creek, having left said neighborhood in 1860; that his father had often told him that he was with the surveying party that ran the state line in 1821 and frequently pointed out said state line to him when they were together on hunting expeditions and had told him that the state line ran from the Tennessee river up Slick Rock creek and ran up the creek for some distance to a spur of the Big Fodder Stack and up this spur to the top of the ridge and along the top of this ridge passing "Jeffers Hell" and the junction with Hangover lead and along past the headwaters of Tellico river, this location being in exact accordance with the defendants' theory in this case, and that his father had, on hunting expeditions, pointed out marked state line trees to him on this line in the land in dispute, and that said trees were plainly marked; and that he had hunted a great deal in said territory and was familiar with said line on the land in dispute; and that his father is now dead.

E. P. McQUEEN.

Sworn and subscribed to before me this 10th day of August, 1898.

E. H. WILSON,
Notary Public.

Knoxville, Tenn., Knox county.

Filed Aug. 23, 1898. J. T. Carter, Deputy Clerk.

(Endorsed:) No. 1056. In the U. S. Circuit Court at Knoxville. Chas. Hebard against D. W. Belding, et al. Application for a rehearing. Filed Aug. 23, 1898. J. T. Carter, Deputy Clerk.

386 In the United States Circuit Court, at Knoxville, Tennessee.

In Equity.

CHAS. HEBARD
vs.
D. W. BELDING.

To McCroskey & McCroskey, solicitors for Charles Hebard:

Please take notice that we, for and in behalf of the defendants, except T. W. and R. L. Cooper, have applied to the Hon. Charles D. Clark, District Judge, for leave to take further proof in this case and for re-reference of the same to the special commissioner, for reasons stated in the joint affidavit of E. P. McQueen and Edward T. Sanford, dated August 10th, 1898, and the separate affidavit of E. P. McQueen of same date, substantial copies of which are hereto attached. We do not send copies of the exhibits B and C to the joint affidavit, as you are already familiar with the same, and the originals have been sent by us to Judge Clark. This August 14th, 1898.

LUCKY, SANFORD & TYSON,
Solicitors for Defendants, Except the Coopers.

We hereby acknowledge service of the original notice of the foregoing copy, together with the copies of affidavits referred to in said notice.

This 15th day of August, 1898.

McCROSKEY & McCROSKEY,
Solicitors for Complainant.

(Endorsed:) No. 1056. In the U. S. Circuit Court at Knoxville. Charles Hebard against D. W. Belding, et al. Notice of motion for leave to take further proof. Filed Aug. 23, 1898. J. T. Carter, Deputy Clerk.

In the Circuit Court of the United States, at Knoxville, Tennessee.

CHAS. HEBARD
vs.
D. W. BELDING et al.

Answer of the Complainant to the Defendant's Application for Leave to Take Further Proof and for Rereference to the Special Commissioner, T. A. Wright.

387 I.

This application is made to the court, and not to the special commissioner, although the affidavit of Sanford and McQueen shows that the special commissioner has not yet filed his report, and the case is still pending before him; and the newly discovered testimony

of Mashburn was discovered since the hearing before the special commissioner, but has not been brought to his notice.

II.

The original bill was filed January 16th, 1896, and the cause was put at issue upon both the original and amended bills by complainant's replication filed September 29th, 1896.

A vast volume of proof was taken from September 29th, 1896, to March 30th, 1898 (a period of eighteen months), when the case was called for trial and both sides announced ready and the trial of the cause was begun. The pleadings were read, and, while the depositions were being read, the court made an order referring the cause to special commissioner, Wright. This same order upon the application of the defendants extended the time for taking proof to —— —, 1898, and provided that the proof should then close. The special commissioner's report shows: that he met counsel for both parties on May 9th, 1898, by appointment, and defendants' counsel applied for and obtained an extension of time to take proof until June 2nd, 1898, or a period of 24 days. On the 2nd day of June the special commissioner came to Knoxville to hear the cause, when defendants' counsel announced themselves ready to try, but the cause was not tried on account of the sickness and absence of complainant's counsel. The hearing was then set for June 9th. On June 7th (two days before the day set for hearing) defendants' counsel again filed an affidavit and procured *of* extension of time to take proof until June 20th, and an order setting the hearing for June 23rd. The cause was heard on June 23rd, 1898. After all these delays, and extensions of time at the instance of defendants, and after they have three times announced themselves ready for trial, and after the trial has been actually had and the decision of the commissioner announced, defendants now ask to re-open the case for further proof solely upon the ground of the discovery of one Mashburn. If Mashburn will swear exactly what McQueen's affidavit claims, his testimony will clearly be incompetent and will be exactly of the same character and purport as other testimony
388 excluded by the commissioner. If it was incompetent, it is merely cumulative, and the case should not be re-opened to let it in.

It will be observed, however, that while the discovery of Mashburn's testimony is the sole ground urged for re-opening the case, yet the application is to re-open the case generally for proof. It is clear that the defendants would not be ready to try in twenty years, if it is left for them to decide. They have three times procured extensions and for three times announced themselves ready to try, and the case has been at issue since September, 1896, or about two years.

If the Special Commissioner's Report is not satisfactory to Defendants they can except to it; but manifestly they have no ground for re-opening the case for proof.

WEBB & McCLUNG,
McCROSKEY & McCROSKEY,
Sol's for Compl't.

(Endorsed:) No. 1056. Chas. Hebard vs. D. W. Belding, et al. Answer of Complainant to Def'ts' application for a rehearing. Filed Aug. 23, 1898. J. T. Carter, Deputy Clerk.

CHAS. HEBARD
vs.
D. W. BELDING et al.

Defendants' Reply to Complainant's Answer to Their Application for Leave to Take Further Proof and for Re-reference.

I.

We do not understand that it is necessary that this application should be made to the Special Commissioner, nor that it should be delayed until after the filing of his report. It was not made to the Commissioner, 1st, because, at the time of the hearing, after the North Carolina depositions were suppressed, upon defendants' motion for further continuance in order to re-take the suppressed depositions, the Commissioner refused such continuance on the grounds, as understood by us, that he had not authority to further extend the time, so that application to him would be a useless formality, and 2nd, because, we do not understand that application should be made to him, but consider it proper that it be presented to the court in the first instance.

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II.

The statement in the Complainant's answer that the order referring the cause to the Special Commissioner upon the application of defendants extended the time for taking proof to —— —, 1898, and provided that proof should then close is wholly incorrect. The order, as will be seen by reference to Minute Book Q, page 509, contained no provision whatever limiting the time for taking proof at any fixed date and the defendants made no application to the court for such limitation. The only provision in the order was that the Special Commissioner should make and file his report "as early as practicable."

III.

Complainant's principal objection now seems to be that the leave should not be granted because the defendants have twice announced themselves ready. We consider this, however, to be no answer whatever to the application for leave to take further proof on the very ground of newly discovered evidence. The witness Mashburn has been discovered since the hearing before the Special Commissioner and the fact that twice previously the defendants had been ready to try in absence of evidence afterward discovered is certainly no answer to their present application for leave to take this newly discovered evidence. It will be seen from the joint affidavit of E. P. McQueen and Edward T. Sanford and especially from the affidavit of Edward T. Sanford and exhibits thereto, which is filed

as exhibit "C" to send joint affidavit, that not only the witness Mashburn, but all of the North Carolina witnesses whose depositions were suppressed were discovered after the last time that the defendants announced ready, to wit, June 2, 1898. Since said June 2d they discovered the North Carolina witnesses and took their depositions, but the same were suppressed by the Special Commissioner for informality in the notice, in spite of the facts shown in said Sanford's affidavit and the Special Commissioner likewise overruled Def'ts' motion for continuance and leave to re-take the suppressed depositions and forced the defendants to try the case before him on June 23, without said depositions, so that all the testimony which it is now asked leave to take, has been discovered since the last time that the defendants announced ready, June 2d.

390 IV.

The testimony of the witness Mashburn is newly discovered evidence in the strictest sense of the term. It is competent and material as shown by the substance of the same as stated in affidavit of E. P. McQueen, and neither the defendants nor their counsel had any means of discovering said testimony before. Nor is it cumulative. On some points as to statements as to the location of the state line, it is true there is one witness who testifies to similar statements by other parties, but the deposition- of all the other witnesses who testified as to statements made by parties on the survey of 1821 were North Carolina witnesses whose depositions were suppressed. Furthermore, no other witness testified to the material fact to which Mashburn will testify, that the marked line on the land in dispute was actually pointed out to him by a person who was on the survey of 1821.

V.

It is lastly objected that the application to re-open the case is too broad, as it asks that the case be re-opened generally for proof. As to this point the defendants would prefer that the order re-opening the case be limited to allowing them to take Mashburn's deposition and to re-taking the suppressed depositions, but they made the application in the form they did supposing that in the event it was granted the complainant would not wish to be deprived of the right to introduce any rebuttal evidence if *they* so desired, though, so far as they are concerned, they would be glad to have the order limited as above indicated.

VI.

This application will not delay the hearing of the case. If the order should provide that the depositions could be taken on three or five days' notice, the entire proof could be taken inside of a week or ten days and the Special Commissioner re-file his report and the case be ready for hearing at the next session of the court before the Equity docket is reached. We have no desire for delay and make the application only that the depositions may be taken.

VII.

In conclusion we would suggest that this case is one in which too strict rules should not be applied in limiting taking of proof, for the reason that the question involved, to wit, the location of the
391 state line is one of public interest in which it is of prime importance that a true and right solution should be reached, and this should not be prevented by the application of too stringent rules insisted upon by either party.

Respectfully submitted,

LUCKY, SANFORD & TYSON,
Sol's for Def't- Except Coopers.

(Endorsed:) No. 1056. Charles Hebard vs. D. W. Belding, et al. Def'ts' reply to Compl't's ans. to application for leave to take further proof. Filed Aug. 23, 1898. J. T. Carter, Deputy Clerk.

CHARLES HEBARD
vs.
D. W. BELDING et al.

As the commissioner has never filed his report, and it has not therefore become part of the record, I do not think I can properly make any order to re-open the case on the proof as that question is before the commissioner, until his jurisdiction has been ended by a filing of the report. To save any doubt about the question, if desired the defendants may take a formal order amendatory of the order of reference, giving the commissioner authority at any time before his report is actually filed to open the case for further proof in his discretion on sufficient ground shown. I think there is no doubt of his authority to do so independently of an order of this court. In the event the commissioner re-opens the case for proof the time ought to be very restricted and it ought to be on the further condition that when the report is filed both parties shall immediately file exceptions and agree to a hearing, without requiring the report to remain on file thirty days according to the general equity rule.

CLARK, *Judge.*

(Endorsed:) No. —. In the U. S. Circuit Court at Knoxville. Chas. Hebard vs. D. W. Belding, et al. Opinion. Filed Aug. 23, 1898. J. T. Carter, Deputy Clerk.

And afterwards, to wit, 23d day of August, 1898, a certain
392 report of Asbury Wright, Special Master, was filed in the Clerk's Office of said court, which said report is clothed in the words and figures following, to wit:

Special Master Report Endorsed: Report of Special Master. Filed Aug. 23, 1898, as of and for July 9, 1898. J. T. Carter, Deputy Clerk.

In the United States Circuit Court at Knoxville.

CHARLES HEBARD
vs.
D. W. BELDING et al.

Report of Referee under Order Entered March 30, 1898.

To the Honorable Judges of the United States Circuit Court, sitting at Knoxville, for the Northern Division of the Eastern District of Tennessee:

I respectfully report that in obedience to the order of reference in the above styled cause directing me to report to the court, "the true state line between the states of Tennessee and North Carolina, from the Little Tennessee River to the Junction of the Hangover and Fodder Stack Ridges, as run and located by the commissioners of the states of North Carolina and Tennessee, in 1821, and confirmed by the respective legislatures of said states."

I met the counsel for complainants and defendant- by appointment in the court room in Knoxville on May 9th, 1898, and on the application of counsel for defendants for time in which to file additional proof I continued the hearing until June 2d, 1898. On that day I was in Knoxville and understood from defendants' counsel that they were ready for the hearing, but the sickness of Maj. Webb and the absence of Maj. McCroskey, counsel for complainant, caused me to again continue the hearing, which I set for June 9th. On June 7th, counsel for defendants filed an affidavit asking a continuance of the hearing, and that the time for taking proof be extended ten days. I granted the application, with leave to both sides to take proof until June 20th and set the hearing for June 23d, 1898. During the last continuance counsel for defendants took some depositions, which were excepted to by complainants, for want of notice, and I sustained the exceptions, whereupon counsel for defendants filed another affidavit and moved a continuance,
393 which I refused, and heard argument of both sides at that time upon the matter to be reported upon.

Upon the hearing both sides objected to all irrelevant, hearsay and incompetent testimony. These objections were principally made by complainants, to the testimony of the witness Patton, who testified to statements of one Thos. Tatham as to how the line was run, and to witness Jones, as to why the surveyors of the Ocoee District stopped at Slick Rock Creek.

The defendants' objection being to the statements of parties living in the disputed territory as to the general reputation in the community that they lived in Tennessee, and also to the statements of one of the surveyors of the Ocoee District as to why he stopped at Slick Rock Creek, testified to by Maj. McCroskey.

I think the reasons given by both surveyors of the Ocoee District for stopping at Slick Rock Creek are incompetent, nor do I regard as competent the testimony of the witnesses living in the disputed territory as to what state they live in. I think this matter is too re-

cent to be proved by general reputation and that the general reputation sought to be established by this evidence, has been made very largely, if not wholly, since the dispute as to the true location of this line has existed.

The statements of Tatham, are, in my judgment, competent in so far as they show the general reputation of the location of the state line in question at the time they were made.

It was agreed on the hearing that defendants had paid taxes on the land covered by their grants for a number of years to the state of North Carolina, and that the place at which the mountain takes the name of Unicoy or Unaka, is some distance southwest of the junction of Fodder Stack and Hangover Ridges.

Counsel for both sides in presenting the case agree, as to the location of the state line northeast of the Little Tennessee River and in fact the witnesses agree on this line, which is shown by the green and brown shades on the map filed as Exhibit "A" to the deposition of W. D. Hale, and which may be called complainant's map. The defendants also file a map, Exhibit No. 1, to the deposition of H. S. Hayes. The meat in the litigation is readily seen and thoroughly illustrated by these maps. It will be seen from them that complainant is strongly attached to the mountains, while defendants are equally as fond of the creek.

It is contended by complainant that the line crosses the
394 Tennessee River at the point where it reaches it, and goes directly on to the Hangover Ridge, and thence along the extreme heights of that ridge to its junction with the Fodder Stack Ridge, while the defendants insist that the line runs down the Tennessee River before crossing it about one-half a mile to the mouth of Slick Rock Creek; thence up Slick Rock Creek five miles or more, to a small spur leading up to Big Fodder Stack; thence up this spur to Big Fodder Stack and along the Fodder Stack to its junction with the Hangover.

When the pleadings were made up the defendants claimed that the line left the Tennessee River just below the mouth of Slick Rock Creek and ran up Slick Rock Ridge to Stiff Knee, thence south along the ridge passing Little Fodder Stack to Big Fodder Stack, etc.

In fact this seems to be the line as contended for by the State of North Carolina, as it was recently surveyed up that way, (presumably by the state) and stone monuments set up to mark it, but after complainant's testimony was taken and the defendants sent surveyors on the ground, they abandoned that line and insist on the Slick Rock Creek, as before stated.

For complainant's contention the proof shows:

That the Hangover Ridge is the main ridge of the mountain between the river and the junction of the Hangover and Fodder Stack; that it is from 300 to 500 feet higher than the Fodder Stack Ridge, and that a person standing on top of the mountain where these two ridges come together and looking northeast could see no ridge except the Hangover, and would have to descend the mountain side some two or three hundred feet before he could discover that there was another ridge leading off from the main ridge. Southwest of

their junction there is only one ridge leading down to the Unicoy or Unaka Mountain. It also appears that this ridge bluffs up to the river immediately opposite the point where it is agreed the state line reaches the river on the northeast side, and that it is a continuation of the ridge along the extreme height of which the line is running until it reaches the river. And to anyone approaching the river on the northeast side along the state line and looking southwest in the direction the state line was running, it would readily appear to be the main ridge. It is true that the defendants show that a ridge runs off from the Hangover Ridge at the Hao several miles from the Tennessee River down to the Cheowah River, and that it is as large or larger than the Hangover from there on to the Ten-
395 nessee River, but as this ridge does not reach the Tennessee River, it of course could not be thought of as the "main ridge," so far as the state line is concerned. It also appears that this mountain being high and poor, the timber on the top and along the height of it is very poor and scrubby, and would not be good to hold line marks, but complainant's surveyors insist that they found at least two trees along the top of this ridge, a black or water oak and a sourwood, which show two chops above a blaze (the state line mark), and that these marks were of the proper age for the state line. The surveyors for the other side contend that these trees do not bear the state line marks. I am of the opinion that these two trees bear marks similar to those used in marking the state line and that they were marked about the year 1821.

For the line contended for by the defendants, the proof shows: That beginning at the mouth of Slick Rock Creek, there is a well marked line up the creek for a distance of about one-third the distance they claim the line runs with the creek—say a mile and two-thirds. These trees are marked some as fore and aft trees and some as side line trees. Some of the trees are on one side of the creek and some on the other. Some of the trees marked as side line trees are nearer the creek than some marked as fore and aft trees and vice versa. These marks are similar to those used on the state line and were made about 1821. The marked trees then entirely cease for a distance of about three or three and one-half miles, or until the line leaves the creek and starts up the spur to the Fodder Stack, when a number of trees are found for a short distance leading up this spur. They bear the proper marks and age. No more trees are then found until near the top of this spur where there is one marked tree, and from that point to the junction of Hangover and Fodder Stack there are two or three marked trees. Marked trees are also found on the Fodder Stack lead northeast of the spur on which this line runs for some distance.

The surveyors who laid out the Ocoee land district in Tennessee in 1886 evidently understood that the state line run up Slick Rock Creek and up this particular spur to the Fodder Stack and thence along it, for they stopped at Slick Rock Creek and at a line substantially in accordance with the line as contended for by defendants. It also appears that since 1853, parties have been obtaining grants from the state of North Carolina for land in this Slick Rock

Creek basin, both on the east and west side of Slick Rock Creek, and that deeds and conveyances made by parties in Tennessee
396 and in complainant's claim of title have called for Slick Rock Creek since 1853, as the state line. The Slick Rock Creek basin is well timbered and along the creek where there are no marked trees there is an abundance of timber capable of holding the marks. This basin timber is very much better for holding marks than the timber on the mountain.

The marked trees found on the creek follow its course and the line for what ever purpose run and marked was evidently intended to go with the creek. The creek is about six miles long and has a number of smaller tributaries, one of them being Little Slick Rock Creek.

The witness Patton testifies that Thos. Tatham, an aged man, now dead, told him 40 years ago that he was with the commissioners who, surveyed the state line in 1821; that they "run along the main divide of the Smoky Mountains to the Tennessee River, crossed the river and marked a large pine that stood near the bank of the river near the mouth of Slick Rock Creek" 60 or 65 miles from the beginning; that they then "ran up Slick Rock Creek on the west side to the fork of the creek and crossed the west fork and struck the point of a ridge that ran down into the fork of the creek and ran up that ridge to the divide that ran up to Big Fodder Stack."

And Patton says that he run the line in 1867 on the Fodder Stack lead and traced the marked line to within 300 or 400 yards of the head of Little Slick Rock Creek, when he lost it, and went back to the ridge and run down on the line where defendants now claim it runs and thence down the creek, finding the line as found by defendants' surveyors.

I have endeavored to state as fully as practicable in the limits of this report, the evidence sustaining the contention of each party, but after all, in determining the location of a line, the most important thing to look to is the report of the party locating it. And in this case, the report of the commissioners of the states of North Carolina and Tennessee, who run the line in 1821, for I am to report the true state line from the Little Tennessee River to the junction of Fodder Stack and Hangover leads as run and located by these commissioners. I understand that calls for natural objects, if reasonably certain, must control the location of a line, unless it is shown that a different line was actually run and marked at the time, and in this character of case, unless it is shown that the line so run and marked was actually adopted as the line by the parties in making their report.

After a careful consideration of the whole case, I am of the opinion and so report that the line between the states of
397 Tennessee and North Carolina from the Little Tennessee River to the junction of the Hangover and Fodder Stack Ridges, as run and located by the commissioners of said states in 1821, and confirmed by the respective legislatures of said states, crosses the Little Tennessee River at the point where it reaches the river on the northeast side, and from the river runs up the Hang-

over lead, as shown on complainant's map, and along the extreme heights of this ridge, passing the black or red oak, Slick Rock Gap, Cold Springs Knob, Big Flat Knob, Hangover, Hao, Grassy Gap and Stratton Bald, to the junction of the Hangover with the Fodder Stack.

The contention of the defendants has been presented in the record, and before me, with much learning and ability and with great earnestness. In deference to which I will give some of the reasons for my conclusion.

The Act of North Carolina of 1789 ceding to the national government the territory now comprising Tennessee, fixes the eastern boundary line as follows: "Beginning on the extreme heights of Stone Mountain at the place where the Virginia line intersects it, running thence along the extreme height of said mountain to the place where the Watauga River breaks through it; thence a direct course to the top of the Yellow Mountain where Brights' road crosses the same; thence along the ridge of said mountain, between the waters of Doe River and the waters of Rock Creek to the place where the road crosses the Iron Mountain; from thence along the extreme heights of said mountain to where Nolichucky River runs through the same; thence to the top of the Ball Mountain; thence along the extreme height of said mountain to the Painted Rock on French Broad River; thence along the highest ridge of said mountain to the place where it is called the Great Iron or Smoky Mountain; thence along the extreme height of the said mountain to the place where it is called Unicoy or Unaka Mountain between the Indian towns Cowee and Old Chota; thence along the main ridge of the said mountain to the southern boundary of this state." It is very evident that the intention was to fix the Western boundary line of the State of North Carolina and the eastern boundary of the ceded territory along the top of the mountain range, which run across the state from northeast to southwest, so that the exereme top of the mountain should be the boundary. The line now in question is included in the following call of the Cession Act. After getting on the Great Iron or Smoky Mountains: "Thence along the extreme
398 height of said mountain to the place where it is called Unicoy or Unaka Mountain."

The constitution of the State of Tennessee adopted in 1796, with a slightly fuller description, shows clearly a fixed purpose to keep the line on the extreme top of the highest dividing mountain, and for the line in question uses the same description as is contained in the Cession Act. In 1805, the legislature of Tennessee by act, appointed two commissioners to act in conjunction with a similar commission from the State of North Carolina, if one should be appointed to designate the dividing line between the two states for a given distance (not including the line in question) and they were to do so "agreeably to the Act of Cession."

In 1796, the legislature of North Carolina passed an act appointing commissioners to meet a commission from Tennessee to fix the line as described in the Cession Act, and again in 1819, the legislature of North Carolina, passed an act constituting a commission to

meet a similar commission from Tennessee to "settle, run and mark the boundary line between this state and the state of Tennessee agreeably to the true intent and meaning of the act of the general assembly of this state entitled "An act for the purpose of ceding to the United States of America certain western lands therein described."

This is the act under which the North Carolina commissioners who assisted in the survey of 1821, were appointed.

Commissioners on the part of Tennessee were appointed, and acting in connection with these North Carolina commissioners, the survey of 1821 was made, and each set of surveyors reported to their respective states and their reports were adopted. They are identically the same in description with the exception of some few differences in the spelling of proper names, and with the further exception that the North Carolina commissioner's report after the description, the following, "the whole distinctly marked with two chops and a blaze on each fore and aft tree and three chops on each side line tree and mile marked at the end of each mile." The full description of the survey as adopted by both legislatures was as follows: "Beginning at a stone set up on the north side of Cataloochee turnpike road and marked on the west side 'Ten. 1821,' and on the east side, 'N. C. 1821,' running thence on a southwestwardly course to the Bald Rock on the summit of the Great Iron or Smoky Mountains, and continuing southwestwardly on the extreme heights thereof to where it strikes Tennessee river, about seven miles above the old Indian town of Tallassee, crossing Porter's Gap at a
399 distance of 22 miles from the beginning, passing the Meigs boundary line at 31½ miles, the Equovettly path at 53 miles and crossing Tennessee river at the distance of 65 miles from the beginning, from the Tennessee river to the main ridge and along the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain, striking the old trading path leading from the valley towns to the over-hill towns near the head of the west fork of Tellico river and at the distance of 93 miles from the beginning; thence along the extreme heights of the Unicoy or Unaka Mountain to the southwest end thereof at the Unicoy or Unaka turnpike road, where a corner stone is set up, marked 'Ten.' on the west side and 'N. C.' on the east side, and where a hickory tree is also marked on the south side "Tenn. 101 M." and on the north side "N. C. 101 M.," being 101 miles from the beginning; from thence a due course south two miles and 252 poles to a spruce pine on the north bank of the Hiwassee river below the mouth of Cane creek; thence up the said river the same course about one mile and crossing the same to a maple marked "W. D. & R. A." on the south bank of the river; thence continuing the same course due south 11 miles and 273 poles to the southern boundary line of the state of Tennessee and North Carolina, making in all 116 miles and 228 poles from the beginning, and striking the southern boundary line 23 poles west of a tree in said line, marked "72 M." where was set up by said commissioners a square post marked on the west side

"Ten. 1821," and on the east side "N. C. 1821," and on the south side "G."

It must be kept in mind that these commissioners were not making a new line, but were simply determining the true location of the line fixed by the Cession Act of 1789. They got on the top of the Great Iron or Smoky Mountain and were then to determine the true location of the line between that point and the Unaka Mountain, and to do so, they were to run along the extreme height of the mountain. They report that they run on the extreme height of the mountain to where it strikes the Tennessee river, and the river being a natural object, permanent and notable, they stop in their description to call attention, particularly and minutely to the several prominent and notable objects passed. The first reference to the Tennessee river is "to where it strikes the Tennessee river," and the next is "crossing the Tennessee river," and then the report says, "from the Tenn. river" and yet if the line was run up Slick Rock Creek, as contended for by defendants, then either before crossing the river or afterwards, the line would have had to run down
400 the river one-half mile, and this not in the general course the line was running (southwestwardly) but back at an acute angle to the line run and in a northwest course, and in running down the river and up Slick Rock creek they would not have been running as the line called to run in the Cession Act, along the extreme height of the mountain to where it is called Unaka, but for one-half a mile would have been running down a large river in the deep gorge cut through the mountain, and for more than five miles up Slick Rock creek in a basin or valley 6 miles long and three miles wide, surrounded by mountains from one to three thousand feet high. It would certainly not have been in compliance with the Cession Act. It is true that it is my purpose to determine where they actually run and located the line and not whether they complied with the Cession Act, but I can not believe that they would abandon the line called for in the Cession Act, and be diverted from their course in this way, and make no mention of it in their report. They had just paused in their report to make particular mention of many objects, less prominent and less noteworthy, than either the Tennessee river or Slick Rock creek. They mention the fact that they reach the Tennessee river that they cross it and that they leave it, and I do not believe that they would have run down the river for one-half a mile and made no mention of that fact, nor do I believe that they would have run for five miles up Slick Rock creek, a creek with numerous tributaries, apparently of considerable size, so large in fact, that there is another creek in the same basin called Little Slick Rock, and not have mentioned it in their report. After this call has reached Unaka Mountain they are particular to call attention to every object that could give permanency and notoriety to the location and when they reach the Hiwassee river, which at that point is running the same course as the line they were running, and they go up the river about one mile, they call attention to the fact (the river was then running in their direction. See Gov. Map, Exhibit "G," to Dep. H. S. Hayes), and if necessary to call attention to the

fact when the river was in direct course, how much more necessary it would have been when by following it the line is deflected and caused to turn back at an acute angle. In running up Hiwassee river they pass the mouth of Cane Creek and they mention this fact, and yet, shall we say they run up Slick Rock creek for five miles and made no mention of that. As soon as Hiwassee river, by a bend, leaves the general course of the line, being run they leave the river.

They were not running with rivers they were locating a line
401 that was to be run along the tops of the mountains. But again, the line runs "from the Tennessee river to the main ridge and along the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain." How shall it get to the main ridge, by running down the river and up Slick Rock creek to a spur of Fodder Stack and thence to its junction with Hangover? I am satisfied from the proof that the Hangover is the main ridge, and that to get on the main ridge, they would have had to be on the Hangover either before or after its junction with the Fodder Stack, and according to the proof, when they came to the river on the northeast side and looked across, there directly opposite them was a continuation of the same ridge along the height of which they were running. This main ridge was on the southwest side of the river higher than it was on the northeast side and run in the general course of the line they were running. They were locating a line which was to run along the extreme height of the mountains from the Great Iron or Smoky Mountain to the Unaka, and at the time the line strikes the Tennessee river they say they are on the extreme height of this mountain and immediately across the river is the same mountain some higher, but the same, and I think that unquestionably this is the main ridge or mountain on which they say they run and located the line.

There are other reasons disclosed by the record of greater or less weight to the same effect.

There are more marked trees on the Slick Rock creek line than on the Hangover, but I am inclined to believe from the record that it would not be safe to attempt to pull this line away from the well defined natural objects to follow marks as shown on either line. This section of country was inhabited by the Indian tribes until 1836 or '37, and is crossed by numerous trails and paths, and numerous marks are found similar to these state line marks.

The defendants' witness, Patton, testifies to following the state line marks in 1867 along the Fodder Stack lead to within 300 or 400 yards of the head of Little Slick Rock creek, which would be two or three miles further along this lead than where the defendants' marked line leaves it. There are many ways in which these marks could have been placed there without having been made by these state commissioners, but if made by them it was evidently run as a tentative line, and not adopted or reported by them, and if they are to mark the line actually run and adopted, why did they mark so
carefully for a mile and a half then not mark any trees for
402 three or three and a half miles. There was an abundance of timber all the way, that they might have marked.

This Slick Rock creek basin appears to be a wild and almost uninhabited section now, and in 1836 still occupied or only recently vacated by the Indians. When the Ocoee district was surveyed it must have been much more so, and the parties surveying the district doubtless knew little of the location of the state line. I do not attach very great importance to the statements Tatham made 36 years after the survey to Mr. Patton 40 years ago. Human memory is too uncertain, especially for such a length of time, to determine the location of a line, contrary to its calls for natural objects, besides the report of the Tennessee commissioner embodied in the act of 1821, shows that Tatham was not one of the commissioners—the Tennessee commissioners being Alexander Smith, Isaac Allen and Simeon Perry, and those for North Carolina, James Mebane, Montfordt Stokes and Rob't Love.

Upon the whole the conclusion I have herein announced is the one I believe is warranted by the record. A number of questions are raised in the pleadings and arguments, such as adverse possessions, estoppel, etc., but I have not considered them because I do not understand that they are included in the matter referred to me.

All of which is respectfully submitted. July 7th, 1898.

ASBURY WRIGHT,
Special Master.

No. 1056. In Equity.

CHAS. HEBARD
vs.
D. W. BELDING et al.

In this cause, upon application of the defendants, and for sufficient causes appearing to the court, defendants are hereby granted ten days' time in which to take any additional proof they may desire and complainant is also granted ten days within which he may take further proof, and five days' notice to any solicitor of either complainant or defendants shall be sufficient notice to take any depositions under this order.

(Endorsed:) No. 1056. In the U. S. Circuit Court at Knoxville. Charles Hebard against D. W. Belding, et al. Order to take additional proof. Ent'd Journal "Q." p. 557. Filed 24 day of August, 1898. J. T. Carter, Deputy Clerk.

403 In the United States Circuit Court at Knoxville, Tennessee.

CHAS. HEBARD
vs.
D. W. BELDING et al.

The Deposition of Boyd McMurray, a Witness for the Compl't in the Above-styled Cause, Taken by Consent before Vastine Stickley, Clerk & Master, at His Office in Madisonville, Tenn., on This the 6th Day of September, 1898.

Said witness BOYD MCMURRAY, being duly sworn, says:

(By Compl't:)

Q. 1. What is your age? What is your business, and where do you live?

A. I am 71 of age. I am a farmer and live on Little Tennessee river of Monroe county & in 17th Civil District and at the foot of the mountains.

Q. 2. How far do you live from the N. C. state line, and how long have you lived there?

A. I live about 15 miles from the state line and have lived there for 30 years.

Q. 3. State if you have herded your cattle along or near the state line and if so for how long and where and how long have you known and been familiar with Slick Rock section of country?

A. I have herded cattle there for 31 years. The first year I herded my cattle on Slick Rock Creek, since that time I have herded my cattle on the north or opposite side of the river and have herded there every year since. Col. E. J. Sanford, of Knoxville, Tenn., owns the land where I now herd.

Q. 4. When you herded cattle on Slick Rock creek what did you then understand as to location of state line; who herded or looked after your cattle and how did you get your information about the state line.

A. The year that I herded my cattle there 31 years ago, Jack Milligan an old citizen who lived at the foot of the mountain and was raised there and about 4 or 5 miles from Slick Rock creek, went with me and showed me the country, he told me that the state line was on the dividing ridge east of and beyond Slick Rock creek called the "Hangover Lead," I have always since then understood that to be the state line. In 1880 or 1881 I was going over into North Carolina through the Slick Rock country and fell in with Isaac Carringer, who lived on Santeedla creek in N. C., when we got on
the main divide or "Hangover" we stopped to rest and Car-
404 ringer told me that that was the state line and pointed to a tree near the trail and said that it was a state line tree. I did not go and see the tree to see whether it was marked or not.

Q. 5. State whether Milligan or Carringer are now living and

what aged men were they when they died and how long have they been dead?

A. They were both old men. Carringer has been dead ten or twelve years and Milligan has been dead five or six years.

Q. 6. State whether or not the people who lived on the waters of Slick Rock creek would come down and at different times work on your farm, and where did the people who lived on the waters of Slick Rock creek vote, pay taxes and work the public roads?

A. Yes, those Slick Rock people have worked for me from year to year and they voted and worked the roads in my district, they also paid taxes in Monroe county, Tenn. I frequently paid the taxes for them myself. All the men who lived on this side of the "Hangover" divide, voted, paid taxes & worked the road in Tennessee.

Q. 7. State if you know D. W. Belding, and if so, whether he has frequently stayed over night with you in going to and from North Carolina, and if he ever talked with you about the state line. Where did he claim the Slick Rock basin was located in, North Carolina or Tennessee?

A. Yes, I am acquainted with him, he has stayed all night at my house frequently on his way back and forth from N. C. he talked to me about the state line and he claimed that the Slick Rock basin was all located in North Carolina.

Q. 8. Do you remember a Mr. Hoyt who surveyed lands in the mountains near the state line, and if so how long since he worked there and how long was he surveying in that country, and who did he work for? State whether Hoyt made headquarters at your house and how long? What did he tell you about locating the state line in Slick Rock country. Tell all you remember about his surveys?

A. I remember Hoyt very well. He was an old man and I thought the best surveyor that I was ever acquainted with, and I remember of him surveying the state line for Gov. Wetmore some twelve or fifteen years ago, he was surveying six months or more in the mountains for Gov. Wetmore and stayed at my house a month or more while he was at work there, Hoyt said he was surveying for Wetmore. Hoyt told me that he had located the state line on the
405 Hangover ridge, that he found a pine tree marked at the edge of the water on the North side of the river, he then crossed the river and went up the main divide and found a dogwood plainly marked, on the Hangover lead, and he seemed to have no doubt about that being the state line. Gov. Wetmore and Hoyt were both at my house and I heard Gov. Wetmore instructing Hoyt about locating the state line, and he told him to go north of the river and back four or five miles and first locate the state line on the north side of the river, and then to cross over and locate it on this side. It was after this that he told me of having located the state line on the main divide or Hangover ridge. Hoyt told me that he found marks up and down Slick Rock creek but that it was a "bogus" line. He also said that he found a line north of the river running through Mr. E. J. Sanford's land which he said was a "bogus" line also, while Mr. Hoyt was at my house he surveyed and

platted my lands. Mr. Hoyt is now dead. Gov. Wetmore lives in Rhode Island and owns mountain lands in this country.

Q. 9. Have you any interest in the location of the state line?

A. No, sir.

Q. 10. State if you ever talked with Edward T. Sanford and tell him where you understood the state line to be located?

A. Edward T. Sanford told me that they were going to locate the state line on Slick Rock creek. I told him that if they did it would not be right.

And further saith not.

BOYD McMURRAY.

Sworn to and subscribed before me this Sept. 6th, 1898.

VASTINE STICKLEY, *C. & M.*

Bill of Costs.

Witness Boyd McMurray 2 days $2.46 miles 4c. 1.84,.....	$3 84
Paid by McCroskey, sol.	
V. Stickley, C. & M., taking 1 dep. postage 4.....	1 04
	$4 88

Paid by McCroskey, sol.

The foregoing deposition was taken by me as stated in the caption and reduced to writing by me, and I certify that I am not interested in the cause nor kin nor counsel to either of the parties and
406 that I sealed it up and put it in the post office at Madisonville, Tenn., without being out of my possession or altered after they were taken.

Given under my hand the 6th day of Sept., 1898.

VASTINE STICKLEY,
Clerk & Master, Madisonville, Tenn.

(Endorsed:) Deposition of Boyd McMurray, Charles Hebard vs. D. W. Belding, et al. Filed Sep. 7, 1898. J. T. Carter, deputy clerk.

In the United States Circuit Court of Knox County, Tennessee.

CHAS. HEBARD
vs.
D. W. BELDING et al.

Deposition of R. B. Mashburn, Witness for the Defendants in the Above-entitled Cause, Taken by Consent at the Offices of Lucky, Sanford & Tyson, Knoxville, Tennessee, at 2 P. M., Sept. 6th, 1898, in the Presence of T. S. Webb, Solicitor for the Complainant, and of Edward T. T. Sanford, Solicitor for all the Defendants Except the Coopers.

Said witness, R. B. MASHBURN, of lawful age, being duly sworn, deposes as follows:

Q. What is your age and where do you live?

A. R. B. Mashburn; live in Moore county, middle Tennessee.

Q. At what place?

A. Ridgeville.

Q. What is your age?

A. 64 years.

Q. What is your business?

A. I have none now; my hands are so crippled from rheumatism that I can not work. I have an interest in a store am a partner but do not do anything.

Q. Did you ever live on Tallassee creek, Monroe county, Tennessee?

A. Yes, sir.

Q. How far did you live from the mouth of the creek?

A. About three miles I think.

Q. How far is the mouth of Tallassee creek from the mouth of Slick Rock creek?

407 A. About 6 or 8 miles. I was not along the river, it was 6 or 8 miles from where I lived across the mountain to Slick Rock Creek.

Q. When did you live there and for how long?

A. From my first recollection, when I was a little kid. I remember getting my lip cut when my father built a new house.

Q. How long did you stay there? Some years?

A. Two or three years.

Q. Where did you then move?

A. Moved about two miles from there to what is called the mountain settlement, it was then called the Phillips place, about two miles further away from Slick Rock creek.

Q. How long did you stay there?

A. Two years.

Q. Then where did you move?

A. Moved to Citico creek.

Q. How far was that from Slick Rock creek?

A. About 16 miles.

Q. How long did you live there on Citico creek?
A. I lived there until the spring 1860.
Q. Where did you then move?
A. To where I now live.
Q. Been living there ever since?
A. Yes.
Q. Do you know where the state line between Tennessee and North Carolina runs in the neighborhood of Slick Rock creek?
A. Yes, it runs up Slick Rock Creek.
Q. How far did it run up it and how did it go after it left it?
A. I do not know the distance, but it ran up the creek to a spur that ran up to the top of the mountain just beyond the Big Fodder Stack and then up that spur.
Q. Then how did it run?
A. It cornered there and ran along the Fodder Stack ridge through what we called Jeffers' Hall and along the ridge that divides the waters of Citico and the waters of Slick Rock creek and then turned again to the right. I have been nearly to Georgia on it.
Q. As I understand you then, the line began at the river and ran up Slick Rock creek to the spur that ran up to the Big Fodder Stack and ran up the spur to the Big Fodder Stack and along that to the junction with the Hangover, and on further south.
A. Yes.
Q. How did you know where the state line ran?
408 A. My pa told me and showed me where it was.
Q. What was your father's name?
A. Levi Mashburn.
Q. Did your father ever tell you anything about being on the survey in running the state line?
A. He told me that he was with the party that surveyed the line.
Q. The state line?
A. Yes, sir.
Q. Did your father tell you how the state line ran?
A. Yes, he told me it ran up Slick Rock creek when we were camped on it. We camped several times on Slick Rock creek.
Q. Did he tell you it ran as you have described it above?
A. Yes, sir.
Q. Did you get your description of this line as running up the spur and along from your father?
A. Yes, I got it from him.
Q. How many times, according to your best recollection, did he tell you about this line, and how would he happen to tell you?
A. I can not tell how many times, but we have camped time and again on Slick Rock creek. I have been bee hunting and deer hunting time and again all over the country; I can not tell how many times and when he had crossed the creek he would say: "Son we are in North Carolina now." That was when we were hunting he told me about the line and there were marked trees on the line. Sometimes it is my recollection, it was on one side of the creek and cometimes on the other it was a little narrow creek and a man could not always get up on one side all the way.

Q. And your father would tell you, as I understand it, when you had crossed the creek you had gotten into North Carolina?

A. Yes, sir.

Q. Did your father point out any marked trees to you on the creek?

A. Yes, he showed me some.

Q. Those trees were on the creek?

A. Yes, on Slick Rock Creek?

Q. Do you know how far from the mouth of the creek?

A. No, I do not. One place was where an old Indian trail crossed but I do not remember how far, and another was where another Indian trail crossed still above there, the two places were about a mile apart.

409 Q. Was one of these the old Tallassee trail?

A. Yes, one was the Tallassee trail.

Q. And when you camped at different times where these trails crossed the creek, he showed you the marked trees?

A. Yes.

Q. Did he tell you what these trees were marked for?

A. He said it was the line between Tennessee and North Carolina.

Q. Do you remember what the state line mark was?

A. My recollection is that it is two hacks and a blaze on center trees and three hacks on a side line tree, but I may be mistaken but I think this is it; it is over forty years since I saw it.

Q. The center trees would be marked on one side or both?

A. Both sides.

Q. Is your father living?

A. No, he has been dead for years; died in 1848.

Q. Did anyone else ever tell you where the state line was in this territory?

A. Yes, my father-in-law, Clinton Hudson.

Q. Where did your father-in-law live?

A. In Cherokee county, North Carolina.

Q. About how far from Slick Rock creek?

A. Three or four miles, right under the Hangover, in a little cove of a creek that heads there and runs down to the Tennessee river.

Q. Were you ever with your father-in-law on Slick Rock Creek?

A. Yes, many a time, when he was going down to Tennessee and I was with him, and we have hunted many a time and camped on the creek. I have camped there so many times I can't tell how many.

Q. Did he ever tell you about the state line?

A. He told me it ran up Slick Rock.

Q. Did he ever point out marked state line trees to you?

A. Yes, sir.

Q. Were they marked the same or different from the marked trees that your father had pointed out to you?

A. Just the same.

Q. They were on the creek and he told you they were state line trees?

A. Yes.

Q. Did you ever go with your father up on that spur you spoke of as running from the creek to the Big Fodder Stack?

410 A. I went with him to the top of the Fodder Stack, we camped there by a little spring and hunted, but I never went up the spur with him and he never pointed out any marked trees on the spur, but I have been up there myself many a time since.

Q. Did you ever go up that spur since looking for marked state line trees?

A. Yes, sir.

Q. Did you find any?

A. Yes, sir.

Q. Mr. Mashburn, please state when it was that you went up on that spur looking for state line marks, how you happened to go and whether or not you found any state line marks?

A. It was in 1854, after the Ducktown copper mines were found. I went into a company of seven besides myself and we went to Ducktown and followed the appearance as good as we could and found all the Tennessee land had been taken up, so we traced the appearance of the copper until it went into North Carolina, where we entered 640 acres on the far side of the Big Fodder Stack and dug for copper.

Q. As I understand it, you found this trace of the copper ore, and went up and down the spur to find the state line so as to know in what state to enter it.

A. Yes, sir, we traced it into North Carolina and entered it in that side.

Q. Where were those copper indications?

A. Just beyond the Big Fodder Stack; between the Big Fodder Stack and the Hangover.

Q. Just where was this?

A. Just over on the side of the spur that the state line runs down toward the head of Slick Rock.

Q. Did you go down this spur at this time?

A. Yes, we went up and down several times.

Q. Did you find any trees on this spur with the state line mark?

A. Yes, sir.

Q. How many?

A. I do not know; several.

Q. Did they have the same kind of marks as the trees your father had pointed out to you as state line trees?

A. Yes.

Q. State whether or not in consequence of these state line marks you made your entry in North Carolina.

A. Yes, we made it in North Carolina.

Q. In whose name was this entry made?

A. W. H. Maroney. I have receipts from him for two payments I made; I have lost the others.

411 Q. Will you please file these receipts as exhibits "A" and "B" to your deposition?

A. I will.

Q. What became of that land you were interested in? How did it happen that you lost sight of it?

A. There came along a New York Mining Co. while we were there digging and wanted to buy it. I wanted to sell, but the others did not, and we leased it to that New York Co. for five years. Before the lease expired the war broke out and I moved away to where I live now, and have never been back since to see about it.

Q. Did you ever make any inquiries?

A. I wrote three or four letters just after the war, but never heard anything of it. I was broke up so bad I could not go to see about it.

Q. Is your father-in-law dead?

A. Yes, sir.

Q. When did he die?

A. I do not know; I only heard he was dead.

Q. When you were living in that section of the country, what was the general understanding in the community as to where the state line ran?

A. Where I said it ran; never heard of its running anywhere else. That was the general understanding.

The counsel excepts to all the foregoing questions and to the answers of the witness relating to conversations between the witness and his father and between the witness and his father-in-law as incompetent for the purpose of establishing the state line.

T. S. WEBB,
Solicitor for Complainant.

Cross-examination by Major WEBB:

Q. In what year were you born?

A. In 1834; June 25th.

Q. You have stated that your father died in 1848?

A. Yes, sir.

Q. Then you were about fourteen years old when he died?

A. Yes.

Q. And the conversations you have had with him about which you have testified occurred about how long before his death?

A. About two years the last one was.

Q. Then at the time of your last conversation with him about the state line you were twelve years old?

412 A. Yes, about that old.

Q. Was that country thickly settled or not when you lived there?

A. In the Slick Rock there was a man by the name of Frank Nichols lived, and beyond there where my father-in-law lived there was a man by the name of Bob Strutton, and this side in what we called the "Puncheon Camp" there were some persons, and that was all there was living there at that time in the country.

Q. As I understand from your testimony, your father-in-law lived on the east side of the Hangover; that is on the far side from here?

A. No, he lived facing the river; between it and the Hangover.

Q. And the creek he lived on ran towards North Carolina?
A. No, it ran the way Slick Rock creek ran; both ran in the same direction.
Q. The creek that he lived on did not run into Slick Rock?
A. No, it is independent.
Q. How far above the mouth of Slick Rock creek does the creek your father-in-law lived on empty into the river?
A. I don't know; I never was up the river any farther than where the Indian trail crosses it.
Q. In crossing over from Slick Rock creek to your father-in-law's you crossed the Hangover lead to get to his house, didn't you?
A. No, the highest part of the Hangover is just beyond his house.
Q. Did the creek that he lived on run down the same side of the mountain as Slick Rock, or on the other side?
A. It ran down right from the end of the Hangover; we always said the Hangover stopped where it dropped down.
Q. If you were on the top of the mountain where the Hangover and the Big Fodder Stack come together and you were going towards the river along the top of the mountain then Slick Rock creek would be on your left wouldn't it?
A. Yes, sir, and the other creek would be right in front of me, a little to the left.
Q. When did your father-in-law die?
A. I do not know.
Q. Did he die after you moved to Middle Tennessee, or before?
A. He died after I moved there.
Q. How old were you when you were married?
413 A. I lacked from April to June 25th, of being 21 years old.
Q. You have stated in the direct examination that the general reputation in that settlement was that the state line ran up Slick Rock Creek. Please give the names of any other persons besides your father and father-in-law whom you have heard say that the state line so ran?
A. Robert Ballew, a Baptist preacher.
Q. Have you heard any others?
A. John Harrison.
Q. Any other?
A. Mike Harrison.
Q. Any others?
A. Calve. Harrison.
Q. Any others?
A. Jack Milligan, he lived on Tallassee creek.
Q. Who else?
A. Frank Milligan.
Q. Who else?
A. Joe Milligan?
Q. Who else?
A. I don't recollect any one else just now.
Q. Where did Robert Ballew live?
A. He lived on a creek called Tocoah Creek.
Q. Did he live in Tennessee or North Carolina?

A. In Tennessee.

Q. Was it before you moved to middle Tennessee that you heard him say the line ran so?

A. Yes, it was before I moved.

Q. Where did the Milligans live?

A. On Tallassee Creek in Tennessee, old man Milligan lived at the mouth of Tallassee Creek.

Q. Where did the Harrisons live?

A. In Tennessee, in Monroe County, right below the mouth of the Creek called Mulberry.

Q. Have you ever been back to that neighborhood since you left it in 1860?

A. I was back there during the war, in 1862, just to stay all night. I have also heard G. W. Morgan a part Indian, say that the line ran up Slick Rock Creek.

Q. Where did he live?

A. On Citico Creek.

Q. When was your father born?

A. Feb. 17th, 1803.

Q. How old was he at the time the line was run? He was not one of the commissioners was he?

A. I suppose not, he never said anything about it; just said he was with the party.

414 Q. Did he state when it was run?

A. No, sir, he did not.

Q. Have you ever been at the place where the Hangover mountain comes down to the river?

A. Never in my life. I never was on the Tennessee river from where Tallassee Creek comes down to where Slick Rock Creek comes in above there. I have been up and down many a time on the old Tallessee trail, on the south side of the river, and the road on the other side.

Q. Then you do not know where the Hangover lead comes down to the river?

A. We always said that when the Hangover gave out it gave out and the highest part goes to the North Carolina side.

Q. Where does this highest part, which you say goes to North Carolina reach the river?

A. I do not know; it may strike the Cheowah river, but I do not know, I was never there.

Q. At what point does this highest part of the mountain that you speak — turn off toward North Carolina?

A. About half a mile from the very Hangover.

Q. This place where this mountain that turns off into N. C. turns off from the main ridge is the head of Slick Rock Creek?

A. It is just opposite the head of Slick Rock Creek.

Q. How far is this point where this mountain turns off toward N. C. from the Tennessee River?

A. I do not know; I never was there.

Q. Is it 6 or 8 miles?

A. Not so far.

Q. 5 or 6?

A. Yes, perhaps, I do not know, but that is nearly it.

Q. Mr. Mashburn, how long have you known Mr. E. P. McQueen?

A. The first time I ever saw him or heard of him was at the Democratic Convention at Chattanooga.

Q. When was that?

A. In June of this year.

Q. Did you then tell him what you knew about Slick Rock Creek and the state line?

A. Yes.

Q. How did you happen to tell him?

A. In the convention I saw the Louden County sign and I went to it and Mr. McQueen and one or two others were there. I asked them if they were from Louden County and he said yes. I said I had come to see if I could see any of my old acquaintances there in the delegation, or could hear of them. Then he got to talking with me about that county and asked me if I had ever
415 lived there. I told him I was born and raised in Monroe County, near the river. He asked me where and I told him on the Tallassee Creek. He began asking me questions about it and that is how I came to tell him.

Q. Where was your father born, Mr. Mashburn?

A. I do not know.

Q. In Tennessee or North Carolina?

A. I do not know where he was born.

Q. You say this creek that your father-in-law lived on, ran down between the mountain that turned off toward N. C. and Slick Rock Creek?

A. Yes.

Q. Do you know the place on the Hangover called Sourwood Gap?

A. No, sir.

Q. How far was your father-in-law's place from where you crossed Slick Rock Creek in going over there?

A. About four miles, I suppose. We struck the creek something like a mile below where he lived and then had to go up the creek.

Q. In crossing over to his house this mountain which you say turned off toward N. C. was on your right was it not?

A. It was right in front of me.

Q. In going over to his house from your place what you call the Hangover was on your right wasn't it?

A. Yes, sir.

Q. That place that you called the Hangover is the high point of the mountain where there is a cliff, isn't it?

A. Yes, it hung over facing the river.

Q. Now this mountain which you say turned off to N. C. turned right at this Hangover, did it not?

A. Just a little piece back from where it hung over.

Q. The place you call the Hangover was where the mountain hung over towards the river wasn't it; and the mountain that turned off into N. C. was back a little?

A. Just a little; it ran along in very nearly the same direction only a little variation.

Q. Did you state that this mountain that turned off into N. C. ran down into Cheoate River in North Carolina?

A. Never, I never knew where it went.

Q. In going to your father-in-law's house you would be on this side of that mountain, would you not, and next to the Tennessee River, or on the other side of it?

A. You would be on this side of that mountain.

Q. In going to your father-in-law's house you would be between the mountain and the Tennessee River?

416 A. Between it and Slick Rock Creek.

Q. In what direction would the Tennessee River be from you at your father-in-law's house?

A. I do not recollect it has been so long, near forty years. I think it would be southeast.

Q. How old were you when you left East Tennessee?

A. 26 years old.

Q. When you talked with Mr. McQueen at Chattanooga in June last did you then remember that the state line mark was two hacks and a blaze?

A. That was what I told him was my recollection.

Redirect examination:

Q. Did you tell him that it was two hacks and a blaze only, or two hacks and a blaze on center trees and three hacks on side line trees?

A. That is what I told him, I won't be positive, but that is what I told him. That is my recollection of the marks.

Q. How far was the mouth of Tallassee creek from the mouth of Tallassee Ford?

A. My recollection is that it is about a mile; I have forded it hundreds of times.

Q. As I understand you on cross-examination, after you left the junction of the Fodder Stack and the Hangover and went along the top of the Hangover, when you came to that place where it hangs over towards the river with a cliff, you say that the name of Hangover stops, and you did not call it the Hangover any farther towards the river in either direction.

A. That is correct. The hunters in that country never call it the Hangover any farther.

Q. This Hangover place as I understand, was just over the head waters of Slick Rock Creek.

A. Right at the side of it.

Q. Then as I understand, the main ridge of the mountain ran along from this point in about the same direction, and you do not know where it went over into North Carolina?

A. No, sir, I do not know.

Q. Now, from near this point, as to the ridge that ran from near this point to the Tennessee River, coming in about half a mile or so above Slick Rock Creek, the ridge that you had to cross after

you left Slick Rock Creek as you went over to your father-in-law's house; did you call that ridge the Hangover?

A. No, sir, we never called that the Hangover.

Q. But there was ridge there?

417 A. Yes, there was ridge there.

Q. You have named on cross-examination various persons whom you have heard state that the state line ran up Slick Rock Creek. Are all of these persons now dead?

A. Yes, I do not know of but one alive; that is William Harrison he was living the last time I heard.

Q. Were any of these persons whom you have named, interested with you in the entry of copper land you spoke of?

A. There were six of them interested with me besides Maroney.

Q. Were these men Tennesseeans?

A. All Tennesseeans but Maroney and my father-in-law.

Q. What did you have to pay for that entry in North Carolina?

A. Fifty cents per acre.

Q. To the North Carolina government.

A. Yes.

Q. Before you were married did you frequently go over to your father-in-law's house?

A. Yes, sir.

Q. And you would cross Slick Rock Creek on your way?

A. Yes, sir.

Recross-examination by T. S. WEBB:

Q. These several men whom you have mentioned as telling you that the state line was on Slick Rock Creek; were they men who were engaged with you in the copper land?

A. Part of them.

Q. How many of them; did you say 7?

A. 7 besides myself.

Q. Was it at the time you were making the entry that you heard them say the line was on Slick Rock?

A. It was when there was so much talk about the copper ore, that I heard it; everybody was talking about the copper ore; it was general talk.

Q. When you would be going from your father-in-law's house from your house you stated that what you called the Hangover would be on your right, and you would have to go past the Hangover?

A. No, not past it, his house was just about opposite it.

Q. What you call the Hangover is the hanging cliff of rock at the high point on the mountain and you do not call any other part of the mountain the Hangover?

A. No, nor anybody else, that I ever heard of.

418 Re-redirect examination:

Q. You have spoken of six men besides yourself; do you mean that 6 men besides yourself and Maroney were interested in this entry or that six of the men that you mentioned as stating that the line ran up Slick Rock Creek were interested with you?

A. Six of them were interested with me.

Q. Which ones of these men you have mentioned were interested in that entry?

A. None of the Milligans, nor the Indian, nor Strutton, nor Frank Nichols were interested in the entry.

Q. That is these men have stated to you that the state line ran up Slick Rock Creek and none of them were interested with you in the entry, but the others you have previously mentioned were interested with you, and were all Tennesseeans except the ones you mentioned, Maroney and your father-in-law?

A. Yes, sir. One of the Harrisons was not interested I think.

And further deponent saith not.

R. B. MASHBURN.

Subscribed and sworn to before me this 7th day of Sept., 1898.

HENRY O. EWING, *Clerk.*

Bill of Costs.

R. B. Mashburn, mileage, 100 miles each way	$10 00
Attendance one day	1 50
Total	$11 50

Paid by Lucky, Sanford & Tyson.

Formal caption, certificate and transmission waived and all exception as to competency, relevancy and materiality of the foregoing matters specifically reserved to the hearing.

(Endorsed:) No. 1056. Chas. Hebard *vs.* D. W. Belding et al. Deposition of R. B. Mashburn. Filed Sept. 7th, 1898. Henry O. Ewing, Clerk.

419 EXHIBIT A TO R. B. MASHBURN'S DEPOSITION.

December 10, 1855, of Robert Mashburn, ten dollars by R. B. Billins, which is in payment of 640 acres entered by W. H. Maroney, in Cherokee County, N. C., on the waters of Slick Rock Creek at 50 c. per acre this being his part of the first payment due Dec. 20, 1855.

W. H. MARONEY.

EXHIBIT B TO R. B. MASHBURN'S DEPOSITION.

Received of Robert B. Mashburn in full of second payment, ten dollars on 640 acres of land lying on Slick Rock Creek, in Cherokee Co., N. C., Jan. 9, 1857.

W. H. MARONEY.

J. S. MARONEY, *Agent.*

CHAS HEBARD
vs.
D. W. BELDING et als.

This cause is referred back to T. A. Wright, Esq., heretofore appointed Special Commissioner in this cause, who will examine the proof taken by the parties since said commissioner's report was filed, and hear argument thereon, if desired and he will report whether upon said proof he will change his report already filed, and if so to what extent. He will make his report as soon as practicable. Exceptions to the original report may be reserved until after the coming in of the supplemental report.

O. K.

WEBB & McCLUNG.
LUCKY, SANFORD & TYSON.

(Endorsed:) No. 1056. In the U. S. Circuit Court at Knoxville. Chas. Hebard against D. W. Belding, et al. Order of re-reference Entd. Journal "Q" p. 569. Filed 13 day of Sept., 1898. J. T. Carter, Deputy Clerk.

420 In the U. S. Circuit Court, at Knoxville, Tennessee.

CHARLES HEBARD
vs.
D. W. BELDING et al.

Supplemental Report of Referee Under Order Entered March 30th, 1898, and Order Entered September 13th, 1898.

To the Honorable the Judges of the U. S. Circuit Court, Sitting at Knoxville, for the Northern Division of the Eastern District of Tennessee:

I respectfully report that in obedience to the order entered in this cause on September 13th, 1898, again referring to me the case on the question submitted in the first reference, and directing me to examine the proof taken by the parties since my report was filed, and to hear argument thereon if desired, and report whether upon said proof I would change the report which I have already filed, and if so, to what extent.

On September 13, 1898, at the request of the counsel for both parties, after having read the proof taken since my last report I heard the counsel in the Court Room at Knoxville argue the question upon the additional proof filed, and in fact, upon the whole record covering the question submitted to me. I have delayed filing this supplemental report at the request of counsel for the defendants, who desired to file with me a written brief supplemental to the oral argument made by them. This has been handed to me and I have endeavored to again carefully consider all the proof

bearing on the question submitted, and especially the proof taken since the filing of my report, and after a consideration of the whole matter, I am satisfied with the conclusion of the question as stated in my first report and therefore report that I will make no change in said report.

Respectfully submitted this November 21st, 1898.

T. A. WRIGHT,
Special Commissioner.

(Endorsed:) No. 1056. Sup. Report of Com. Chas. Hebard vs. D. W. Belding, et al. In Circuit Court, U. S. Filed Nov. 23, 1898. J. T. Carter, Deputy Clerk.

421 In the United States Circuit Court, at Knoxville, Tennessee.

No. 1056. In Equity.

CHARLES HEBARD
vs.
D. W. BELDING et al.

Exceptions Taken by the Defendants, D. W. Belding, M. M. Belding, A. N. Belding, Henry Stix, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg, and R. N. Archer to the Original and Supplemental Reports Made Herein by Asbury Wright, One of the Masters of This Court to Whom This Cause was Referred by an Order of This Court Made on the 30th Day of March, 1898.

I.

First Exception. For that the Master, in his original report, reported that the Hangover lead ridge is the main ridge of the mountain between the river and the junction of the Hangover and the Fodder Stack; whereas the said Master should have reported that there is no main ridge of the mountain between the river and junction of the Hangover and the Fodder Stack, but that at the junction of the Hangover and Fodder Stack the main ridge breaks up into various ridges and spurs running to the river in various directions one of them being the Fodder Stack lead, one the so-called Hangover lead and that of all these spurs or ridges into which the main ridge is divided, the main spur or ridge is the spur or ridge of the Hangover leading eastwardly from near the Hao down to the Chevah river.

M. L. Brittain, qs. 9 and 10; John Dockery, q. 17; H. S. Hayes, q. 27; re-ex. q. 7; Reuben Carver, p. 11; R. B. Mashburn, re-ex., p. 10; Topographical maps of the U. S. Geol. Survey, Exhibit F. & G. to dep. of H. S. Hayes.

II.

Second Exception. For that the said Master in his said original report, reported that the timber on the top of and along the highest

part of the Hangover lead is very poor and scrubby and would not be good to hold line marks, whereas the said Master should have reported that there was abundant timber on the crest of the Hangover of sufficient age and size to have been marked by the
422 Commissioners in 1821 as state line trees if they had run the line on the Hangover lead.

Deposition of W. D. Hale, re-ex. q-. 37-38, p. 19; H. P. Hyde, p. 12. See also, generally J. K. Wilson, H. O. Muller and first deposition of W. D. Hale.

III.

Third Exception. For that the said Master in his said original report, reported that the black or water oak and the sourwood on the top of the Hangover lead ridge bore marks similar to those used in marking the state line and that they were marked about the year 1821; whereas the said Master should have reported that the said two trees did not bear any state line marks and that they were not marked in 1821, and were not marked by the commissioners who ran the state line in 1821.

See as to black oak: Complainant's witness, H. O. Muller, complainant's map, filed as exhibit to dep. of W. D. Hale. H. S. Hayes, q-. 15 to 22, 79 to 80 and 85 to 87; J. C. M. Bogle, qs. 24 to 30; 1st dep. of H. P. Hyde, pp. 5, 6 and 7; sec. dep., qs. 31, 40, 42 and 44, 46, 52, 59, to 73 and 104. Reuben Carver, sec. dep., qs. 12 to 17. See also black oak block, exhibit A, to Hale's second dep. As to Double Sourwood: H. S. Hayes, p. 4; J. C. M. Bogle, qs. 32 and 33 and re-ex., q. 12; H. P. Hyde, 1st dep., pp. 7, 8 and 9, sec. dep., qs. 98 and 100; Reuben Carver, 1st dep. pp. 5, 8 and 9; sec. dep., qs. 27 and 28; Dave Orr, pp. 2 and 4 and 7; also Sourwood Block filed as exhibit B to second deposition of W. D. Hale.

IV.

Fourth Exception. For that the said Master has reported in his said original report that the marked trees, showing marks made in 1821, and showing proper marks and age for state line trees, after running and forming a well-marked line up Slick Rock Creek for a distance of about a mile and one-third, then entirely cease for a distance of about three or three and one-half miles, or until the line starts up the spur to the Fodder Stack; whereas the said Master should have reported that there were a half a dozen or more marked state line trees between the mouth of Little Slick Rock Creek and the foot of the Fodder Stack ridge; that is, in the last or upper two miles of the line along the creek before reaching the foot of the ridge and that the marked trees extended up to within three-fourths of a mile of the foot of the ridge.

H. P. Hyde, pages 15, 16 and 17.

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V.

Fifth Exception. For that in his said original report, the said Master reported that a number of trees, with proper marks and age for state line trees, were found for a short distance leading up the spur from the creek to the Fodder Stack, but that no more trees were then found until near the top of the spur; whereas the said Master should have reported that nine state line trees were found on the spur leading up from the creek to the Fodder Stack ridge and covering a distance of about three-fourths of a mile (Dep. of H. S. Hayes), and that, altogether sixteen trees with state line marks were found on this ridge at various intervals.

Dep. of H. S. Hays, qs. 63 and 68; map ex. No. 1 to the dep. H. S. Hayes.

VI.

Sixth Exception. For that the said Master in his said original report has reported that two or three marked trees were found from the point where the spur reaches the Fodder Stack ridge to its junction with the Hangover; whereas the said Master should have reported that seven marked state line trees were found along the top of the Fodder Stack ridge between these two points.

Deposition of H. S. Hayes, qs. 69 to 73.

VII.

Seventh Exception. For that the said Master in his said original report has reported that marked trees were also found on the Fodder Stack ridge northeast of the spur leading down to the creek; whereas the said Master should have reported that no state line trees were found on the Fodder Stack ridge beyond the top of the aforesaid spur leading down to the creek and in the direction of the river.

Dep. of H. S. Hayes, q. 12.

VIII.

Eighth Exception. For that the said Master in his said original report has reported that since 1853 parties have been obtaining grants from North Carolina for land in the Slick Rock basin, both on the east and west sides of Slick Rock Creek; whereas the said Master should have reported that there was no evidence of any grants issued by North Carolina west of Slick Rock Creek and north of the spur leading down from the top of the Fodder Stack ridge to the creek.

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IX.

Ninth Exception. For that the said Master in his said original report has reported that the line between the states of Tennessee and North Carolina, from the Little Tennessee River to the junction of the Hangover and Fodder Stack Ridges, as run and located by the commissioners in 1821 and confirmed by the respective legislatures of said states, crossing the Little Tennessee river at the point where

it reaches the river on the northeast side of the river and then runs from the river up the Hangover lead, as shown by the complainant's map, and along the extreme height of this ridge passing the red oak, Slick Rock Gap, Cold Spring Knob, Big Fat Gap, Hangover, Hao, Grassy Gap and Stratton's Bald to the junction of the Hangover and the Fodder Stack; whereas the said Master should have reported that this line crossed the Little Tennessee River at the mouth of Slick Rock Creek, and then ran up the creek to the foot of the spur leading up from the creek to the Big Fodder Stack and up this spur to the Big Fodder Stack and then with the main top of the Fodder Stack lead to its junction with the Hangover, as shown on the map exhibit No. 1 to the deposition of H. S. Hayes.

This is shown by:

First. The language of the Acts in connection with other evidence. See Acts of North Carolina, 1819, Acts of Tennessee, 1820, chapter 22; Acts of North Carolina, 1821; Acts of Tennessee, 1821-'22, chapter 35; dep. of M. L. Brittain, qs. 9 and 10; John Dockery, q. 17; H. S. Hayes, q. 27, re-ex., q. 7; Reuben Carver, p. 11; R. B. Mashburn, p. 10; maps of the U. S. Geol. Survey, ex. F. & G., to deposition of H. S. Hayes, and stipulation of counsel, filed Aug. 6, 1898; H. S. Hayes, q. 95; James McDaniel, q. 8; John Dockery, q. 9; C. C. Jones, q. 7 and 8; S. Whittaker, q. 5; James Whittaker, q. 8; Hale's field notes, stations 1 to 81; H. P. Hyde, sec. dep., qs. 17, 18 and 101; depositions of Edward T. Sanford and L. D. Tyson.

Second. Marked trees on Slick Rock Line; H. S. Hayes, qs. 37 to 78 and 83-4, cross-q. 30 to 37, and re-dir. q. 8; map ex. No. 1 to dep. of H. S. Hayes; J. C. M. Bogle, qs. 46 to 68, 79, 80 and 84; Dave Orr, p-. 2 to 7; H. P. Hyde, 1st dep. pp. 1 and 2, 3, 4, and 15, 16, 18, and 19; report of Hyde and Loringood, ex. No. 8 to dep. of H. P. Hyde; Reuben Carver, pp. 3 and 4; Dr. J. W. Patton, pp. 5-7; R. B. Mashburn, pp. 2, 3 and 4; John Dockery, X ex. and re-ex.; W. D. Hale, X q. 16-45; Dave Orr, p. 8; H. P. Hyde, sec. dep. q-. 13-16. See also books in evidence from trees on Slick Rock Creek spur and Fodder Stack ridge.

425 Third. By Ocoee District map. See map exhibit A. to T. E. H. McCroskey's deposition; stipulation of counsel, Sept. 25th, 1897, sec. 3; H. P. Hyde, sec. dep., q. 22; H. S. Hayes, q. —; J. C. M. Bogle, q. —; C. C. Jones, qs. 2, 5 and 11 and 34; Acts of Tennessee, 1836, chapter 2.

Fourth. By reference in Complainant's title papers; See Tennessee Grants Nos. 6399, 6407, 6419, 6418, filed as exhibits to T. E. H. McCroskey, sec. dep. and following deeds: from H. A. M. White to William Goodrich, July 16th, 1853; H. A. M. White to Marcus D. Bearden, Sept. 7th, 1853; H. A. M. White to William Goodrich, April 24th, 1854; William Nicholsto William Goodrich, April 25th, 1854; William Goodrich to Joseph L. King, Sept. 19th, 1853, and April 24th, 1854; William Goodrich to R. R. Bearden, May 15th, 1854; M. D. Bearden to Hugh L. McClung, May, 1854; H. A. M. White to Joseph L. King; mortgage from Wm. Goodrich and wife to Henry Doolittle, July 31st, 1855; deeds from C. L. Ward and wife to Albert

Doolittle, executor, June 24th, 1869; William Goodrich to Henry Doolittle, Mar. 1st, 1856; Henry Doolittle and wife to C. L. Ward, Mar. 4th, 1856; Albert Doolittle, acting executor, to Amelia Burgess, May 11th, 1875; S. P. Evans, C. & M. to E. T. Gratz, Dec. 19th, 1887; S. P. Evans, et al., to William Fleming, et al., Sept. 10th, 1885; L. A. Gratz and wife to William Fleming, et al., 1885; A. P. White to William Fleming, et al., Nov. 15, 1885; William Goodrich, et al., to William Fleming, et al., Nov. 30th, 1895; T. S. Webb to William Fleming, et al., Nov. 18th, 1895; A. B. McCorkle, et al., to William Fleming, et al., Aug. 20th, 1886; Helen Fleming to Charles Hebard, June 15th, 1891; Amelia Burgess, et al., to Charles Hebard, July 9th, 1891; Vastine Stickly, C. & M. Jan. 16th, 1892; and decree of the Chancery Court in the case of Chas. Hebard vs. R. P. Cline, June 6th, 1892, all exhibits to deposition of T. E. H. McCroskey. The references in these title papers to Slick Rock Creek as the state line are not only of highest evidential value, but are also binding on complainant by way of estoppel.

Fifth. By references in defendant's title papers. See North Carolina grant No. 2336, ex. H. to dep. of H. S. Hayes and plat and certificate thereto. Also various deeds exhibits 1 to 4 to dep. of D. W. Belding and defendant's abstract of title filed June 4th, 1898.

Sixth. By non-assertion of title by Tennesseeans. See John Blackburn entries, July 6th, 1869.

Seventh. By assertion of title by North Carolina. See stipulation of counsel, Sept. 25th, 1897; J. J. Turnbull's entry No. 611;
426 plot and certificate of J. M. Lyle, entry No. 455; North Carolina grant No. 2784; North Carolina grant No. 2336, exhibit A. to dep. of H. S. Hayes and original plot attached to same; North Carolina grant No. 101; North Carolina grant No. 144; North Carolina grant No. 8234; North Carolina grant No. 8573; dep. of R. B. Mashburn, p. 5, J. S. Maroney, Samuel Henry; Reuben Carver, p. 2; H. S. Hayes, 85-86; North Carolina Code, 1883, vol. 2, chapter 11, sec. 2465.

Eighth. By defendant's payment of taxes on disputed land in North Carolina. See stipulation of counsel filed Aug. 6th, 1898.

Ninth. By recognition of Slick Rock Creek line in judicial proceeding in both Tennessee and North Carolina. See decree of the Chancery Court of Monroe County, Tennessee, in case of Chas. Hebard, et al., vs. R. P. Cline, et al., June 8th, 1892, and proceedings in North Carolina Probate Court in re petition of W. A. Bartlett, admr's. of W. H. Peet.

Tenth. By tradition. R. B. Mashburn, X ex., re-dir. ex., re-X ex. and re re dir-ex.; James McDaniel, qs. 1, 2 and 11; John Dockery, qs. 1, 7, 8, and 10; C. C. Jones, qs. 1, 4, and 14; M. L. Brittain, qs. 1, 3, 4, and 9; Dave Orr, pp. 1, 2 and 8; W. P. Jones, q. 5, and Stephen Whittaker, q. 5.

Eleventh. By statement of members of the commissioners' party and other deceased persons. Dr. J. W. Patton, pp. 1, 2 and 3; Stephen Whittaker, q. 5; John Dockery, qs. 5, 6, 7, 8, 12 and 13, James Whittaker, qs. 1 to 7 and 9; James McDaniel, qs. 4, 5, 6, 7, 11, 14 and 16; M. L. Brittain, qs. 3 to 8 and 12, and R. B. Mashburn, pp. 2, 3, and 4.

X.

Tenth Exception. For that the said Master, in his said original report, has reported that if the commissioners had run the line up Slick Rock Creek it would not have been a compliance with the Cession Act; whereas the said Master should have reported that the line up Slick Rock Creek would have been a compliance with the Cession Act.

The proof shows that the main ridge of the mountain is divided into several ridges and that neither one of these various ridges could be termed the main ridge, and it would have been a compliance with the Cession Act to adopt a line midway between the two ridges and in substance and in fac comply with the terms of the Cession Act.

M. L. Brittain, qs. 9 and 10; John Dockery, q. 17; H. S. Hayes, q. 27, re-ex. q. 7; Reuben Carver, p. 11; R. B. Mashburn,
427 re-ex. p. 10; Topographical map of the U. S. Geol. Survey, exhibits F and G to deposition of H. S. Hayes.

Eleventh Exception. For that the said Master in his said original report has reported that it is not probable that the commissioners would have run the line up Slick Rock Creek and not have mentioned it in their report; whereas the said Master should have reported that the commissioners' report has been lost or destroyed and is not itself in evidence, and that even if this creek had had a name in 1821, it was not natural that the North Carolina and Tennessee Acts of 1821, adopting the line run by the commissioners, should not have mentioned this creek, as this line has been distinctly marked with over forty marked trees bearing State Line marks, and, as appears from the acts, it was intended to adopt the line that had been "run and marked" by the commissioners and that the marked line should control.

See North Carolina and Tennessee Acts of 1821, confirming the survey of the commissioners, also evidence cited under first exceptions.

XII.

Twelfth Exception. For that the said Master in his said original report has reported that, in his opinion, the Hangover is the main ridge of the mountain on which the commissioners say they ran and located the state line, from the Tennessee River to the main ridge; whereas the said Master should have reported that the call "from the Tennessee River to the main ridge" in the North Carolina and Tennessee Acts adopting the line "run and marked" by the commissioners, did not indicate that this line ran along the Hangover Lead Line, but on the contrary, together with the other evidence in the case, shows that this phrase was intended to imply to and describe the line running up Slick Rock Creek and up the spur and along the top of the Fodder Stack to its junction with the Hangover, where the main ridge began.

See evidence in support of the first and ninth exceptions.

XIII.

Thirteenth Exception. For that the said Master in his said original report has reported that in the section of land in question numerous marks are found similar to state line marks; whereas the said Master should have reported that there was no evidence whatever in the record showing any trees marked with state line
428 marks except those along the Slick Rock Creek line as contended for by the defendants.

See evidence in support of the ninth exception.

XIV.

Fourteenth Exception. For that the said Master in his said original report has reported that there were many ways in which the marks on the Slick Rock Creek line might have been placed there without having been made by the commissioners in running the state line; whereas the said Master should have reported that there is no other way shown in the proof in which these marks could have been made except by the commissioners who ran the state line in 1821 and that there is no reasonable explanation of the more than forty marked trees on this line except that the marks were placed there by the commissioners to indicate the state line.

XV.

Fifteenth Exception. For that the said Master in his said original report has reported that if the commissioners marked the line up Slick Rock Creek, it was marked by them as a tentative line and not adopted and reported by them; whereas the said Master should have reported that there is no explanation of the fact that they ran this line and marked these trees as state line trees with the particularity, regularity and in the number shown by the proof, except for the purpose of fixing the location of the state line, and that if the said line had been run merely as a tentative line, the commissioners would not have marked these trees as state line trees, but would simply have blazed them, to indicate an experimental line, and that if, after marking these trees as state line trees, they had abandoned this line and adopted the Hangover Lead Line they would have been careful to mark the Hangover Lead Line with unmistakable and many state line marks and if it had been intended to abandon the marked line up Slick Rock Creek the Acts of North Carolina and Tennessee in adopting and describing the state line would have referred to the fact that there was a marked line up Slick Rock Creek, with more than forty marked trees, but that this line had been abandoned in favor of the Hangover Lead Line, and said Master should have reported that the marked line up Slick Rock Creek was the line run, marked and adopted by the commissioners and reported by them as the state line.

429 See evidence in support of the ninth exception.

It is unreasonable to suppose that the commissioners, having so carefully marked the state line up Slick Rock Creek would

have abandoned it as the state line without making any reference to this fact in their report, and would have left these forty trees, without explanation, to confuse posterity. The only explanation of the marked trees on the Slick Rock Creek line is that it was the line adopted by the commissioners, and this was the marked line confirmed by the Acts of Tennessee and North Carolina.

XVI.

Sixteenth Exception. For that the said Master, in his said supplemental report has reported that, upon the whole record, including the proof taken since his said original report, he is satisfied with the conclusion of the questions as stated in his said original report, and will make no change therein; whereas the said Master should have reported that, upon the entire record, including the proof taken subsequent to his original report, his original report was erroneous and should have corrected the same so as to report that the commissioners ran and located the state lines in 1821 up Slick Rock Creek and up the spur leading to the fodder stack lead and along the Fodder Stack Lead to its junction with the Hangover, as shown on the map exhibit No. 1 to the deposition of H. S. Hayes.

See evidence cited under exception nine.

XVII.

Seventeenth Exception. For that the said Special Master in his said original report excluded the testimony of C. C. Jones as to why the surveyors of the Ocoee District stopped at Slick Rock Creek, whereas the testimony of the said witness that he was acquainted with Thomas Hensley, now deceased, and that the said Hensley said that he knew the parties who ran the east line of the Ocoee District and was with the party some of the time and that they went to the mouth of Slick Rock Creek and stopped at the mouth of Slick Rock Creek because it was the state line and surveyed Slick Rock Creek as the eastern line of the Ocoee District because it was the state line, was competent, relevant and material as proof of the statements of the deceased members of the surveying party, and should have been admitted in evidence by the said Special Master.

Deposition of C. C. Jones, qs. 5-11.

430

XVIII.

Eighteenth Exception. For that the said Special Master admitted in evidence the statement of the witness James Farr as to his understanding of the location of the state line; whereas the said statement is not shown to be based upon general reputation, it being further shown on cross-examination of this witness that the only person the said witness had heard say the state line ran along the Hangover was old man Nelson, Marion Carriger and perhaps Andy Carriger, and the witnesses' said statement being hearsay and not constituting proof of general reputation, and being incompetent and inadmissible

especially in the absence of proof as to whether or not said parties are dead and should have been excluded by the said Master.

XIX.

Nineteenth Exception. For that the said Special Master admitted a statement of Emerson Debity, that he had always understood the state line to be the Hangover, the statement of the witness B. R. Nichols that he understood that the state line was east of Slick Rock Creek, the statement of Samuel Blair that he had considered the land in dispute as lying in Tennessee and the statement of the witness John Debity that he understood the state line between North Carolina and Tennessee to be the Hangover Lead; whereas the statements of these witnesses was not competent evidence to prove the location of the state line, as none of the witnesses pretend to state the general reputation, which alone would be competent on such a question, and the statement of these witnesses as to their particular understanding is wholly incompetent and inadmissible and the said Master should have excluded the same.

XX.

Twentieth Exception. For that the said Special Master admitted in evidence the statement of Boyd McMurray that Jack Milligan told him that the state line was on the Hangover Lead, and that he has always since that time understood that to be the state line, and that Isaac Carriger told him that the Hangover was the state line and pointed to a tree near the trail and stated that that was the state line; whereas this evidence as to statements of Milligan and Carriger is hearsay, incompetent, immaterial and irrelevant and the statement of the witness' own individual understanding of the state line,
431 not shown to be based on general reputation, is also incompetent and immaterial, and the said Master should have excluded all of said testimony.

XXI.

Twenty-first Exception. For that the said Special Master admitted the testimony of the witness Boyd McMurray as to the statements made by Mr. Hoyt that he had located the state line on the Hangover Lead and as to the Sourwood on said lead and the opinion of said Hoyt as to the marks up and down Slick Rock Creek; whereas this evidence as to statements made by said Hoyt is hearsay evidence, incompetent and irrelevant, and the said Special Master should have excluded all of the testimony of said witness as to the statements made by the said Hoyt.

CHAMBERS, McQUEEN & NICHOLS,
Sol's for R. N. Archer.
LUCKY, SANFORD & TYSON,
Sol's for all Def'ts Except Cooper.

(Endorsed:) No. 1056. Charles Hebard vs. D. W. Belding, et als. Def't's exceptions to report of Special Master. Filed Dec. 22, 1898. J. T. Carter, Deputy Clerk.

HEBARD
vs.
BELDING et al.

Defendants' Exception to Evidence.

First. The defendants except to the evidence of the witness James Farr as to his understanding of the location of the state line on the Hangover Lead.

This evidence is incompetent and irrelevant:

1st. It is not shown to be based upon general reputation, and the individual understanding of this witness, not based upon general reputation of the statements of ancient persons shown to have been familiar with the state line is clearly incompetent.

2d. It is shown on the cross-examination of this witness that the only person he ever heard say that the state line ran along the Hangover was old man Nelson, Marion Carriger and perhaps Andy Carriger and these persons are not shown to be dead, two of them, 432 in fact, having been shown to be living by another witness, nor are they shown to have had any special acquaintance with the state line, hence proof of their statements does not constitute proof of general reputation, and it is hearsay evidence, incompetent and inadmissible.

Second. The defendants also except to the statement of the witness Emerson Debity that he understood the location of the state line to be on the Hangover Lead, and the statement of B. R. Nichols, that he understood the state line to be east of Slick Rock Creek, and the statement of Samuel Blair that he considered the land in dispute as lying in Tennessee, and the statement of John Debity that he understood the state line to be the Hangover.

None of these witnesses pretend to state the general reputation, which alone would be competent on this question. The witnesses are mostly young men and are not shown to have any knowledge of ancient tradition. The particular understanding of all these witnesses at this late period is wholly incompetent, irrelevant and inadmissible.

Third. The defendants except to the statement of the witness Boyd McMurray that James Milligan told him that the state line was on the Hangover, and that he has since that time understood that to be the state line, and that Isaac Carriger told him that the Hangover was the state line and pointed to a tree near the trail and said it was on the state line, and that Mr. *Hoyt's statement as to the marks on Slick Rock Creek. This* over Lead and the further evidence of this witness as to Mr. Hoyt's statement as to the marks on Slick Rock Creek. This evidence is hearsay, incompetent and irrelevant. It is not based on general reputation. It is simply the particular understanding of this witness and hearsay testimony as to statements made by persons not shown to have had any peculiar means of information as to the location of the line, nor to have been

familiar with it, and this evidence does not come within any exception to the general rule excluding hearsay testimony.

LUCKY, SANFORD & TYSON,
Sol's for All Def'ts Except the Coopers.

(Endorsed:) Charles —— vs. D. W. Belding et al. Defendants' exceptions to testimony. Filed Mar. 23, 1899. J. T. Carter, Deputy Clerk.

433 CHARLES HEBARD
vs.
D. W. BELDING et al.

After careful consideration of this case, I reach the conclusion that I am not warranted upon the facts in differing from the commissioner in the view which he takes of the case. It is a very close one on the facts, and the equity of the case is rather with the defendants in view of the fact that they obtained their grant earlier, and have been paying taxes upon the property while the plaintiff's grant was only recently obtained. If there was a basis for estoppel, or if the doctrine of estoppel could be applied to the state of Tennessee, a different question might arise growing out of the fact that the state has, through the Ocoee District Commissioners established its line at Slick Rock Creek, and has sectionized all of the territory supposed to belong to the state. In the absence, however, of any ground on which an equitable view might be taken of the situation, I am constrained to believe that the weight of evidence is with the plaintiff as to the true location of the state line. I do not underestimate the great force found in the better marked line of the defendants. It must not be forgotten however, that the commissioners in surveying and making the line, followed the mountain range down to the Tennessee River, and that according to the calls actually made, they would cross that river and proceed along the mountain crest where complainants contend the line is. It was the crest of this same mountain range which brought them to the river and it was the obvious and conspicuous range to have followed by directly crossing the river and keeping up the previous course. It is extremely difficult to believe that the commissioners at this point would have dropped down the river for half a mile and then followed Slick Rock Creek for a distance of five or six miles without ever making the slightest reference to this water stream. Granting as argued that the creek may, at that time have had no name whatever, nevertheless it would have been so natural and not necessary to avoid misleading for the commissioners to have said that they changed their course, and instead of going directly across the river went down and then followed a creek or water stream up the valley and then to the ridge which led out to the junction, that it is next to impossible to think that such a deviation as this would have been made without a word
to give any indication of the fact. Following the calls as
434 actually given it would be impossible to run the line as claimed by the defendants.

Looking at the case then from the legal point of view (and no other, it seems permissible), I am certain that by the weight of the evidence the case is with the complainants.

As I concur with the commissioner in the reasons which he gives, as well as the conclusion at which he arrives, it is not necessary that I should go over the grounds separately. It results therefore that the exceptions to the commissioner's report are overruled, the report confirmed and decree will go accordingly.

I think the cost of the commissioner's report should be divided and the general cost should follow the result of the suit, and it is adjudged accordingly.

CLARK, *J.*

(Endorsed:) No. 1056. In the U. S. Circuit Court at Knoxville. Chas. Hebard against D. W. Belding. Opinion. Filed Apr. 25, 1899. J. T. Carter, Deputy Clerk.

In the United States — Court, at Knoxville, Tennessee.

CHARLES HEBARD
vs.
D. W. BELDING et al.

Be it remembered that this cause came on to be heard and determined before the Honorable C. D. Clark in the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee on this 10 day of June, 1899, upon the report and supplemental report of the Special Commissioners T. A. Wright, as to the location of the state line, the exceptions to said reports filed by the respondents, and the court being of the opinion that the said exceptions are not well taken and the court concurring with the Special Commissioner in his reasons and conclusions, it is pleased to disallow and overrule the said exceptions, and said reports are in all things confirmed.

And the cause coming on to be further heard upon the original bill, pleading answer and proof and upon the whole record, from all of which it appears that it is a contention; as to the true location of the state line between Tennessee and North Carolina run-
435 ning South or Southwest from the Little Tennessee river, and between the said river and the junction of the Hangover and Fodder Stack Ridges, said junction being about ten miles southwest of the river.

After hearing the cause, argument of counsel and mature deliberation, the court is of the opinion, and doth so adjudge and decree that the state line between the states of Tennessee and North Carolina as run and located by the Commissioners of said states in 1821, *is* as found by Special Commissioner T. A. Wright, is as follows: Crossing Little Tennessee river at the point where it reaches the river on the North east side, and about one-half mile above where Slick Rock creek empties in said river; and from the river runs up the Hangover ridge or lead and along the extreme height of the

same, passing the black oak or red oak, passing Slick Rock Gap, Cold Springs Knob, Big Fat Knob, Hangover Ridge, Hao, Grassy Gap, and Stratton Bald to a junction of the Hangover Ridge with the Fodder Stack Ridge; and all the lands lying west or northwest of said Hangover Ridge, including Slick Rock basin, is in the state of Tennessee.

And it, further appearing to the court, that complainant Chas. Hebard, acquired title to the lands in dispute in Slick Rock creek basin by and through grants from the state of Tennessee, and that said lands are within the lines and boundaries of said state; and that the defendants, D. W. Belding, M. M. Belding, Henry Stix, Nathan Stix, Levi Kohn, D. W. Hyman, Mary Bragg, R. L. Cooper and J. W. Cooper acquired title to the lands in dispute in said Slick Rock Basin by and through the grants from the state of North Carolina and that said lands are not within the lines and boundaries of said state.

It is therefore -judged and decreed that the titles of the complainant to said lands are valid and that the titles of defendants are void, and that the defendants have established no defense to the suit, either by adverse possession or otherwise, and that complainant is entitled to the relief sought.

And it is further adjudged and decreed that complainant have and recover of said defendants all the lands in Slick Rock creek basin more particularly described as follows: Beginning on the Tennessee river now called the Little Tennessee river, at the point where the line between the states of Tennessee and North Carolina crosses, opposite a marked Spruce Pine now blocked out about one-half mile above the mouth of Slick Rock creek; running thence up the Hangover Ridge or lead, and along the extreme height of the same passing the black oak or red oak, passing Slick Rock Gap, Cold Springs Knob, Big Fat Knob, Hangover, Hao, Grassy Gap and Stratton Bald to the junction of the Hangover Ridge with
436 the Fodder Stack Ridge; thence along Big Fodder Stack Ridge to Little Fodder Stack Ridge to the point called Stiff Knee; thence along Stiff Knee Ridge to the ridge turning eastwardly towards the mouth of Slick Rock creek; thence along said ridge to the point where it reaches the Tennessee river below and near the mouth of Slick Rock creek; thence up *to* the river to the beginning.

And upon demand of complainant a writ of execution or possession will issue to put complainant in possession of said lands.

It is further adjudged that defendants pay all the costs of this cause except the compensation of Special Commissioner T. A. Wright, which is hereby fixed at the sum of 300.00 which will be divided, complainant paying one-half and defendants one-half of the same, for all of which execution will issue. On the trial of this cause, both before the Special Commissioner and the court, complainant excepted to all that part of the evidence of the witnesses, J. W. Patton, Jas. McDaniel, Jas. Whitaker, W. P. Phillips, W. P. Jones, M. L. Britton, J. H. King, H. S. Hays, Stephen Whitaker, in which it was sought to prove the declarations of others as to the location of the state line because said evidence was hearsay and for

that reason incompetent evidence, also the maps of topographical surveys by the U. S. survey because the same is not binding upon the states or parties to this cause and can not be competent evidence. The court concurs in and adopts the rulings of the Special Commissioner on these exceptions of the complainant to which action of the court the complainant excepts and the defendants except in so far as the court excludes said testimony.

By agreement of counsel all exceptions to the testimony were reserved until the hearing before the court. On the hearing the defendant excepted to the evidence of the witness, James Farr as to his understanding of the location of the state line on the Hangover Lead, on the ground that said evidence was incompetent and irrelevant because:

1st. It is not shown to be based upon general reputation, or the statements of ancient persons shown to have been familiar with the state line is clearly incompetent; and because:

2nd. It is shown on the cross-examination of the witness that the only person that he ever heard say that the state line ran along the Hangover Ridge was old man Nelson, Marion Carriger and perhaps Andy Carriger and these persons are not shown to be dead, two of them, in fact, having been shown to be living by
437 another witness, nor are they shown to have had any special acquaintance with the state line; hence proof of their statements does not constitute proof of general reputation, and it is hearsay evidence incompetent and inadmissible.

The defendants also excepted on the hearing to the statement of Emerson Debity that he understood the location of the state line to be on the Hangover lead, and to the statement of B. B. Nichols that he understood the state line to be east of Slick Rock creek, and the statement of Samuel Blair that he considered the line in dispute as lying in Tennessee, and the statement of John Debity that he understood the state line to be the Hangover, on the ground that none of these witness pretend to state the general reputation, which alone would be competent on this question, that the witnesses are mostly young men and are not shown to have any knowledge of ancient tradition, and that the particular understanding of all these witnesses at this late period is wholly incompetent, irrelevant and inadmissible.

The defendants also excepted on the hearing to the statement of the witness Boyd McMurray that James Miligan told him that the state line was on the Hangover, and that he has since that time understood that to be the state line and that Isaac Carriger told him that the Hangover was the state line and pointed to a tree near the trail and said it was on the state line and that Mr. Hoyt told him that he had located the state line on the Hangover Lead and the further evidence of this witness as to Mr. Hoyt's statements as to the marks on Slick Rock creek on the ground that said evidence is hearsay, incompetent and irrelevant not being based on general reputation and being simply the particular understanding of this witness and hearsay testimony as to statements made by persons not shown to have had any particular means of information as to the location of

the line nor to have been familiar with it and that this evidence does not come within any exceptions to the general rule excluding hearsay testimony.

The court sustained each and all the foregoing exceptions made by the defendants and excluded all the foregoing testimony by consent of parties it is further ordered that on any appeal taken by any of the parties the clerk will send up to the Court of Appeals with the transcript all the maps offered in evidence by either the complainants or defendants and also all the blocks of wood
438 and bark put in evidence by any of the parties and said maps and blocks are hereby made a part of the transcript.

Enter this.

CLARK, *Judge.*

(Endorsed:) No. 1056. In the U. S. Circuit Court at Knoxville. Charles Hebard vs. D. W. Belding, et al. Decree entered Journal "R," page 107, filed 10th day of June, 1899. J. T. Carter, deputy clerk.

In the Circuit Court of the United States, Eastern District of Tennessee, Northern Division.

CHARLES HEBARD
vs.
D. W. BELDING et al.

In this cause it is stipulated and agreed as follows:

I.

That on April 2nd, 1897, the complainant took the second deposition of T. E. H. McCroskey, and filed said deposition herein on said date, and exhibited with said original deposition the original grants, deeds, decrees, etc., or certified copies thereof, under which he claims title to what is known as the White and Bearden lands, and consisting of what is known as the "large tract," composed of various quarter-sections and fractional quarter-sections of fractional township 2, north, range 6, east of the basis line of the Ocoee Land District, and the "small tract" composed of various quarter-sections and fractional quarter-sections of fractional township 1, south, range 6, east of the basis line of the Ocoee District, covering all the lands in dispute except the lands covered by the grant from the state of Tennessee to T. E. H. and H. M. McCroskey, filed as exhibit to T. E. H. McCroskey's first deposition.

II.

That the said deposition and the said title papers were in evidence on the hearing of this cause, but said deposition has
439 been lost or mislaid since the hearing, and this stipulation shall stand in lieu thereof.

III.

That a correct abstract of the papers so exhibited with said deposition is hereto attached marked exhibit "A" to this stipulation and made a part hereof.

IV.

That the following grants and deeds exhibited as aforesaid shall be copied by the clerk in the transcript, but in making the copies, only the body of the instrument need be copied, and all certificates of acknowledgment, probate, record or certification, need not be copied:

Grants Nos. 6399 and 6419 and deeds from H. A. M. White to William Goodrich, dated July 16th, 18.., and from Helen Fleming, et al., to complainant Charles Hebard, dated June 15th, 1891.

V.

That the other grants, deeds and decrees shown in said abstract of title contain the following descriptions and recitals, to wit:

(*a*) Grant 6407 conveying sections 14 and 23 speaks of the north-east and south-east quarter-sections of section 14 as being fractional quarter-sections and also speaks of the north-west and south-west quarter-sections of section 23 as fractional quarter-sections, and gives the total acreage of sections 14 and 23 as 830 acres.

(*b*) Grant 6418 conveying a portion of section 35, speaks of the southeast quarter of said section as a fractional quarter-section.

(*c*) In deed from H. A. M. White to Marcus D. Bearden, dated Sept. 7th, 1853, No. 3 in the abstract, the land is described as "beginning at a stake at the mouth of Slick Rock creek on the bank of the Tennessee river, being the point where the state line of North Carolina and Tennessee crosses said river; thence southwestwardly with the various course- and distances of the said state line as laid down upon the map of the Ocoee District, or as agreed upon by the commissioners appointed to 'runn and sittle' said state line through the entire township of 2 north range 6 E. to a stake at the intersection of the township line between township 2 N. and 1 S. of said range line 6 E. still on the aforesaid state line," &c.

(*d*) In the deed from H. A. M. White to William Goodrich, dated April 24th, 1854, No. 7 in the abstract, the land
440 is described as "beginning at the mouth of Slick Rock creek on the Tennessee river, being the point where the boundary line between the states of North Carolina and Tennessee crosses said river; thence southwardly with the various call-, courses and distances of said state line through the section township two, north range six east to a stake," etc.

(*e*) In deed from William Nichols to William Goodrich, dated April 25th, 1854, No. 8 in abstract, the land is described as "beginning at Slick Rock creek on the Tennessee river, where the line between North Carolina and Tennessee crosses the river; thence southward with the calls and course- and distances of said state line to a stake on said state line," etc.

(*f*) The deeds from William Goodrich to Joseph L. King, dated Sept. 19th, 1853, and April 24th, 1854, Nos. 9 and 10 in the abstract, and the deed from William Goodrich and Joseph L. King to R. R. Bearden, dated May 5th, 1854, No. 12 in the abstract, contain substantially the same description, beginning at Slick Rock creek; thence with state line, etc.

(*g*) In deed from M. D. Bearden to Hugh L. McClung, dated May —, 1854, No. 13 in the abstract, the land is described as "beginning at the mouth of Slick Rock creek at a point where it has been considered that the state line between Tennessee and North Carolina crosses the Tennessee river, thence southwardly with what has been considered the state line," etc.

(*h*) In deed from H. A. M. White to Joseph L. King, dated May 24th, 1855, No. —, in the abstract, the land is described as "beginning at the mouth of Slick Rock creek on the Tennessee river, being the point where the state line between Tennessee and North Carolina crosses said river; thence southwestwardly with the various calls, courses and distances of said state line through the entire township of 2 N. Range 6 E.," etc.

(*i*) In mortgage from William Goodrich, Banker, and wife, to Henry Doolittle, Gentleman, dated July 1st, 1855, No. 15 in the abstract, the land is described as "a certain tract of land, being part of a tract of land known and designated as the Ocoee District, lying and being situated in the county of Monroe, said tract of land being bounded on the east by the state line of the state of North Carolina, and on the west by Citico creek, and comprising sections 12, 8, 9, 10, 14, 18, 17, 16, 22, 23, 24, 19, 20, 21, 22, 26, 25, 30, 29, 28, 27, 38, 36, 31, 32, 33, 25, 3, 1, 2, 6, 5, and 4 range 5 east," etc.

441 (*j*) The last description is substantially repeated in deed from Christopher L. Ward and wife to Albert Doolittle, executor, dated June 29th, 1867, No. 18 in abstract.

(*k*) The deeds from William Goodrich to Henry Doolittle, dated March 1st, 1856, and from Henry Doolittle and wife to C. L. Ward, dated March 4th, 1856, Nos. 16 and 17 in the abstract, both call for the "beginning at the mouth of Slick Rock creek at the point where the boundary line between the state of Tennessee and the state of North Carolina crosses the Tennessee river; thence with said state line," etc.

(*l*) In deed from Albert Doolittle, acting executor, to Amelia Burgess, dated May 11th, 1875, No. 19 in the abstract, the land is described as "beginning at the mouth of Slick Rock creek at the point where the boundary line between the state of Tennessee and the state of North Carolina crosses the Tennessee river; thence with said state line westwardly until it strikes the southerly line of section 13 (range 1, south) being the ninth section intersected by said line."

(*m*) Deed from S. P. Evans, C. & M., to E. T. Gratz, dated December 9th, 1887, No. 24 in the abstract, describes the lands as bounded "on the east by the North Carolina line," and refers to various deeds of H. A. M. White for more specific description. This is

one of the deeds referred to by the witness C. C. Jones in answer to questions 36 to 38.

(*n*) In deed from S. P. Evans, et al., to William Fleming, et al., dated Sept. 10th, 1885, No. 26 in the abstract, the land is described as "beginning at the mouth of Slick Rock creek on the Tennessee river, being the point where the boundary line between Tennessee and North Carolina crosses said river; thence southwestwardly with the various calls, courses and distances of said state line between North Carolina and Tennessee, as laid down on the map of the Ocoee District, through the entire township or fractional township No. 2 N., range 6 E. of the meridian Ocoee District, to a stake in the state line," etc.

(*o*) In deed from L. A. Gratz and wife to William Fleming, et al., dated October 13th, 1885, No. 27 in the abstract, the land is described as "beginning at the mouth of Slick Rock creek, where the Tennessee river crosses the line between Tennessee and North Carolina; thence up said creek with the North Carolina line and the east boundary of fractional township 2 N. range 6 E. Ocoee District, and to the southeast corner of said fractional township on the state line," etc.

422 (*p*) In deed from A. P. White to William Fleming, et al., dated November 18th, 1885, No. 28 in abstract, the land is described as "beginning at the mouth of Slick Rock creek, where the Tennessee river crosses the line between North Carolina and Tennessee; running thence up said creek with the North Carolina line and the east boundary of fractional township 2 N. range 6 E. Ocoee District and to the south-east corner of said fractional township on the state line," etc.

(*q*) Substantially the same description as the last issued in deed from William Goodrich, et al., to William Fleming, et al., dated November 2nd, 1885, and deed from T. S. Webb to William Fleming, et al., dated November 18th, 1885, Nos. 29 and 30 in the abstract, the description in each case beginning at the mouth of Slick Rock creek and running up the creek with the North Carolina line and the eastern boundary of fractional township 2 N.

(*r*) In deed from A. B. McCorkle, et al., to William Fleming, et al., dated August 20th, 1886, No. 31 in the abstract, the eastern boundary of the land is described as "the North Carolina State line." This is one of the deeds referred to by the witness C. C. Jones in answer to questions 36 to 38.

(*s*) In the deed from Helen F. Fleming, and others, to the complainant Charles Hebard, dated June 15, 1891, No. 33 in the abstract, the land is described as "beginning at the mouth of Slick Rock Creek on the Little Tennessee river; thence up said creek with what is commonly called the state line between Tennessee and North Carolina, to where the said state line leaves the creek; thence continuing with said state line and the east boundary of fractional township 2 N. range 6 E. of the meridian line, Ocoee District, as shown on the official map in the land office at Cleveland, Tennessee, to the east corner of said fractional township," etc.

(*t*) In deed from Amelia Burgess, et al., to complainant, Charles Hebard, dated July 9th, 1891, No. 34 in the abstract, the land is described as "beginning at the mouth of Slick Rock creek on the Little Tennessee river, thence up said creek with what is commonly called the state line between Tennessee and North Carolina to where the state line leaves the creek, thence continuing with the state line and the east boundary of fractional township 2 N. range 6 E. of the meridian line, Ocoee District, as shown on the official map in the land office at Cleveland, Tennessee, to the southeast corner of said fractional township," etc.

(*u*) In the decree of the chancery court in the case of
443 Charles Hebard vs. R. P. Cline, dated June 6th, 1892, No. 36 in the abstract, these lands are again described as bounded on the east by the North Carolina line.

(*v*) In deed from Vastine Stickley, C. & M. to Charles Hebard, dated January 16th, 1892, No. 37 in the abstract, specific reference is made for description to the deed of Helen Fleming, et al., to Charles Hebard, and the eastern boundary of the land is again declared to be the North Carolina state line.

VI.

That all the other deeds shown in said abstract need not be copied by the clerk in the transcript, but that said abstract, with the foregoing stipulation as to the descriptions and recitals therein, shall stand in lieu of and have the same effect as said original deeds.

VII.

That the defendants offered in evidence on the hearing grant No. 2336 from the state of North Carolina to L. W. Gilbert and William H. Peet, with plat and certificate of survey attached, filed as exhibit "H" to the deposition of H. S. Hayes, and say whatever title, if any, vested in said grantees under said grant, to the land in dispute, has been transferred to the defendants by reason of the various mesne conveyances exhibited with the deposition of D. W. Belding and referred to therein. The deed from W. A. Bartlett, adm'r of William H. Peet, deceased, dated December 31st, 1881, which is filed as exhibit No. 3 to the deposition of D. W. Belding in this case conveys to D. W. Belding, J. W. Cooper, Henry Stix, Nathan Stix, Louis Krohn, Henry Lewis, and D. W. Strickland for a valuable consideration among other tracts of land, the tract described in the aforesaid grant, by the same description as that contained in the grant, said deed having been recorded in the register's office of Cherokee county, North Carolina, on January 11th, 1882, and in Graham county, North Carolina, on February 11th, 1882. Said original grant, with certificate and plat of survey, shall be copied in the transcript of the record by the clerk, but the other intermediate conveyances from the grantees to the defendants, exhibited with the deposi-ion of D. W. Belding and therein referred to, need not be copied by the clerk, this stipulation being in lieu thereof.

444 Witness the hands of the parties, by their solicitors, this the 4 day of November, 1899.

CHARLES HEBARD,
By T. S. WEBB, *Solicitor.*
D. W. BELDING,
M. M. BELDING,
A. N. BELDING,
HENRY STIX,
NATHAN STIX,
LOUIS KROHN,
D. W. HYMAN,
MARY BRAGG,
R. N. ARCHER,
By LUCKY, SANFORD & TYSON,
Solicitors.

Endorsed: Stipulation. Filed Nov. 4, 1899. J. T. Carter, deputy clerk.

EXHIBIT "A" TO STIPULATION.

Abstract of Titles of White and Bearden Lands, Monroe County, Tenn., Owned by Chas. Hebard.

Grants Nos. 6412, 6414, and 6416.

State of Tennessee to H. A. M. White.

Fractional Township, 2 North Range, 6 East of the Basin Line Ocoee Land District.

Grant No. 4618 for S. W. Qr. & S. E. Fr. Qr. Sec. 35.
Grant No. 6398 for covering all of Secs. 2 and 11.
Grant No. 6399 for covering all of Fr. Secs. 1 and 12.
Grant No. 6400 for covering all of Secs. 9 and 10.
Grant No. 6404 for covering all of Secs. 27-28-29.
Grant No. 6405 for covering all of Secs. 15 and 22.
Grant No. 6407 for covering all of Fr. Secs. 14 and 23.
Grant No. 6419 for covering N. W. & S. Fr. Qrs. of 26, the N. E. & S. W. Qr. of 33; the N. E. and N. W. Qrs. of 34, and the N. W. F. & Qr. of 35 Sec.

Grant No. 4618, dated March 15th, 1842.
All the others dated May 15th, 1844.

445

Small Tract.

Deed Dated April 30th, 1853.

Hu. A. M. White to M. D. Bearden.

Registered in Register's office of Monroe county, Tennessee, in Book "O," page 554.

Conveys by deed absolute sections and fractional sections 1, 2, 3, 10, 11, 12 and 13, in Fractional Township 1, South Range 6, East, Ocoee District.

Large Tract.

Deed Dated July 16th, 1853.

Hu. A. M. White to William Goodrich.

1–4.

Registered in Register's office for Monroe county, Tennessee, in Book "O," page 572, on August 11th, 1853.

Reciting that grants were issued to said White, but in fact belonging to him, Wm. Swann, Wm. Nichols and M. D. Bearden in equal moieties; and by written request Nichols had directed White to make a deed to Wm. Goodrich for an undivided fourth, and he so makes a deed to Goodrich to following lands: Beginning at mouth of Slick Rock creek; thence up the creek and with the North Carolina line to the small tract above described, and after the small tract is carved out, completing the description of the entire boundary and giving numbers of grants.

Large Tract.

Deed Dated September 7th, 1853.

Hu. A. M. White to M. D. Bearden.

1–4.

Registered in Register's office for Monroe county, Tenn., in Book "P," 27, on March 15th, 1854.

446 Conveying an undivided fourth in the large tract, but does not include the small tract.

Small Tract.

Deed Dated April 29th, 1854.

M. D. Bearden to Hu. A. M. White.

Registered in Register's office for Monroe county, Tennessee, in Book "P," page 59.

Reconveys to White the small tract.

Small Tract.

Deed Dated May 1st, 1854.

Hu. A. M. White to M. D. Bearden.

1–4.

Registered in Register's office for Monroe county, Tennessee, in Book "P," page 60.

Conveys one-fourth interest in small tract.

Small Tract.

Deed Dated May 1st, 1854.

Hu. A. M. White to Wm. Goodrich.

1–4.

Registered in Register's office for Monroe county, Tennessee, in Book "P," page 61.

Conveys one-fourth in small tract.

447

Large Tract.

Deed Dated April 24, 1854.

Hu. A. M. White to Wm. Goodrich.

1–4.

Registered in Register's office for Monroe county, Tennessee, in Book "P," page 62, on July 25, 1854.

Conveys to Wm. Goodrich the one-fourth interest of William Swan in large tract.

Both Tracts.

Deed Dated April 25th, 1854.

Wm. Nichols to Wm. Goodrich.

1–4.

Registered in Register's office for Monroe county, Tennessee, in Book "P," page 64.

Conveys all of his equitable interest in both large and small tracts. Also authorizing White to make a deed, and ratifying any deed that White had already made.

Both Tracts.

Deed Dated Sept. 19th, 1853.

Wm. Goodrich to J. L. King.

1–8.

Registered in Register's office for Monroe county, Tennessee, in Book "P," page 65.

Conveys an undivided one-eighth in both the large and small tracts.

448

Large Tracts.

Deed Dated April 24, 1854.

Wm. Goodrich to J. L. King.

1–8.

Registered in Register's office for Monroe county, Tennessee, in Book "P," page 68.

Conveys one-eighth in large tract only, and being one-half of the one-fourth conveyed to him on April 24th, 1854.

Dated April 24th, 1854.

Wm. Goodrich, by Power of Attorney, to M. D. Bearden and J. L. King.

Registered in the Register's office for Monroe county, Tennessee, in Book "P," page 71.

Reciting that the parties are desirous of developing the mineral lands, and authorizing King and Bearden to lease, rent or sell all or any part of said lands, &c.

Large Tract.

Deed Dated May 5th, 1854.

J. L. King, for Himself and as Attorney for Wm. Goodrich, to R. R. Bearden.

1–16.

Registered in Register's office for Monroe county, Tennessee, in Book "P," page 69.

Conveys to R. R. Bearden for a consideration of $1,200.00 an undivided 1-32, each for King and Goodrich, making in all an undivided 1-16 in the large tract, which does not include the small tract.

449

Both Tracts.

Deed dated May —, 1854.

M. D. Bearden to Hu. L. McClung.

1–16.

Registered in Register's office for Monroe county, Tennessee, in Book "P," page 72.

Conveys one-fourth interest, or rather one-fourth of his interest, and recites that his interest is one-fourth of both the large and small tracts, being 1-16 in both tracts.

Both Tracts.

Deed dated Feb. 24, 1855.

Hu. A. M. White to J. L. King.

1–4.

Registered in Register's office for Monroe county, Tennessee, in Book "P," page 183.

Conveys an undivided one-fourth in both tracts.

Both Tracts.

Dated July 1st, 1855.

Mortgage. Wm. Goodrich and wife, to Henry Doolittle.

5.1/2/16. Should be 7–32.

Registered in Register's office for Monroe county, Tennessee, in Book "P," page 187.

Conveys by mortgage 5.1/2/16 in 30,000 acres, giving a general description of the land, and including the entire boundary. Goodrich at this time had title to 7-32 only.

450

Deed Dated March 1st, 1856.

Wm. Goodrich to Henry Doolittle.

5.1/2/16. Should be 7–32.

Registered in Register's office for Monroe county, Tennessee, in Book "P," page 633.

Conveys by deed 5.1/2/16 or 11-32 of all the lands claimed by Goodrich, but describes the large tract only. Yet recites all the grants issued for both tracts.

Both Tracts.

Deed Dated March 4th, 1856.

Henry Doolittle, to C. L. Ward.

5.1/2/16. Should be 7-32.

Registered in Register's office of Monroe county, Tennessee, in Book "Q," pages 4 and 5.

Conveys 5.1/2/16 in same land and same descriptions as that from Goodrich to Doolitle.

Both Tracts.

Deed Dated June 29th, 1867.

C. L. Ward, to A. Doolittle, Ex. of Henry Doolittle.

5.1/2/16. Should be 7-32.

Registered in Register's office for Monroe county, Tennessee, in Book "S," pages 93-4.
Conveys 5.1/2/16 and same description.

451 Both Tracts.

Deed Dated May 11th, 1875.

Albert Doolittle, Ex., to Amelia Burgess.

5.1/2/16. Should be 7-32.

Registered in Register's office for Monroe county, Tennessee, in Book "T," page 183.
Conveys same 5.1/2/16 as above.

Both Tracts.

Deed Dated April 6th, 1882.

J. L. King, to S. P. Evans and J. M. King.

15-32.

Registered in Register's office for Monroe county, Tennessee, in Book "V," page 115.
Conveys all his interest in both the large and the small tract, being 15-32 by a quit-claim deed, giving number of grants, &c.

Both Tracts.

Deed Dated April 14th, 1882.

Hu. L. McClung, to T. S. Webb & Hu. L. McClung, Jr.

2-32.

Registered in Register's office for Monroe county, Tennessee, in Book "V," page 117.
Conveys 2-32 in both large and small tracts.

452

Both Tracts.

Deed Dated June 16th, 1882.

Hu. L. McClung, Jr., to Wm. Caswell and A. P. White.

1–32.

Registered in Register's office for Monroe county, Tennessee, in Book "X," page 363, &c., on December 19th, 1887.
Conveys an undivided 1-32 in entire tract.

Entire Tract.

Deed Dated November 14th, 1883.

Wm. Caswell and wife, to R. P. Cline and A. R. McCorkle.

1–64.

Registered in Register's office for Monroe county, Tennessee, in Book "V," pages 476-7 on November 15, 1883.
Conveys an undivided 1-64 in entire tract.

Entire Tract.

Deed Dated December 9th, 1887.

S. P. Evans, C. & M., to E. T. Gratz.

3-16.

Registered in Register's office for Monroe County, Tenn., in Book "X," pages 367-8, on December 22, 1887.
D. M. Bearden had died, and his interest in above land being 3-16, was sold by the court and bought by E. T. Gratz. Said deed by the C. & M. conveys 3-16 in entire tract.

453

Both Tracts.

Deed Dated July 12th, 1882.

R. R. Bearden, to Sarah Goodrich.

1–16.

Registered in Register's office for Monroe County, Tennessee in Book "V," page 188, July 24th, 1882.
The heirs of R. R. Bearden, dec'd, recite that their father during his life-time sold his 1-16 to Mrs. Sarah Goodrich, but failed to make a deed, and they convey to her the 1-16 interest of R. R. Bearden in large tract.

Entire Tract.

Deed Dated Sept. 10th, 1885.

J. M. King and S. P. Evans, to Wm. Fleming et al.

15-32.

Registered in Register's office for Monroe county, Tennessee, in Book "W," page 388-90, on Oct. 9th, 1885.
Conveys an undivided 15-32 in entire tract.

Entire Tract.

Deed Dated October 13, 1885.

L. A. Gratz and wife, to Wm. Fleming et al.

3–16.

Registered in Register's office for Monroe county, Tennessee, in Book "W," page 392, &c., on November 11th, 1885.
Conveys an undivided 3-16 in entire tract.

454

Entire Tract.

Deed Dated November 18th, 1885.

A. P. White, to Wm. Fleming et al.

1–64.

Registered in Register's office for Monroe county, Tennessee, in Book "W," page 491 &c., on December 23d, 1885.
Conveys an undivided 1-64 in entire tract.

Entire Tract.

Deed Dated Nov. 2, 1885.

Sarah Goodrich's heirs, to Wm. Fleming et al.

1–16.

Registered in Register's office for Monroe county, Tennessee, in Book "W," page 433-6, on January 18th, 1886.
Conveys an undivided 1-16 in entire tract.

Entire Tract.

Deed Dated Nov. 18th, 1885.

T. S. Webb, to Wm. Fleming et al.

1–32.

Registered in Register's office for Monroe county, Tennessee, in Book "W," page 416-18, on December 23, 1885.
Conveys 1-32 interest in above lands.

455 Entire Tract.

Deed Dated August 20th, 1886.

McCorkle and Cline, to Wm. Fleming, et al.

1–64.

Registered in Register's office for Monroe county, Tennessee, in Book "W," page 578-9.
Conveys an undivided 1-64 in entire tract.

Entire Tract.

Deed Dated June 15, 1891.

J. H. Simonson and John Rhinesmith, to Charles Hebard.

16.2–3–32.

Registered in Register's office for Monroe county, Tennessee, in Book "Z," page 162, &c., on July -st, 1891.
Conveys 16.2-3-32 undivided interest in entire tract.

Entire Tract.

Deed Dated June 15, 1891.

Heirs of Wm. Fleming, Dec'd, to Charles Hebard.

8.1–3–32.

Registered in Register's office for Monroe county, Tennessee, in Book "Z," page 157, &c., on July 1st, 1891.
Conveys an undivided 8.1-3-32 in entire tract.

456 Entire Tract.

Deed Dated July 9, 1891.

Amelia Burgess and Husband, to Charles Hebard.

7–32.

Registered in Register's office for Monroe county, Tennessee, in Book "Z," page 189, &c., on July 30th, 1891.
Conveys 7-32 in entire tract.

WM. FLEMING et al.
vs.
AMELIA BURGESS et al.

In a suit for partition in the Chancery Court, Monroe County, Tennessee, the court decreed that Wm. Fleming, et al., had title to

25-32, except 1-28 interest of R. P. Cline where acknowledgment of deed was defective; and that Amelia Burgess had title of 7-32 interest in the entire tract. (See decree of the Chancery Court Dec'r. Term, 1891.)

CHARLES HEBARD
vs.
R. P. CLINE.

After Charles Hebard bought 25-32 from Fleming heirs and Rhinesmith and Simonson, including the 1-28 interest of R. P. Cline, he filed a bill in the Chancery Court of Monroe County, Tennessee, to have the title from Cline to Fleming, Rhinesmith and Simonson perfected, which was done by final decree at June term, 1892, and the same registered in the Register's office, Monroe County, Tennessee, in Book "Z," page 518, &c., on June 18th, 1892.

457 Clerk and Master's Deed, Dated January 16th, 1892.

Vastine Stickley, C. & M., to Charles Hebard.

Registered in Register's office for Monroe county, Tennessee, in Book "Z," page 375, &c., on January 16th, 1892.

Conveys all interest that minor heirs of William Fleming have in said land, the same being done under decree of the court.

This, November 5th, 1896.

McCROSKEY & McCROSKEY,
Att'ys for Charles Hebard.

(Endorsed on back:) Abstract of title for Charles Hebard. Charles Hebard vs. D. W. Belding, et al.

This indenture made this 16th day of July, 1853, between H. A. M. White, Knoxville, Tennessee, of the first part, and Wm. Goodrich, of Philadelphia, Pennsylvania, of the second part, witnesseth;

That, whereas, certain lands lying in the Ocoee District of Tennessee which are hereinafter more fully and particularly described *more* in fact the joint and common property of William Swan, M. D. Bearden, Wm. Nichol and said H. A. M. White, yet the legal title to said land was vested in said H. A. M. White alone by certain grants which issued from the State of Tennessee, which said grants are hereinafter numbered and described; and

Whereas, also, the said Goodrich has become the purchaser of the interest of said Nichol in said lands, and the said William Nichol hath moreover in writing under his hand and seal directed and requested said White to transfer and convey his said Nichol's interest in said lands to the said Goodrich;

Now, therefore, and in consideration of the reasons above stated, and for the further considerations of the sum of one dollar paid by the said Goodrich to the said White the receipt of which is hereby

acknowledged, the said White hath and by these presents doth bargain, sell, convey and confirm to the said Wm. Goodrich, his heirs and assigns forever all his right, title, interest and claim in and to one-fourth part of the following described land, viz.:
458 lying and being in the Ocoee District in the State of Tennessee and beginning at a stake at the mouth of Slick Rock Creek, on the Tennessee River being the point where the boundary line between the state of North Carolina and Tennessee crosses said River; thence southwesterly with the various — and distances of said state line as laid down upon the map of the Ocoee District through entire township of Two North, Range Six East to a stake at the intersection of the Township line between Township two North and South of said Range six East with the said state line; thence westwardly along the said township dividing two north and one south, and along the northern line of sections one, two and three of said township one south to a stake, at the northwest corner of section three and northeast corner of section four, in said township; thence southwardly along the section line between sections three and four, and sections ten and nine of said township, to a stake at the northeast corner of section sixteen; thence eastwardly along the sectional line dividing sections ten and fifteen and sections eleven and fourteen to a stake at the northeast corner of section fourteen and northwest corner of fractional section thirteen of said township; thence southwardly along the dividing line between said section thirteen and fourteen to the southwest corner of said section thirteen and southeast corner of said section fourteen to a stake on the state line; thence westwardly along the southern line of sections fourteen and fifteen to the southeast corner of section sixteen of said township; thence northwardly with the east line of said section sixteen to a stake southeast corner of section nine; thence west with the line dividing said sections nine and sixteen and sections eight and seventeen of said township to a stake southeast corner of section seven; thence northwardly along the line dividing said section seven and eight to a stake southeast corner of section six; thence westwardly along the line dividing said section six and seven passing the southwest corner of section six, and crossing the range line; thence along the line dividing sections one and twelve and sections two and eleven of fractional township two north, range five east to a stake at the intersection of said sectional line with the line dividing the Hiwassee and Ocoee Districts; thence northwestwardly with the various calls courses and distances of said dividing districts line passing the Goodfields and continuing the said Hiwassee and Ocoee line to a stake at the intersection of said line with the sectional line dividing sections one and twelve of fractional township one north range five east; thence eastwardly along the sectional line dividing said sections one and twelve and passing into range six east fractional township two north and with and along the divid-
459 ing line between sections six and seven, five and eight, four and nine, three and ten, of said last mentioned township to a stake the southeast corner of section three; thence northwardly along the dividing line between section two and three to the township

line and stake at the northeast corner of said section three; thence eastwardly with the northern line of sections two and one of said township and along said township line to the beginning, which the said *treaty* of land were granted to the said H. A. M. White by the State of Tennessee by Grants No-. 4607, 4608, 4609, 4610, 4611, 4612, 4613, 4614, 4615, 4616, 4617, 4618, bearing date*d* the 15th day of March, 1842, and by Grant No. 5096, bearing date*d* June 24th, 1842, and by Grants No. 6398, 6399, 6400, 6401, 6402, 6403, 6404, 6405, 6406, 6407, 6408, 6409, 6410, 6411, 6412, 6413, 6414, 6415, 6416, 6417, 6418, 6419, bearing date May 15th, 1844, yet sections one, two, three, ten, eleven, twelve and fractional sections thirteen and fourteen in fractional township one south, range six, east, which are covered by said grants, but are excluded in the above boundaries and sections sixteen in fractional township two north range six east included in the above boundaries and not covered by said grants, are now specially excepted as well as any other valid entries granted by the state within said boundaries and in no wise conveyed by this instrument; to have and to hold said undivided fourth part of said lands together with the waters, water courses, mines, minerals, metals, hereditaments and appurtenances thereunto belonging from the said White, his heirs, etc., to the said Goodrich, his heirs and assigns forever. And the said White, his heirs and — the title of the said Goodrich in and to the above described lands containing by estimation sixty thousand acres, be the same more or less will forever warrant and defend to the said Goodrich, his heirs and assigns from all persons claiming or pretending to claim by or through or under the said White.

In testimony whereof the said H. A. M. White hath hereunto set his hand and seal the day and date first above written.

H. A. M. WHITE. [SEAL.]

Signed, sealed and delivered in presence of;
J. J. CRAIG.
H. BAMY.

460 STATE OF TENNESSEE,
Knox County:

Personally appeared — me George W. C. Cox, Clerk of the County Court of Knox County, H. A. M. White, the within named bargainor, with whom I am personally acquainted, and who acknowledged that he executed the within deed for the purposes therein contained.

Witness my hand at office in Knoxville, this 10th day of August, 1853.

GEORGE W. C. COX, *Clerk.*

Rec'd for Registration at 7 p. m., August 11th, 1853.

STATE OF TENNESSEE,
County of Monroe:

I hereby certify that the foregoing is a true and perfect copy of a deed which is of record in deed book O, pages 572, '3 and '4.
Given under my hand at office in Madisonville on this the 10th day of October, 1887.

D. H. QAINES, *Register.*

Endorsed: No. 3; Copy of deed, H. A. M. White, to Wm. Goodrich. Wm. Fleming, et al. vs. Amelia Burgess; Filed Dec. 8, 1887. Vastine Strickley, C. & M. Register's Fee, $1.25.

Ex. "C."

Filed Oct. 1, 1897.

Grant No. 6399.

Recorded the 10th Day of February, 1845.

No. 6399.

THE STATE
vs.
H. A. WHITE.

THE STATE OF TENNESSEE:

To all to whom these present shall come, Greeting:

Know ye, that in consideration of 8 entries, made in the Entry Taker's Office of the Ocoee District of Numbers 8777, '78, '79, '80 '87, '91, '92, '93, '94, dated the 8th day of May, 1844, by H. A. M. White as general enterer.

There is granted by the said State of Tennessee to the said H. A. M. White and his heirs, a certain tract or parcel of land, containing seven hundred and ninety-nine acres, lying in the County of ——, in the said District, situate in the 6th range, east of the basis line, second fractional township, north and 1st and 12th sections, being
the southwest, northwest, northeast fractional and the south-
461 east fractional quarters of the 1st section and the northwest, northeast fractional southeast fractional and the southwest fractional quarters of the 12th section beginning at the northwest corner of said first mentioned quarter.

With its appurtenances. To have and to hold the said tract or parcel of land, with its appurtenances to the said H. A. M. White and his heirs forever.

In witness whereof, James C. Jones, Governor of the State of Tennessee hath hereunto set his hand, and caused the great seal of the

state to be affixed at Nashville, on the 15th day of May, in the year of our Lord, 1844 and of American independence the sixty-eighth.

By the Governor.

[SEAL OF STATE.] JAMES C. JONES.

JOHN S. YOUNG, *Secretary.*

H. A. M. White hath title to the above described land.

J. C. TIPTON,
Register of Ocoee District.

I, A. J. White, Register of the Ocoee District, hereby certify that the foregoing is a full, true and perfect copy of grant number 6399 from the State of Tennessee to H. A. M. White, as appears of record in my office in Book "K" at page 279.

Witness my hand this 22d day of June, A. D. 1892.

A. J. WHITE,
Entry Taker and Register of the Ocoee District.

(Endorsed on beak:) State of Tennessee, Monroe County: "I hereby certify that the foregoing instrument and Register's certificate were received for registration and noted in note book "B," page 131, at 3 p. m., July 7th, 1892, and registered in my office in book "Z," page 551. J. M. Henderson, Register.

No. 6419.

Recorded 10th Day of February, 1845.

STATE OF TENNESSEE:

To all to whom these presents shall come, Greeting:

Know ye, that in consideration of seven entries made in the entry taker's office of the Ocoee District of numbers 5304-05-06-08-462 09-12 & '13, dated the fifth day of April, 1842, by H. A. M. White as general enteror. There is granted by the said state of Tennessee to the said H. A. M. White, and his heirs, a certain tract or parcel of land, containing eight hundred and ninety-two acres lying in the county of ——, in the said district, situate in the sixth range, east of the basis line, second fractional township north and 26th 33d, 34th, and 35th sections, being the northwest and southwest fractional quarters of 26th section northeast and southwest quarters of 33d section, the northeast and northwest quarters of the 34th section and the northwest fractional quarter of the 35th section, beginning at the northwest corner of said first mentioned quarter.

With its appurtenances. To have and to hold the said tract or parcel of land, with its appurtenances, to the said H. A. M. White and his heirs forever.

In witness whereof, James C. Jones, governor of the state of Tennessee, hath hereunto set his hand, and caused the great seal of the

state to be affixed at Nashville, on the 15th day of May in the year of our Lord, 1844, and of American independence the sixty-eighth.

By the Governor.

[SEAL OF STATE.] JAMES C. JONES.

JOHN S. YOUNG, *Secretary.*

H. A. M. White hath title to the above described land.

J. C. TIPTON,
Register of the Ocoee District.

I, A. J. White, Register of the Ocoee District, hereby certify that the foregoing is a full, true and perfect copy of grant number 6419 from the State of Tennessee, to H. A. M. White, as appears of record in my office, in book K, at page 299.

Witness my hand this 24th day of June, 1892.

A. J. WHITE,
Entry Taker and Register of the Ocoee District.

STATE OF TENNESSEE,
Monroe County:

I hereby certify that the foregoing instrument and Register's certificate were received for registration and noted in note Book B, page 131, at 4 p. m. July 11th, 1892, and registered in my office in Book "Z," page 571.

J. M. HENDERSON, *Register.*

Endorsed: Grant No. 6419. The State to H. A. M. White. Ex. H. Filed Oct. 1, 1897. J. T. Carter, Deputy Clerk.

463 In the Circuit Court of the United States for the Eastern District of Tennessee, Northern Division.

In Equity. No. 1065.

CHARLES HEBARD
vs.
D. W. BELDING, M. M. BELDING, A. N. BELDING, HENRY STIX, Nathan Stix, Lewis Krohn, D. M. Hyman, Mary Bragg, R. L. Cooper, J. W. Cooper, and R. N. Archer.

Assignment of Errors.

And now on the 8th day of September, 1899, came the defendants, D. W. Belding, M. M. Belding, A. N. Belding, Henry Stix, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg, and R. N. Archer, by E. P. McQueen and Edward T. Sanford, their solicitors, and say that the decree made and entered in this cause on the 10th day of June, 1899, is erroneous and against the just rights of said defendants for the following reasons:

First. Because the evidence showed that the several exceptions filed by the said defendants to the report and supplemental report of the Special Commissioner T. A. Wright, as to the location of the state line between North Carolina and Tennessee, were well taken, and said exceptions should have been in all things allowed, and the court erred in disallowing and overruling said exceptions and in confirming said reports.

Second. Because the evidence showed that the state line between the states of Tennessee and North Carolina as run and located by the Commissioners of said states in 1821, is not as found by the Special Commissioner T. A. Wright, and as set forth in said decree, but that said line, as run and located by said commissioners, crosses the Little Tennessee River at the mouth of Slick Rock Creek and runs thence up the creek five miles and sixty-three poles to the foot of the spur leading from the creek to the Big Fodder Stack, and up this spur to the Big Fodder Stack and thence with the main top of the Fodder Stack lead to its junction with the Hangover, in all, ten miles and 228 poles as shown on the map exhibit No. 1 to the deposition of H. S. Hayes in this cause, and the court should have adjudged and decreed the location of the said state line accordingly and erred in adjudging and decreeing that it was run and located as found by the Special Commissioner.

464 Third. Because the evidence showed that none of the lands lying east and southeast of the true location of the said state line as set forth in the aforesaid second assignment of error, are in the state of Tennessee, and that all the said lands are in the state of North Carolina, and the court should have adjudged and decreed accordingly, and erred in adjudging and decreeing that said lands are in the state of Tennessee.

Fourth. Because the evidence showed that the lands in dispute in this cause are not within the lines and boundaries of the state of Tennessee, and are within the lines and boundaries of the state of North Carolina, and the court should have adjudged and decreed accordingly and erred in adjudging and decreeing that said lands are in the state of Tennessee.

Fifth. Because the evidence showed that the title of complainant to the lands in dispute is void, and the titles of the defendants thereto are valid, and that the defendants have established a defense to the complainant's suit, both by adverse possession and by having superior titles to said lands independently of adverse possession, and the court should have adjudged and decreed accordingly, and erred in adjudging and decreeing that the complainant's titles thereto are valid and the defendants' titles void, and that the defendants have established no defense to complainant's suit, by adverse possession, or otherwise.

Sixth. Because the evidence showed that the lands in Slick Rock Creek basin, described and set forth in the decree, as to which recovery was adjudged in said decree in favor of the complainant, are held by the said defendants by a good and valid title superior to any claims of the complainant, and the court should have adjudged and decreed accordingly, and erred in adjudging and decreeing that the

complainant have and recover said lands of the defendants; and in awarding complainant a writ of execution or possession therefor, and in adjudging all the costs of this cause against the defendants, except one-half of the compensation of the special commissioner.

Seventh. Because the court erred in concurring in and adopting the ruling of the special commissioner in excluding the testimony of the witness C. C. Jones, as to why the surveyors of the Ocoee District stopped at Slick Rock Creek, the full substance of the evidence so excluded being that the said witness was acquainted with Thomas Hensley, now deceased, and that the said Hensley said that he know the parties who ran the east line of the Ocoee District, and was with the party some of the time, that they went to the mouth of Slick Rock Creek and stopped at the mouth of Slick Rock Creek, and stopped there because it was the state line, and surveyed Slick
465 Rock Cre[illegible] as the eastern line of the Ocoee District, because it was the state line.

Eighth. Because the court erred in concurring in and adopting the ruling of the special commissioner in only holding the testimony of the witness J. W. Patton, as to the statements of one Thomas Tatham as to how the line was run, competent in so far as they showed the general reputation of the location of the state line at the time they were made, and in not holding said testimony competent for all purposes and for the specific purpose of proving the statement as to the location of the state line made by a member of the commissioner's party who ran and located the same, the full substance of the evidence of said witness on this point being that the said Thomas Tatham, in giving said witness a history of his life, stated that he was a member of the party with the commissioners who ran the state line in 1821, and also stated to said witness on that occasion, about forty years ago, that they crossed the Little Tennessee River and marked a large pine that stood near the bank of the river and near the mouth of the creek, at 60 or 65 miles from the beginning, then ran up Slick Rock Creek on the west side of the fork of the creek, crossing the west fork of the creek to the ridge that ran down into the fork of the creek and ran up the ridge to the divide that ran up to the Big Fodder Stack, over the Fodder Stack and on the main divide.

Ninth. Because the court erred in holding the complainant's title to the lands in dispute to be superior to that of the defendants and in adjudging a recovery therefor in favor of complainant and in failing to dismiss the complainant's bill at his cost.

Wherefore, the said defendants pray that the said order and decree be reversed and that the said court may be directed to enter a decree in favor of the defendants and dismissing the complainant's bill, and adjudging all the costs of the cause against him.

E. P. McQUEEN,
EDWARD T. SANFORD,
Solicitors for said Defendants.

(**Endorsed**:) No. 1056. Charles Hebard vs. D. W. Belding et al. Assignment of errors. Filed Sept. 8, 1899. J. T. Carter, Deputy **Clerk.**

466 Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

No. 1056.

CHARLES HEBARD
vs.
D. W. BELDING et al.

Know all men by these presents, that we, D. W. Belding, M. M. Belding, A. N. Belding, Henry Stix, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg and R. N. Archer as principal and Edward T. Sanford, and C. S. Lucky, as sureties are held and firmly bound unto Charles Hebard in the penal sum of two hundred and fifty (250) dollars to be paid to the said Charles Hebard, his heirs and assigns; for which payment well and truly to be made, we bind ourselves, and each of us, and each and every of our several heirs, executors and administrators, jointly and severally, firmly by these presents,

Witness our hands and seals on this — day of September, 1899.

Whereas the above named D. W. Belding, M. M. Belding, A. N. Belding, Henry Stix, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg and R. N. Archer have prosecuted an appeal to the United States Circuit Court of Appeals for the Sixth Circuit to be holden at Cincinnati, in the state of Ohio, to reverse the decree rendered in the above entitled suit in said court, by the judge of the District Court of the United States for the Eastern District of Tennessee, Northern Division, holding the Circuit Court therein.

Now, therefore, the condition of this obligation is such that if the above named D. W. Belding, M. M. Belding, A. N. Belding, Henry Stix, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg and R. N. Archer shall prosecute said appeal to effect, and answer all damages and costs, if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

D. W. BELDING, [SEAL.]
By EDWARD T. SANFORD, *Sol.*
M. M. BELDING, [SEAL.]
By EDWARD T. SANFORD, *Sol.*
A. N. BELDING, [SEAL.]
By EDWARD T. SANFORD, *Sol.*
HENRY STIX, [SEAL.]
By EDWARD T. SANFORD, *Sol.*

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NATHAN STIX, [SEAL.]
By EDWARD T. SANFORD, *Sol.*
LOUIS KROHN, [SEAL.]
By EDWARD T. SANFORD, *Sol.*
D. W. HYMAN, [SEAL.]
By EDWARD T. SANFORD, *Sol.*
MARY BRAGG, [SEAL.]
By EDWARD T. SANFORD, *Sol.*
R. N. ARCHER, [SEAL.]
By EDWARD T. SANFORD, *Sol.*
EDWARD T. SANFORD. [SEAL.]
C. E. LUCKY. [SEAL.]

Approved: C. D. CLARK.

(Endorsed:) No. 1056. In the U. S. Circuit Court at Knoxville. Charles Hebard against D. W. Belding, et al. Appeal Bond. Filed Sept. 8, 1899. J. T. Carter, Deputy Clerk.

In the Circuit Court of the United States for the Eastern District of Tennessee, Northern Division.

In Equity. No. 1056.

CHARLES HEBARD
vs.
D. W. BELDING, M. M. BELDING, A. N. BELDING, HENRY STIX, Nathan Stix, Lewis Krohn, D. W. Hyman, Mary Bragg, R. L. Cooper, J. W. Cooper, and R. N. Archer.

The above named defendants, D. W. Belding, M. M. Belding, A. N. Belding, Henry Stix, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg and R. N. Archer conceiving themselves aggrieved by the order and decree made and entered on the 10th day of June, 1899, in the above entitled cause do hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Sixth Circuit for the reasons specified in the assignment of errors which is filed herewith and they pray that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated may
468 be sent to the United States Circuit Court of Appeals for the Sixth Circuit.

Dated Sept. 8th, 1899.

E. P. McQUEEN,
EDWARD T. SANFORD,
Sols. for said Defendants.

The foregoing claim of appeal is allowed, dated Sept. 9, 1899.
C. D. CLARK, *Judge.*

(Endorsed:) No. 1056. In the U. S. Circuit Court at Knoxville. Charles Hebard against D. W. Belding, et al. Order granting an appeal filed Sept. 11, 1899. J. T. Carter, Deputy Clerk.

No. 1056.

CHARLES HEBARD
vs.
D. W. BELDING et al.

In this cause the defendants, D. W. Belding, M. M. Belding, A. N. Belding, Henry Stix, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg and R. N. Archer having prayed an appeal from the decree entered herein on the 10th day of June, 1899, to the United States Circuit — of Appeals for the Sixth Circuit and filed their assignment of errors therewith and given an appeal bond approved

by the court, it is ordered and decreed by the court that said appeal be and hereby is allowed and that the clerk send a transcript of the record, proceedings and papers herein, together with all original exhibits heretofore ordered to be made part of the transcript to said United States Circuit Court of Appeals, at Cincinnati, Ohio.

(Endorsed:) No. 1056. Charles Hebard vs. D. W. Belding, et al. Order granting an appeal. Entd. Journal "R," p. 129. Filed 9 day of Sept., 1899. J. T. Carter, Deputy Clerk.

Be it Remembered That at a Circuit Court of the United States Begun and Held for the Northern Division of the Eastern District of Tennessee, at the Federal Court Rooms, in the City of Knoxville, Within said District and the Sixth Circuit, on the
469 Second Monday, it Being the 11th Day of September, A. D. 1899.

Present and presiding the Hon. C. D. Clark, United States District Judge for the Eastern and Middle Districts of Tennessee.
The following proceedings were had, to wit:

SATURDAY, *October 7th*, 1899.

Court met pursuant to adjournment.
Presiding at Chambers in Chattanooga, Tennessee, The Honorable C. D. Clark, Judge, etc.

No. 1056. In Equity.

CHAS. HEBARD
vs.
D. W. BELDING et al.

For sufficient reasons appearing to the court, 30 days' additional time, from this date, is allowed for filing the transcript in the Circuit Court of Appeals for the Sixth Circuit.
Enter this.
(Signed) CLARK, *Judge*.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To Charles Hebard, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit not exceeding thirty days from this date, pursuant to an appeal filed in the Clerk's Office of the Circuit Court of the United States for the Eastern District of Tennessee, Northern Division, wherein D. W. Belding, M. M. Belding, A. N. Belding, Henry Stix, Nathan Stix, Louis Krohn,

D. W. Hyman, Mary Bragg and R. N. Archer are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 11th day of September, in the year of
470 our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States of America the one hundred and twenty-fourth.

C. D. CLARK, *Judge.*

I hereby, this 11th day of September, 1899, accept due personal service of this citation on behalf of Charles Hebard, appellee.

WEBB & McCLUNG, *Sols.*

UNITED STATES OF AMERICA,
Eastern District of Tennessee, ss:

I, Henry O. Ewing, Clerk of the Circuit Court of the United States for the Eastern District of Tennessee, do hereby certify that the foregoing 555 pages of type-written matter, together with the original exhibits sent with this transcript, is a full, true and correct transcript of the record and proceedings had except the original map, Exhibit "A" to deposition of T. E. H. McCroskey, which by agreement of counsel, is to be supplied or the original sent later in said court in the cause of Charles Hebard vs. D. W. Belding, et al., together with the original citation, as the same appear of record and on file in my office.

Witness my hand and the seal of said court at office in Knoxville, Tennessee, this 4th day of November, A. D. 1899.

[SEAL.]

HENRY O. EWING, *Clerk,*
By J. T. CARTER,
Deputy Clerk.

471 And afterwards to wit on November 8, 1899, praecipe for appearance of counsel was filed which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

783.

D. W. BELDING et al.
vs.
CHARLES HEBARD.

To the Clerk of said Court:

Please enter my appearance as counsel for the appellants.

EDWARD T. SANFORD.

And afterwards to wit on March 13, 1900, a stipulation with reference to testimony was filed, clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth *District* Circuit.

D. W. BELDING, M. M. BELDING, A. N. BELDING, HENRY STIX, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg, and H. N. Archer, Appellants,

vs.

CHARLES HEBARD, Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

In this cause to save costs, it is stipulated and agreed, that the marks on the double sourwood testified to by J. C. M. Boyle, are not correctly copied on page 167 of the printed transcript and that the same are correctly set out on pp. 66 and 67 of the printed brief filed by appellants, and that the printed transcript shall be deemed as corrected accordingly, as if upon diminution of the record duly suggested and supplied.

WEBB & McCLUNG,
T. E. H. McCROSKEY,
Sol's for Appellee.

This Mar. 13, 1900.

T. F. McGARRY,
LUCKY, SANFORD & FOWLER,
Sol's for Appellants.

472 And afterwards to wit on March 14, 1900, an entry was made upon the Journal of said Court in said cause in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

D. W. BELDING et al.
vs.
CHARLES HEBARD.

Before Taft, Lurton & Day, C. JJ.

This cause coming on to be heard this day *and* was argued on behalf of the appellants by E. T. Sanford and on behalf of the appellee by S. T. Webb and T. E. H. McCroskey and is continued until tomorrow at 9.30 A. M.

And afterwards to wit on March 15, 1900, an entry was made in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

783.

D. W. BELDING et al.
vs.
CHARLES HEBARD.

This cause coming on for further hearing was argued for the appellee by Mr. T. E. H. McCroskey and for the appellants by Mr. T. F. McGarry and was submitted to the Court.

And afterwards to wit on July 13, 1900, a decree was entered in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

783.

D. W. BELDING et al.
vs.
CHARLES HEBARD.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern
473 District of Tennessee, and was argued by counsel.

On consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause be and the same is hereby affirmed with costs.

And on the same day, to wit on July 13, 1900, an opinion was filed clothed in the words and figures as follows:

Opinion.

United States Circuit Court of Appeals for the Sixth Circuit.

D. W. BELDING et al., Appellants,
vs.
CHARLES HEBARD, Appellee.

Opinion.

Decided July 13, 1900.

Appeal from the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

This is a bill to restrain trespass and remove a cloud from the title to a large tract of wild mountain land claimed to lie within the

Seventeenth civil district of Monroe county, Tenn. The complainant claims title under a grant from the state of Tennessee. The defendants claim title to the same under a grant from the state of North Carolina. The title turns upon the location of the boundary line between the state of North Carolina and the state of Tennessee, and the object of the bill is to have the state line ascertained and determined between the Little Tennessee river and this mountain peak called "Stratton Bald," a distance of some seven or eight miles from the point where the state line crosses the Little Tennessee river. The claim of the complainant, Charles Hebard, is that the said state line crosses the Little Tennessee river about one-half mile below where Slick Rock creek runs into the river; thence directly to the Hangover ridge, and along the extreme height of that ridge to its junction with another ridge called the "Fodder Stack Ridge." This contention, if sustained, places the lands lying between the Hangover ridge and Slick Rock creek within the state of Tennessee, and confirms the title to Hebard under his Tennessee grant. The defendants, on the other hand, contend that the line crosses the little Tennessee river at or near the mouth of Slick Rock creek,
474 and runs up said creek, following its meanders, something over six miles then up a ridge leading from the creek to the Big Fodder Stack, and then southwestwardly with the top of the Big Fodder Stack lead to its junction with the Hangover lead. In other words, defendants insist that for a distance of nearly six miles the state line follows Slick Rock creek, and that the lands lying east of the creek, and between it and the crest of the Hangover spur, were on the North Carolina side of the line, and therefore subject to grant by North Carolina.

The territory now comprising the state of Tennessee was ceded by the state of North Carolina, in 1789, to the United States. The cession act describes the eastern boundary line as follows: "Beginning on the extreme height of the Stone Mountain, at the place where the Virginia line intersects it, running thence along the extreme height of the said mountain to the place where the Wautauga river breaks through it; thence a direct course to the top of the Yellow Mountain, where Bright's road crosses the same; thence along the ridge of said mountain, between the waters of Doe river and the waters of Rock creek, to the place where the road crosses the Iron Mountain; from thence along the extreme height of said mountain to where Nolinchucky river runs through the same; thence to the top of the Bald Mountain; thence along the extreme height of the said mountain to the Painted Rock, on French Broad river; thence along the highest ridge of the said mountain to the place where it is called the 'Great Iron' or 'Smoky' Mountain; thence along the extreme height of the said mountain to the place where it is called 'Unicoy' or 'Unaka' Mountain, between the Indian towns Cowee and Old Chota; thence along the main ridge of the said mountain to the southern boundary of this state." The line here to be ascertained is included within the call beginning "thence along the extreme height of the said mountain to the place where it is called Unicoy or Unaka Mountain." The mountain whose extreme height is to

be followed until Unaka Mountain is reached is the "Great Iron or Smoky Mountain." The necessity for a definite location and marking of the line became evident to both states, and in 1821, under acts passed by each state a joint commission was appointed for the purpose of settling, running, and re-marking the boundary line. The Tennessee commissioners were appointed under an act which provided that the commissioners should "settle, run and remark the boundary line between this state and the state of North Carolina, agreeably to the true intent and meaning of the said act of the general assembly of the state of North Carolina, entitled: 'An act for the purpose of ceding to the United States of America certain western lands therein described.'" Acts Tenn. 1820, c. 22.

475 The North Carolina act, providing for the running of the line, was substantially identical with the Tennessee statute above set out. 2 Ired. & B. Rev. St. N. C. p. 94. The joint Commissioners did run and remark the line, and each state passed an act ratifying, confirming, and adopting the line as run and reported by the commissioners. Acts Tenn. 1821, p. 45, c. 35; 2 Ired. & B. Rev. St. N. C. p. 96. The Tennessee confirmatory act is as follows: "Be it enacted by the general assembly of the state of Tennessee that the dividing line run and marked by Alexander Smith, Isaac Allen and Simeon Perry, commissioners for and on behalf of this state, and James Mebane, Montfort Stokes and Robert Love, commissioners for and on behalf of the state of North Carolina, which dividing line, as run by said commissioners, begins at a stone set up on the north side of Cataloochee turnpike road; and marked on the west side, 'Ten., 1821,' and on the east side, 'N. C., 1821'; running thence on a southwestwardly course to the Bald Rock, on the summit of the Great Iron or Smoky Mountain, and continuing southwestwardly on the extreme height thereof to where it strikes Tennessee river, about seven miles above the old Indian town of Tallassee, crossing Porters Gap at the distance of twenty-two miles from the beginning, passing Meigs' boundary line at thirty-one and a half miles, the Equovettly path at fifty-three miles, and crossing Tennessee river at the distance of sixty-five miles from the beginning; from Tennessee river to the main ridge, and along the extreme height of the same to the place where it is called the 'Unicoy' or 'Unaka' Mountain, striking the old trading path leading from the valley towns to the overhills towns, near the head of the west fork of Tellico river, and at the distance of ninety-three miles from the beginning; thence along the extreme height of the Unicoy or Unaka Mountain to the southwest end thereof, at the Unicoy or Unaka turnpike road, where a corner stone is set up marked 'Ten.' on the west side, and 'N. C.' on the east side, and where a hickory tree is also marked on the south side 'Ten., 101 M.,' and on the north side 'N. C., 101 M.,' being one hundred and one miles from the beginning; from thence a due course south two miles and two hundred and fifty-two poles to a spruce pine on the north bank of the Hiwassee river, below the mouth of Cane creek; thence up the said river the same course about one mile, and crossing the same to a maple marked 'W. D.' and 'R. A.,' on the south bank of the river; thence continuing the same course due south eleven miles and two hundred and seventy-

three poles to the southern boundary line of the state of Tennessee and North Carolina, making in all one hundred and sixteen miles and two hundred and twenty-three poles from the beginning,
476 and striking the southern boundary line twenty-three poles west of a tree in said line marked '72 M.,' where was set up by said commissioners a square post, marked on the west side 'Ten., 1821,' and on the east side 'N. C., 1821,' and on the south side 'G.,' be, and the same is hereby ratified, confirmed and established as the true boundary line between this state and the state of North Carolina." The boundary is described in the North Carolina confirmatory act in words identical with those used in the Tennessee act, but concludes with these words: "The whole distinctly marked with two chops and a blaze on each fore and aft tree, and three chops on each side line tree, and mile marked at the end of each mile." That part of the line here involved begins with the words, "from Tennessee river to the main ridge, and along the extreme height of the same to the place where it is called the 'Unicoy' or 'Unaka' Mountain."

After some evidence had been taken, the circuit court "ordered that the cause be, and hereby is, referred to Asbury Wright, Esq., of Roane county, Tennessee, as special master, who will, from the proof on file and such other proof as shall be offered by the parties, report to the court the true state line between the state of Tennessee and the state of North Carolina, from the Little Tennessee river to the junction of the Hangover and Fodder Stack ridges, as run and located by the commissioners of the states of North Carolina and Tennessee in 1821, and confirmed by the respective legislatures of said states." A great mass of evidence was taken, and from the entire evidence the special master reported "that the line between the states of Tennessee and North Carolina, from the Little Tennessee river to the junction of the Hangover and Fodder Stack ridges, as run and located by the commissioners of said states in 1821, and confirmed by the respective legislatures of said states, crosses the Tennessee river at the point where it reaches the river on the northeast side, and from the river runs up the Hangover lead, as shown on complainant's map, and along the extreme heights of this ridge, * * * to the junction of the Hangover with the Fodder Stack." This report included a full finding of the facts material to the conclusion reached, some of which will be hereafter referred to. The defendants excepted generally and specially to the findings and conclusions of the master. These exceptions were overruled, and the conclusions of the master adopted, and a decree pronounced establishing the title of complainant. From this decision the defendants have appealed.

477 Before Taft,* Lurton, and Day, Circuit Judges.

LURTON, *Circuit Judge*, after making the foregoing statement of the case, delivered the opinion of the court:

The intention of the North Carolina cession act of 1789 was to make the crest of the great mountain ranges extending across the

*This case was decided before Judge Taft resigned.

state of North Carolina in a southwestwardly direction the boundary line of the ceded territory. This is most evident from even a casual reading of the boundary line therein described. The Painted Rock on the French Broad river is a natural monument of great notoriety. From that point the calls in the cession act are, "Thence along the highest ridge of said mountain to the place where it is called the 'Great Iron' or 'Smoky' Mountain; thence along the main ridge of said mountain to the place where it is called 'Unicoy' or 'Unaka' Mountain, between the Indian towns Cowee and Old Chota." The part of the great mountain range called "Smoky Mountain" is well known, as is also that part of the same range southwest of Smoky Mountain called "Unicoy" or "Unaka" Mountain. There is no trouble about the location of these two great natural monuments in the line. The distance between the two is not less than 50 miles, and the only call which is locative of the line between the two is that the line is to run along "the extreme height of the said range, theretofore called the 'Great Iron' or 'Smoky' Mountain, to that part of the range or ridge called the 'Unicoy' or 'Unaka' Mountain." The commissioners representing the two states were not authorized to agree upon a new boundary, but to "settle, run, and remark the boundary line * * * agreeably to the true intent and meaning" of the said cession act of 1789. It was clearly their duty to run and mark a line between the Great Smoky and Unaka Mountains "following the extreme height" of the mountain range connecting these two prominent points.

The line located by the commissioners, as shown by the two acts adopting it as the boundary between the two states, begins at a stone set up on the north side of Cataloochee turnpike, and properly marked. The course of the line from that stone for a distance of 101 miles is "southwestwardly," as repeatedly stated in the boundary acts referred to. From the Cataloochee stone the call is to run southwestwardly "to the Bald Rock on the summit of the Great Iron or Smoky Mountain," and continuing southwestwardly "on the extreme height thereof to where it strikes the Tennessee river, * * * crossing Tennessee river at the distance of sixty-five miles from the beginning." Between the Bald Rock and the Tennessee
478 river several points on the line are called for, but we need not concern ourselves with them, inasmuch as the line to the Tennessee river is undisputed, and is not here involved. The point where the commissioners' line reaches the Tennessee river, now known as the "Little Tennessee River," is one of the fixed and settled questions on this record. The line on the northeast side of the river is well located, and a fore and aft state-line pine tree is standing very near the bank of the river, one-half mile below the point where Slick Rock creek empties into the river on the opposite side. The special master reports that this pine tree on the northeast bank of the river is a state-line tree, marked as a state-line fore and aft tree, the marks showing by annular lines that it was so marked in 1821. He also reports that the parties agreed before him that the line was well established to that tree. The controversy begins, then, at the point where the line reaches the Tennessee river at this well-estab-

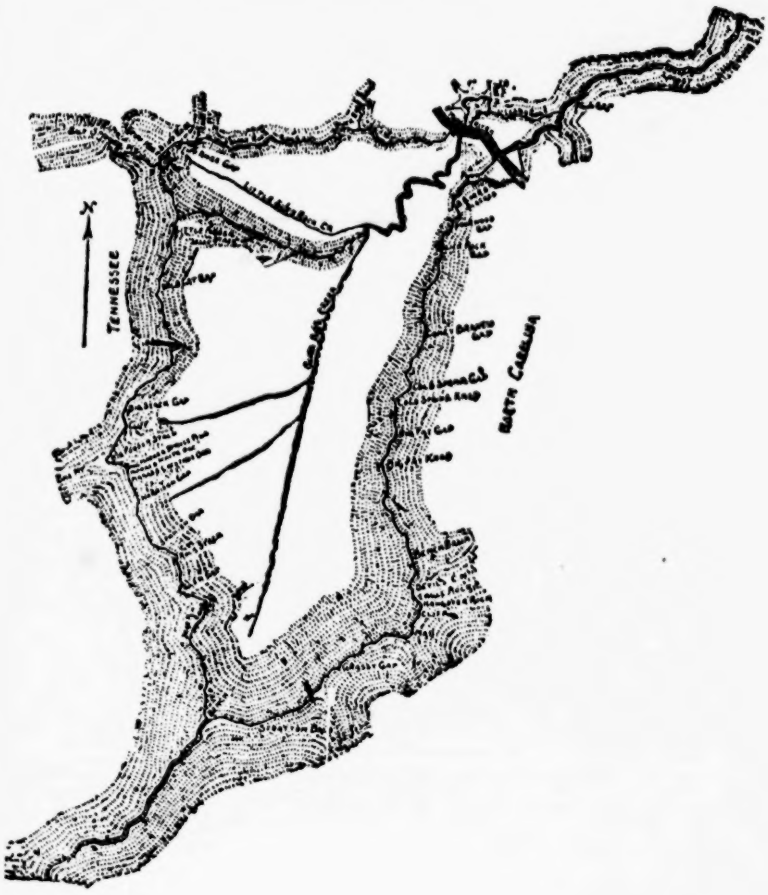
lished monument. The next point in the line as located by the commissioners, upon which all parties agree, is the point where two ridges make a junction southwest of the Tennessee river. One of these ridges is known as the "Hangover" and the other as the "Fodder Stack." This point of junction is about nine miles from the fore and aft pine tree on the northeast bank of the river. The disagreement is as to the true location of the commissioners' line between these two well-located points in the line. Returning to the line as located by the joint commission, we find the next call, after striking the Tennessee river, is in these words: "From Tennessee river to the main ridge and along the extreme height of the same to the place where it is called the 'Unicoy' or 'Unaka' Mountain." Just here it may be observed that the Unicoy or Unaka Mountain is about 15 miles in a southwesterly course from the junction of the two ridges spoken of heretofore. How did the commissioners locate the line between the Tennessee river and the Unaka Mountain? It is to be borne in mind that their authority was to "settle, run, and re-mark" the line "agreeably" to the cession act. The Tennessee river was a water course, which cut a deep gorge through the main mountain range which the line was following between the Smoky and the Unicoy Mountain. The cession act placed the boundary "along the extreme height of said mountain (that is, the Great Smoky) to the place where it is called 'Unicoy' or 'Unaka' Mountain." It was the duty of the commissioners to locate the line "agreeably" to this call. They had been following the extreme height of the ridge between the Smoky and the Tennessee
479 river. The river cut through the ridge by a deep gorge, the mountain on either side gradually lowering, and terminating at the river in a bluff. The last monument on the northeastern side is a tree marked as a fore and aft tree. A fore and aft tree is a tree in the line, and the chops are on the sides showing the direction of the line. The chops on this tree indicated that the line there crossed the river. The general course of the line, as called for by the call which brought the line to the river, was southwesterly, and this course was to be continued to the Unaka. The course would, therefore, require the line to there cross the river, as also indicated by the chops on the tree. The general direction of the cession act would keep the line on the extreme height of the mountain ridge or range. Immediately across the river, and in the general course of the line, was the Hangover ridge. This ridge is joined by another ridge called the "Fodder Stack," some eight or ten miles southwest. Its height increases after it leaves the river, and the highest points between the river and the junction with the Fodder Stack are the Hangover and Hao peaks, the former having an altitude of about 4,500 feet. From the point where it is joined by the Fodder Stack ridge or spur, it is admittedly the main ridge and further southwest becomes the Unicoy or Unaka. From the river the general course of Hangover is southwesterly, and therefore in the general course of the line as described in the cession act. One-half mile below the state-line fore and aft tree, a creek known as "Slick Rock Creek" empties into the river on the opposite side. That creek

is some eight or ten miles in length, and has one or more branches. A short distance below its mouth a low spur approaches the river, called "Slick Rock Spur," being a spur of Fodder Stack ridge. Some seven miles up the creek another spur of Fodder Stack is found. The basin of the Slick Rock is about eight miles long and three miles wide. It is bounded on the south and southeast by the Hangover ridge, on the north and northwest by the Fodder Stack ridge, and on the north and northeast by the Tennessee river and the Slick Rock ridge. The mountains shutting it in are from 1,000 to 4,000 feet high, and the basin itself is a rough, broken mountain valley, almost impenetrable by man. The master reports that the Hangover ridge was the main or highest ridge, having an average of 800 feet greater than the Fodder Stack.

It is admissible, in locating a line, where a difficulty exists in identifying monuments, natural or artificial, to run the line in a reverse way, if thereby doubts may be better solved. "The
480 footsteps of the original surveyor may be traced backward as well as forward." Ayers v. Watson, 137 U. S. 584, 590, 11 Sup. Ct. 201, 34 L. Ed. 803; Coal Co. v. Doran, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063. So any ascertained monument may be adopted as a starting point, where difficulty exists in ascertaining the lines of a survey as actually run. Ayers v. Watson, 137 U. S. 584, 11 Sup. Ct. 201, 34 L. Ed. 803. We have two established points in the line as actually run by the state commissioners of 1821, between which points the disputed line exists. One point is the fore and aft tree on the northeastern side of the Tennessee river, and the other is some eight miles southwest from that tree, being the well marked line on the height of Hangover, where a junction is made with the Fodder Stack ridge. If we reverse the survey, and take this junction of the two ridges, or leads, as they are sometimes called, as a starting point in running backwards, one cannot doubt but that the line should follow Hangover to the river. The Fodder Stack ridge would not be observed by surveyors who had reached that point while following the highest ridge from Unicoy or Unaka, for it branches off several hundred feet below the crest of the Hangover, and the fact that a spur was there could only be learned by going down the mountain from three to four hundred feet. To abandon the Hangover in running backwards would also involve a change in direction from northeast to north, and then northwest and then west, and the Tennessee river would not be reached at all but by again diverging and following one or other of two lateral spurs. This situation is most plainly shown by the map of appellees, adopted by the master, as correctly showing the general course of the ridges or leads at the locality in question. This map is here shown upon a much reduced scale.

If the joint commissioners obeyed the call to follow the highest mountain tops, and adhered to the course pointed out in the cession act, they undoubtedly located the line on the Hangover; and if we follow the line which they reported and adopted, whether we endeavor to track them backward or forward, we must conclude from the call for the "main ridge" and "along the extreme hight thereof,"

in the act adopting their survey, that they did in fact locate the line on the Hangover between the river and the junction of the Hangover and the Fodder Stack. The Hangover is undoubtedly the "main ridge" called for in the survey made by the commissioners, and definitely locates the line, unless there appears such definite and positive evidence of another and different actual location of the line as to justify us in finding that the line
481 as described and located by natural monuments is not in fact the line actually run and marked and adopted by the commissioners. Every presumption is that the commissioners obeyed the directions of the cession act, and so, also, every presumption is that the line as actually run, marked, and adopted was a line which conforms to the call to follow the extreme height of the "main ridge" from the Tennessee river to Unaka.



But appellants say that they have shown a well-marked line from the mouth of Slick Rock creek, which follows the meanders of that creek for about seven miles, and then runs up a spur of the Fodder Stack, and connects with that ridge at the peak called "Little
482 Fodder Stack." The Fodder Stack ridge does not run to the Tennessee river at all. North of the peak called "Little Fodder Stack" its general course is to the northwest. It cannot, therefore, be regarded in any sense as the "main ridge" called for by the survey of the joint commission, irrespective of the fact already noticed that its average altitude is about 800 feet less than that of the Hangover, which does start at the river immediately opposite the main ridge on the northeast side of the river, and upon which the line on that side is confessedly located. From the top of the Fodder Stack the appellants claim that the state line runs south with the summit of that ridge to its junction with the Hangover ridge, which from there runs southwest. To support this contention appellants rely upon the fact that between the mouth of Slick Rock and the junction of Hangover and Fodder Stack ridges they show 41 trees marked as state-line trees, and from this circumstance they contend that this was the line actually marked by the commissioners, and adopted by them as the line, and that the calls for course and the "main ridge" must yield to the actually marked line. That the commissioners marked the line run by them is made clear by the existence of a marked line over those parts of the undisputed line on either side of the place in dispute. The North Carolina act of 1821, adopting and confirming the survey of the commission, concludes with the words, "the whole distinctly marked with two chops and a blaze on each fore and aft tree, and three chops on each side line tree." These words of description do not appear in the Tennessee act of 1821, and neither the original report of the commissioners nor the surveyors' field notes are in existence. The marked trees on this line are shown by blocking to have been probably made in 1821, and correspond in appearance to those existing in the undisputed line. They are strangely scattered along the line claimed. About one-half of the whole number are found within 1½ miles of the mouth of the creek. Then for a distance of 3½ miles not a marked tree is shown, though the line is still in the valley, where there was and is a great abundance of timber. Then, where the line is claimed to have left the creek, there are found a great number of marked trees within a short distance after starting up a spur leading to the Fodder Stack, but from the junction of this spur with the Fodder Stack to the Hangover only two or three trees are found. It is most difficult to account for this line of marked trees, irregularly as they are grouped. The probabilities are that they were marked by the commission. For what purpose? is the question. Their evidential value as establishing the actual
483 state line is greatly impaired by the following circumstances: (1) The line thus marked is not upon the course which is called for by the survey as reported and adopted. (2) It departs from the line of the "main ridge," called for in the commissioners' survey, and a natural monument of the utmost significance. When

a monument, natural or artificial, is called for, and its identity is doubtful, great importance may be properly attached to an actually marked line upon the ground. But in this instance there was no reasonable doubt as to the identity of the "main ridge" called for in the commissioners' survey. The greater altitude of the Hangover ridge, as well as its general course, makes it most clear that there could have been no difficulty in determining that the Hangover, and not the Fodder Stack, was the "main ridge." It is, therefore, not a case of ambiguous calls, or doubt as to the identity of a natural monument in the description. The indisputable facts that the Hangover is much the greater in elevation, was in the direct course called for by the cession act, and was indicated by the chops on the established monument on the north side of the river, leave no reason for supposing that the commission mistook the Fodder Stock ridge as the "main ridge," and undertook to reach it by a line up the creek. (3) If we adopt the Slick Rock creek line, we must believe that the commissioners not only turned down the river at an acute angle from the course they had been following, followed the river for a half mile, and yet made no call in their report which would indicate such a departure, or that the river was made the boundary for any part of the line. (4) We must also believe that, instead of following a mountain boundary, which, according to the cession act, ran with the summits of the highest mountains, they deliberately abandoned the heights of the mountain ranges, and followed a water course from its mouth for seven miles, and yet made no mention of this natural object in their report whatever. (5) The significance of these trees as marking the state line is also affected by the fact that other trees similarly marked are found on the Fodder Stack ridge, which, confessedly, are not upon any line now claimed as the actually located state line. The surveyors who testify to such trees express the opinion that they were marked to designate Indian trails. As this whole region was the habitat of the Cherokee Indians at the time of this survey, in 1821, it is altogether possible that all of this marking was done by the Indians as mere trail marks, or in a spirit of imitation, though the stronger probability is that it was tentatively marked, and then abandoned for the Hangover line,
484 as the one indicated by the cession act, and the report made accordingly. (6) But the significance of the marked trees on the Slick Rock creek line is also weakened greatly by the fact that two, and possibly three, old marked state-line trees are found on the Hangover line. One of these trees is a black or red oak, and the other a sourwood. These trees stand on the summit of the Hangover ridge. The question as to whether they bore the proper marks for state-line trees marked in 1821 was much controverted. The master, after seeing and hearing most of the witnesses, and weighing the evidence, and seeing the blocks cut from the oak, reached the conclusion that the marks were state-line marks made in 1821, and so reported. In this conclusion the learned trial judge concurred. Giving to the finding of the master the weight properly attachable to it by the well-settled rule in that regard, we are unable to see any solid ground for rejecting his conclusion that these dis-

puted trees are state-line trees, and marked as such in 1821 by the state commission. Kimberly v. Armes, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; Medsker v. Bonebroke, 108 U. S. 66, 2 Sup. Ct. 351, 27 L. Ed. 654; Davis v. Schwartz, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; Singleton v. Felton (decided at this term by this court) 101 Fed. 526. We have, then, two lines run and marked. One is the better marked, possibly because it passed through more timber, and timber better adapted to carry the marks than the other, which followed a rocky, barren, mountain ridge, where the trees, as shown by the evidence, were scrubby and scarce. The other line, though more scantily marked, is found just where the course and natural monuments called for in the report of the survey would locate the line if neither had been marked. That the line ought to run on the extreme height of the Hangover ridge from the Tennessee river to the Unaka mountain, if the calls of the confirmatory boundary acts of both states are to control, is most evident.

The order of applying descriptions of boundaries is first to natural objects, course- and distances. In Brown v. Huger, 21 How. 306, 318, 16 L. Ed. 125, 129, the court said:

"In ascertaining the boundaries of surveys or patents, the universal rule is this: that whenever natural or permanent objects are embraced in the calls of either, these have absolute control, and both course and distance must yield to their influences."

In Newson v. Pryor, 7 Wheat. 10, 5 L. Ed. 382, it was laid down as a rule that the most material and certain calls must control those that are less certain and material. The rule in Tennessee is
485 not different. A call for a natural object will control unless it is shown that monuments of boundary were made at the time of the execution of the deed, and adopted as the boundary. Massengill v. Boyles, 4 Humph. 206. In Bishops Lessee v. Arnold, Peck, 366, Haywood, J., said:

"When the consideration of questions of boundary first came before the courts in North Carolina, it was with difficulty the courts could bring themselves to depart from the calls of the grant, under the rule of evidence that parol proof should not be received to add to or detract from a written instrument, and the law to this day is, if the grant is intelligible on its face, it must not be departed from; but, many mistakes having intervened in making surveys, plats, and certificates, and filling the calls in grants, it was at length permitted to show the mistake by proofs."

The description of the boundary as run and marked by the commissioners calls for a course from one natural object, the Tennessee river, to another, the Unaka Mountain. In the absence of any further description, the line should be run straight from one monument to the other. 3 Washb. Real Prop. side p. 632; Burnett v. Jones, 51 N. C. 210; Jenks v. Morgan, 6 Gray, 448; Caraway v. Chancey, 51 N. C. 364. The first call in the boundary act of both states is "from the Tennessee river to the main ridge." There are no words of intermediate description. The line should, therefore, be a straight one from the last monument on the river, the fore and aft pine tree, to the "main ridge." There being no possible

doubt as to the identity of the "main ridge" referred to, there can be no doubt on the face of the description following that the line should then run "along the extreme height of the same" to the next natural monument, to wit, "to the place where it is called the 'Unicoy' or 'Unaka' Mountain." Finding, as we do, upon the line thus located by identified natural objects, two old state-line marked trees, marked, as shown by blocking and examining the annular growth, in 1821, we have no difficulty in agreeing that the line, as run and marked by the commissioners in 1821 was the Hangover line, as found by the special master, and as claimed by the appellee. The probabilities are that the surveyors tentatively or experimentally marked the line up Slick Rock creek. Discovering that thereby they made a radical departure from the "extreme height" of the mountain chain called for by the cession act of 1789, they abandoned the creek, and ran, adopted, and reported the line as running along
the extreme height of the "main ridge," now known as
486 "Hangover Ridge." This is the only reasonable explanation
consistent with the absence of descriptive words calling for a line running down the Tennessee river, and then up Slick Rock creek. But it is insisted that the Slick Rock creek line has been long recognized as the line by both North Carolina and Tennessee, and by reputation and adoption has come to be the actual line, though not originally so run and marked. In the case of Virginia v. Tennessee, 148 U. S. 503, 522, 13 Sup. Ct. 728, 37 L. Ed. 537, where the question was a disputed boundary between Virginia and

"Independently of any effect due to the compact as such, a boundary line between the states and provinces, as between private persons, which has been run out, located, and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the course given in the original grant; and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary."

But the court was there considering the effect of acquiescence upon a line run and marked by the commission of each state, which had been long recognized by both states as the true line, though, in fact, as afterwards discovered, it departed from the line called for in the grant which ought to have been pursued. That is not this case. Upon the facts stated, the Hangover line was run, marked, and adopted by the commissioners as the line called for and described in the cession act. From 1821 down to 1836 there is nothing in this record tending to show that either state, nor any persons, were claiming or recognizing the experimental line on Slick Rock creek as the line. The tentative line on the creek seems to have been first treated as the state line as late as in the fall of 1836, when the Tennessee surveyor general stopped a survey of the Cherokee lands ceded to Tennessee in that year, and which included the disputed strip at Slick Rock creek. Evidence as to the reputation of the creek line of trees as marking the state line, and of other acts indicating a recognition of that line as the actual line, must be unavailing, unless it is pursuasive enough to satisfy the legal

mind that the state commissioners ran, marked, and adopted the Slick Rock creek line as the true line, although it is a radical departure from the description in the cession act, and contradicted by the description they themselves reported of the line they had run and adopted; or such evidence must show such a long and continuous recognition by both states of the creek line as to
487 operate as an estoppel to deny that it was the line run and marked and adopted in 1821. Let us look at the evidence which is to be strong enough to pull the line away from the location indicated by the natural and definite monuments described in the survey. The matters chiefly relied upon by appellants are these:

(1) In 1836 the Cherokee Indians ceded to the United States their lands lying in both North Carolina and Tennessee, and the United States ceded to Tennessee the lands so acquired within that state. The Tennessee legislature, October 18, 1836, passed an act constituting said lands a surveyor's district, to be known as the "Ocoee District," and directed the surveyor general of the state to survey said lands, and plat them off into ranges, townships, and sections. The surveyor general accordingly did survey and plat said lands, and the plat shows that he stopped his survey at Slick Rock creek, and made that the eastern boundary of the Ocoee district. This resulted in leaving unsurveyed a strip of the Cherokee lands lying between the creek and Hangover, some three miles wide and six miles long, and is the land now in dispute. Until 1854 there was no law under which the unplatted Ocoee lands could be granted. But in 1854 an act was passed providing for the entering and granting of lands in the Ocoee district, "whether the same appeared on the map of the district or not." Acts Tenn. 1854, c. 22. The defendants below, by authority of this act, entered the lands now in controversy in 1882, and carried them into a grant in 1892.

(2) A direct consequence of the omission of the surveyor general to survey and plat the land east of the creek was to give rise to the reputation of the creek as the state line, although it is not so shown by his plat, nor by any report made by him. The fractional sections in the Ocoee district bounded on the creek were granted by Tennessee as fractional sections, though none of the grants call for the creek as the state line. The subsequent deeds of the grantees do frequently refer to the creek as the state line, though none of these fractional sections appear to have been conveyed by deeds so describing the creek earlier than 1853.

(3) In 1837, North Carolina made provision for the sale of the lands acquired by her through the Cherokee cession, but no surveys or grants within the disputed lines were made by that state before 1853. Two entries of land appear to have been made under North Carolina entries in 1853, another in 1859, and in 1860 grant No. 2,784, for 14,800 acres, was issued to Gilbert and Peet, under an entry made in 1853, and surveyed in 1856, under which grant the appellants claim.

(4) To further support the claim that the creek has been recog-

nized as the state line, the defendants sought to prove by one
488 Jones certain declarations made to him by one Thos. Hensley, deceased, that he (Hensley) had been with the surveyor general's party a part of the time when the Ocoee district was surveyed, and that Hensley said the survey was stopped at the creek because it was the state line. This was rejected. Hensely's connection with the party of the surveyors was not shown, and his declaration amounted to nothing more than the statement of his opinion on the subject. As the declaration of a deceased person touching the location of a disputed boundary, it was possibly competent, under the Tennessee decisions holding that the declarations of deceased persons as to the location of a boundary line of land, made previous to the litigation, are competent. Beard v. Talbot, Cooke, 142; Holland v. Overton, 4 Yerk. 486; McCloud v. Mynatt, 2 Cold. 163. In a suit involving land titles, the courts of the United States follow state decisions upon questions of evidence. Clement v. Packer, 125 U. S. 309, 8 Sup. Ct. 907, 31 L. Ed. 721; Ayers v. Watson, 137 U. S. 584, 596, 11 Sup. Ct. 201, 34 L. Ed. 803. There was admitted in evidence, under the rule stated above, evidence as to the declarations of several deceased persons, some of whom claimed to have been with the state commission of 1821, as to their understanding of the location of the line on Slick Rock creek. There was conflicting evidence locating the line by reputation. There was little in all this of any moment. The line at the point ran through an uninhabited wilderness, almost inaccessible. The fact of a visible line of marked trees on Slick Rock creek, observed by a few adventurous hunters, would naturally start the tradition that the state line was on the creek. The same fact doubtless influenced the surveyor general, and his omission to plat the lands east of the creek would confirm the reputation of that line. Not more than a half dozen persons are shown to have ever lived within the disputed lines, and there is a conflict as to whether they regarded themselves as living in Tennessee or North Carolina until after 1882, when they, or the greater number, being mere squatters, began to hold under one or other the contending titles, and to locate the line to suit their landlords. None of them go back beyond the North Carolina grant under which appellants claim, which bears date in 1860. Since 1882, when appellees obtained their grant from Tennessee, most of these inhabitants, if not all, have attorned to appellees, and have since voted in Tennessee, and hold themselves out as citizens of the Seventeenth civil district of Monroe county, Tenn. No active exercise of jurisdiction over the disputed territory is shown by either state, aside from the issuances of entries or grants to any who chose to apply.
489 As the greater part of their large grant is indisputably in North Carolina, the appellants have paid taxes on the whole in that state. The fact is that the locus in quo is so inaccessible, so worthless for agricultural purposes, and so uninhabited, as to make the active exertion of jurisdiction by either state of no consequence. The land is now supposed to be valuable for timber and mining purposes, hence the present suit.

To sum up the case:

1. The calls of the cession act of 1789, if followed, would locate the line on the Hangover ridge.

2. The legislation of both states, providing for the survey and marking of the line, required the commissioners to locate the line described by the cession act.

3. The calls of the confirmatory acts of 1821 of both states, if followed, locate the line on Hangover.

4. The commissioners did run and mark a line on Hangover, and two state-line trees are identified and established as state-line trees on that ridge.

5. The commissioners also ran and marked a line along Slick Rock creek, which connect ultimately with the Hangover line at the junction of the Fodder Stack with Hangover.

6. Between 1821 and 1836 the disputed strip between these lines was a part of the land occupied by the Cherokee Indians, who in that year ceded their land to the United States; the Cherokee lands on the North Carolina side being subsequently ceded to North Carolina, and those within Tennessee to the latter state.

7. Between 1836 and 1853 the disputed region was an uninhabited wilderness, and neither state actively asserted any jurisdiction.

8. In 1836, Tennessee caused the Cherokee lands ceded to her to be laid off ino a land district called the "Ocoee District." The surveyor general omit-ed to plat or survey the lands between the marked line on Slick Rock creek and Hangover, and bounded his survey by Slick Rock creek.

9. Between 1853 and 1882 grantees under Tennessee, in conveying fractional sections within the Ocoee district, described Slick Rock creek as the state line.

10. After the Ocoee survey, in 1836, and down to 1882, the marked line on Slick Rock creek was reputed to be the state line.

11. Between 1853 and 1860 North Carolina entries and grants were made between the two lines.

12. In 1854 Tennessee, by law, provided for the entering and granting of lands in the Ocoee district, whether platted
490 and surveyed or not, though the act did not assert that there were such unsurveyed lands.

13. In 1882 the entries under which the complainants claim, or a part of them, were made within the disputed lines, and in 1892 the complainants' grantors obtained a grant.

14. After 1882 there was a divided opinion and reputation as to the location of the state line, and since that time the few inhabitants have voted and paid taxes in Tennessee, though the appellants have paid taxes on their grant in North Carolina.

15. The region remains almost uninhabited and inaccessible. Neither state is shown to have exercised jurisdiction over it save by issuing entries and grants as stated.

16. The true line, as actually located in 1821, was the Hangover line.

17. There has been, on the evidence in this record, no such long and continued recognition or acquiescence in the tentative

line on Slick Rock creek as to justify this court in saying that it has been adopted as the actual line so long as to stand for a definition of the true and ancient boundary. The conclusions and findings of the master upon the principal points in the case are not shown to have been so plainly erroneous as to justify us in overturning his conclusions as to the existence of the marked state-line trees on the Hangover, nor as to the fact that the Hangover was palpably the "main ridge" called for in the commissioners' report and survey.

The case, on the whole, is one not free from doubts engendered by the existence of the marked line on Slick Rock creek and its apparent recognition by the Tennessee surveyor general as the state line. The result reached by the special master, and confirmed by a most careful and conscientious trial judge, is a result which on the whole is most consonant with the calls in the cession act and the subsequent confirmatory boundary acts. The evidence relied upon to deflect the boundary from the line so plainly described by both acts setting the boundary is not so conclusive as to require us to reverse the action of the circuit court. The decree will therefore be affirmed.

491 And afterwards to wit on August 13, 1900, a petition for rehearing was filed which reads and is as follows:

Petition for Rehearing.

United States Circuit Court of Appeals, Sixth Circuit.

No. 783.

D. W. BELDING, M. M. BELDING, A. N. BELDING, HENRY STIX, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg, and R. N. Archer, Appellants,

versus

CHARLES HEBARD, Appellee.

Now come D. W. Belding, M. M. Belding, A. N. Belding, Henry Stix, Nathan Stix, Louis Krohn, H. W. Hyman, Mary Bragg and R. N. Archer, Appellants, and respectfully show to this Honorable Court that they are much aggrieved by the decree rendered in this cause on July 13th, 1900, whereby it was adjudged that Appellee, Charles Hebard has a superior title to the land in dispute lying east of the state line as contended for by Appellants, running up Slick Rock Creek to the spur of the Fodder Stack Ridge, as shown on Map Exhibit No. 1 to the deposition of H. S. Hayes, for the following reasons, to wit:

1. Because this decision is based on the assumption that both the Acts of Tennessee and North Carolina providing for the appointment of the Commissioners to run the line directed the Commis-

sioners to "remark" the boundary line, and that the Commissioners did run and remark a line:

Whereas, only the Tennessee Act contained the word "remark" and the North Carolina Act directed the Commissioners to "run, settle and mark" the boundary line. It is part of the public history of the two states of which the Court will take judicial know-
492 edge, that prior to 1821 the state line had not been marked further south than the Cataloochie Turnpike road. The confirmatory Acts of both Tennessee and North Carolina describe the line adopted, not as "remarked," but as "marked," and the word "remarked" in the Printed Statutes of Tennessee of 1820 is evidently a clerical error.

Ired. and Bat., Revised Statutes of N. C., Vol. 2, pp. 94 and 96. Tennessee Acts 1821-22, Ch. 35, p. 45.

2. Because this decision is based on the assumption that the joint commissioners had authority only to run and mark, or remark the line, and had no authority to depart from the original line.

Whereas, both the North Carolina and Tennessee Acts directing the appointment of the Commissioners, gave them authority to "settle" the boundary line and both Acts of Tennessee and North Carolina adopted the line that had been actually run and marked by the Commissioners, the North Carolina Acts specifically describing the kind of marks. The two states thus adopted not the original line of the Cession Act, but the line that had been agreed upon and "settled" by the Commissioners and had been actually run and marked by them.

Ired. and Bat., Stat. N. C., pp. 94 and 96. Tennessee Acts 1820, Chapter 22, p. 30, 1821-22, Ch. 35, p. 45.

3. Because the decision of the Court is based upon the assumption that the spur on the Hangover claimed by the Appellee is the main ridge from the Tennessee river to its junction with the Fodder Stack Ridge.

Whereas, from the Hangover Rock to the Tennessee river, the spur upon which Appellee claims the state line to be located is not the main ridge of the Hangover, but at this point the Hangover breaks up into various spurs and has no main ridge between this piont and the river, the spur running eastward from the Hayo to the Cheoah river being in fact the largest spur of the Hangover from this point, and if anything, the main ridge of the Hangover from this point.

H. S. Hayes, Rec. p. 149.
Reuben Carver, Rec. p. 149.
M. B. Mashburn, Rec. p. 416.

The proof shows that the main ridge of the mountain ceases at the junction of the Fodder Stack and the Hangover and that
493 there is no main ridge of the mountain between this point and the river.

4. Because the decision of the court is based on the assumption

that the Commissioner's line can be located by reversing the same and running the line as the Commissioners might naturally have been supposed to run the line if they had once run it in a northeasterly direction:

Whereas, the proof shows that the Commissioners ran a southwestwardly line and did not cross the river at the point where they reached the river on the north side but went down the river several miles crossing at Tallassee ford and their probable location of the line should be judged by their position on coming up the south bank of the river after crossing the ford and finding themselves in the center of Slick Rock Valley when they would naturally have been in doubt as between the two ridges on either side and would naturally have settled and compromised the line by running up the valley.

James McDaniel, Q. 8, Rec. p. 360.
John Dockery, R. 5, Rec. p. 352; Q. 10, Rec. p. 362.
H. P. Hyde, Rec. p. 248.

5. Because the decision is based on the assumption that about one-half of the whole number of trees found on the line intended for by Appellees were found within one and one-half mile from the mouth of Slick Rock Creek.

Whereas, the proof shows that of the forty-one marked trees found by the surveyors, Hayes and Bogle, on the entire line (exclusive of the other trees found by the witness Hyde), trees only twelve were in the mile and a half intervening between the river and the mouth of Little Slick Rock Creek.

H. S. Hayes, Rec. pp. 134-137.
Map, Exhibit No. 1 to Dep. of H. A. Hayes.

6. Because the decision is based upon the assumption that after one and a half miles from the mouth of Slick Rock Creek, no marked trees were found to the foot of the Spur, for a distance of three and one-half miles.

Whereas, the proof shows that although the surveyors, Hayes and Bogle, found no marked trees in this distance on account of the fact that from the roughness of the land, they could not go to the creek in several places and had to offset from it, the surveyor H. P. Hyde subsequently found at least one-half dozen marked trees in this distance between the mouth of Slick Rock Creek and the foot of the spur, one being a birch fore and aft tree about one-half mile
494 above Slick Rock Creek, from which he files a block is filed as Exhibit No. 5 to his deposition and that he found marked state line trees in this distance up to within three-quarters of a mile of the foot of the Ridge.

H. P. Hyde, Rec. pp. 194 and 195.

7. Because the decision is based upon the assumption after leaving Slick Rock Creek on the line claimed by appellants there were a great number of marked trees within a short distance up the spur and only two or three trees from the top of the spur to the Junction of the Fodder Stack and Hangover.

Whereas, there were 16 marked state line trees found on this leading up to the Fodder Stack, one of which was a spruce pine 200 to 250 yards from the top of the Fodder Stack, which had found by Appellee's own surveyors and that from the top o Fodder Stack to its Junction with the Hangover, there were f seven marked state line trees, although for a distance of abou and one-half miles, owing to a raging storm, Appellant's surv did not look for any marked trees.

H. S. Hayes, Rec. pp. 137-139.

8. Because the decision is based on the assumption that the M saw and heard most of the witnesses testify and additional we is given to his report on this ground.

Whereas, the Master saw or heard none of the witnesses tes it appearing from the captions of all the depositions taken in case that none of them were taken in the presence of the Master

9. Because the decision is based upon the assumption that trees on the top of the Hangover Spurs were scrubby and scarce the proof shows that the top of the Hangover was well timbered many trees that would have been suitable for state line marks.

W. D. Hale, Re-Ex. Q. 37 and 38, p. 91.

H. P. Hyde, Rec. p. 192.

10. Because the decision of the Court is based upon the assumpt that other trees similarly marked to the line of Slick Rock Creek found on the Fodder Stack Ridge which confessedly are not u any line not claimed as the actually located state line.

Whereas, the depositions of all the witnesses in this case fail show a single marked tree outside of the state line claim
495 by appellants which is marked with state line marks of character shown by the blocks in evidence in this cause. does appear that there are other trees with irregular chops, on vari trails, but no other trees appear marked in this way with the sa regularity of marks and the same kind of an axe as that used on state line survey and of the same age. The very starting point Appellee's argument is the line north of the river and yet H. Hyde, the only witness who has seen both the line north of the riv relied upon by Appellees as the state line and the marked line Slick Rock Creek testifies that they are identical in every respect to age and character of marks and the instrument with which th were made.

H. F. Hyde, Rec. pp. 228 and 229.

11. Because the decision of the court is based upon the assumptio that the call from the Tennessee river to the main ridge should run as a straight line and from the last monument on the river, th fore and aft tree, to the main ridge, this call would not be runnin from the river to the main ridge which implies leaving the river o the south bank and thence running to the main ridge, but would merely a call from the north bank of the river to the south bank the Tennessee river, and there would be no intervening call answe ing the description "from the Tennessee river to the main ridge,

as the spur of the Hangover comes down abruptly to the south bank of the river, while the natural meaning of the phrase "from the Tennessee river to the main ridge" is fully carried out by the line contended for by Appellants, which does run from the south bank of the Tennessee river to the main ridge, to the junction of the Hangover and Fodder Stack and according to the line run and marked by the Commissioners.

H. S. Hayes, Rec. p. 134.

12. Because this decision of the Court is based upon the assumption that the early grants in the Ocoee District did not call for the state line.

Whereas, the custom of issuing grants in the Ocoee District as shown from the grants in evidence in this cause is to describe the grants not by metes and bounds, but by the number of the section, quarter section, or fractional quarter section and the granting of fractional quarter sections shown in said grants show the understanding of the parties at that time that the Slick Rock Creek was the state line.

496 13. Because the decision of the Court is based upon the assumption that North Carolina did not assert jurisdiction over the territory in dispute east of Slick Rock Creek until 1853.

Whereas, it appears by stipulation of counsel that the reason no survey was made by North Carolina in the disputed territory until 1851, was because the North Carolina Act of 1851 providing for the survey of the Cherokee possessions, speci-cally provided that the only lands which would bring more than 20 cents an acre should be surveyed. This territory was surveyed in 1851 and grants began to be made in 1853.

Stipulation of Counsel, Rec. p. 226. Entries and Grants, Rec. pp. 346, 347 and 348, etc.

14. Because the court based its decision on the assumption that the Honorable Circuit Judge concurred with the Master in holding that the trees on the Hangover were marked as state line trees, and

Whereas, the Circuit Judge in his opinion regarded the defendant's line as the "better marked line." The blocks from the trees which are in evidence in this case, speak for themselves and show that the line contended for by Appellants is marked with state line marks and that the two trees contended for by Appellees on the Hangover show no state line marks whatsoever. The marks upon the trees themselves, the best evidence in this cause, are of such controlling character as, it is respectfully submitted, overthrow the weight attaching to the concurrent finding of the Master and the Court.

For the foregoing reasons taken in connection with those set out in the argument made on the first hearing of this cause, petitioners respectfully pray for a rehearing of the argument in this cause, on a day to be appointed by the Court and that the aforesaid decree may be so corrected as to give the petitioners all the land east of the state line and the line running up Slick Rock Creek, the Spur and

Fodder Stack Ridge, as shown on Exhibit No. 1 to Deposition of H. S. Hayes.

THOMAS F. McGARRY,
E. P. McQUEEN,
EDWARD T. SANFORD,
Solicitors for Appellants, D. W. Belding, M. M. Belding, A. N. Belding, Henry Stix, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg and R. N. Archer.

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Certificate of Counsel.

I hereby certify that this petition for rehearing is presented in good faith and that I believe it is based on meritorious grounds.

THOMAS F. McGARRY,
Solicitor for Petitioners.

And afterwards to wit on October 2, 1900, an order denying said petition for rehearing was filed in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 783.

D. W. BELDING et al.
vs.
CHARLES HEBARD.

The petition for rehearing in this cause is hereby denied.

United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of D. W. Belding, et al. vs. Charles Hebard, No. 783, as the same remains upon the files and records of said United — Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 31st day of March, A. D. 1909.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

a United States Circuit Court of Appeals, Sixth Circuit.

No. 2031.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, Fred W. Bruch, George Reeves and John Matthews, Appellants,

vs.

CHARLES HEBARD, Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

RECORD.

Original transcript filed December 18, 1909.

1 TRANSCRIPT OF RECORD.

Petition for Leave to File Bill of Review.

Circuit Court of the United States in and for the Northern Division of the Eastern District of Tennessee.

DAVID W. BELDING, MILO M. BELDING, ALVAH N. BELDING, HENRY Stix, Nathan Stix, David M. Hyman, Eugenia H. Bragg, Marion B. L. Laws and Caleb S. Bragg, a Minor, by Eugenia H. Bragg, His Next Friend, Heirs at Law of Mary Bragg; Henry Cooper and Emily Cooper, Heirs at Law of R. L. Cooper; W. N. Cooper, T. Z. Cooper, Amanda Bryson, Mary Jackson, and Hester Ferguson, Heirs at Law of J. W. Cooper and Robert N. Archer, Complainants,

vs.

CHARLES HEBARD, Defendant.

Petition for Leave to File Bill of Review.

To the Judges of the Circuit Court of the United States in and for the Northern Division of the Eastern District of Tennessee:

Your petitioners, William R. Hopkins, Benjamin H. Bole, Edward I. Leighton, Fred W. Bruch, George Reeves and John Matthews, represent to the court that on the 29th day of October, A. D., 1900, they became the purchasers from the owners thereof of a large body of timber lands in the County of Graham, in the State of North Carolina, abutting upon the boundary line between the states of North Carolina and Tennessee and the said lands so purchased included a body of about 8,000 acres of valuable timber lands in the western part of said county and abutting upon the said state line, that the source of the title of said lands was grants from the state of North Carolina, in which state said lands were situated and conveyances thereof from the predecessors in title.

That on the 16th day of January, 1896, one Charles Hebard filed a bill in equity in the Circuit Court of the United States in and for the Northern Division of the Eastern District of Tennessee against
2 D. W. Belding, Henry Stix, Nathan Stix, Lewis Krohn, D. W. Hyman, Mary Bragg, R. L. Cooper, J. W. Cooper, and R. N. Archer, in which the complainant alleged that he was the owner and in possession of about 40,000 acres of land, including 8,000 acres above mentioned, under grants from the State of Tennessee and conveyances from the original grantees and their successors, and claiming that the said 8,000 acres in dispute were in the State of Tennessee, and alleging that one of the defendants, to-wit; R. N. Archer and others, claiming the right thereto from the co-defendants of the said R. N. Archer, were cutting and removing timber from the said disputed lands and asking that the Court find the State line aforesaid, the true State line and to protect the title of the said complainant. That the point in dispute in said case, as made by the said bill and the answers that were filed, was the true location of the State line between the States of North Carolina and Tennessee, and according as the said State line was located to the contention of the complainant or of the defendants so the said disputed lands belonged to the complainant or defendants respectively.

That the said case was at issue and was referred to a Master who heard the evidence on each side pro and con and after argument of counsel found that the state line between the said States was located in accordance with the contention of the complainant, and that the said 8,000 acres of land in dispute were included in the grants and conveyances to the complainant and that the defendants who claim said disputed lands under grants from the State of North Carolina and subsequent conveyances of said grantees and their successors, had no title thereto because the fixing of the location of the state line as contended for by the complainant located those lands in the State of Tennessee, and not in the State of North Carolina, so that the pretended grants from the State of North Carolina were of no force or effect and that the subsequent conveyances of the grants by the State of North Carolina and its successors, conveyed no title.

That the finding of the said Master in favor of the complainant upon exceptions was affirmed by the said Circuit Court of the United States, and a decree in favor of the complainant was entered which on appeal had been affirmed by this Court, all of which will more fully in the Bill of Review which is now sought to be filed and the record of the case on appeal in this Court.

Your petitioners state that the evidence given before the said Master was strongly favorable to the contention of the de-
3 fendants but it appeared that in 1821 by virtue of acts of the State of North Carolina and Tennessee respectively a joint commission was created to run and locate said division line and it was so run and located. But at the time of said hearing and until very recently it was impossible to discover the report of maps accompanying said survey of the state line and in the evidence offered before the said Master it was conceded that said papers were not in existence but said paper consisting of a map of said dividing line

made by the said joint commissioners has been recently discovered in the City of Nashville, in the State of Tennessee, under the circumstances and at a time set out in the bill for a rehearing sought to be filed herewith, that such evidence could not have been produced at the trial by any amount of diligence, nor the existence and contents of said papers be proven and the existence and production of said map would have been decisive that the contention of the defendants was correct, and that the said lands in dispute unquestionably did belong to them under their grants from the State of North Carolina, and subsequent conveyances.

That your petitioners have been aggrieved by the decree of the Court below and the affirmance thereof by this court in such manner and to such extent that they are remediless except by the action of this court and the court below in reviewing said decree.

Now, your petitioners respectfully ask this court to permit them to file a bill of review which is presented herewith with accompanying affidavits in order that the court may consider this new evidence in connection with the former record and evidence and in order that the court below may re-consider said case and enter such decree as may seem right and just in connection with the said record and evidence and newly discovered evidence, and that said court may right your petitioners in matters in which they have been aggrieved upon such terms as may be proper and your petitioners now offer to enter into bond for such costs or other damages in case they should fail to establish their right to a review of said decree in such sum and upon such conditions as this court may award.

C. B. MATTHEWS,
Counsel for Petitioners.
WILLIAM R. HOPKINS,
BENJAMIN H. BOLE,
EDWARD S. LEIGHTON,
FRED W. BRUCH,
GEORGE REEVES,
JOHN MATTHEWS.
By C. B. MATTHEWS,
Their Solicitor.

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STATE OF OHIO,
County of Cuyahoga:

W. R. Hopkins, having been duly sworn says that he is one of the petitioners herein, and that the allegations of the foregoing petition are true.

W. R. HOPKINS.

Subscribed in my presence and sworn to before me this 26th day of July, 1907.

[SEAL.]

A. H. FIEBACH,
Notary Public.

(Endorsed:) No. —. Circuit Court of the United States, in and for the Eastern District of Tennessee, Northern Division, David W.

Belding and others, Complainants, vs. Charles Hebard, Defendant. Petition for leave to file Bill of Review. Filed Aug. 6th, 1907, D. L. Snodgrass, Clerk, by W. L. Edington, Deputy Clerk.

Bill of Review.

Circuit Court of the United States in and for the Eastern District of Tennessee, Northern Division.

DAVID W. BELDING, MILO M. BELDING, ALVAH N. BELDING, HENRY Stix, Nathan Stix, David M. Hyman, Eugenia H. Bragg, Marion B. Laws, and Caleb S. Bragg, a Minor, by Eugenia H. Bragg, His Next Friend, Heirs at Law of Mary Bragg; Henry Cooper and Emily Cooper, Heirs at Law of R. L. Cooper; W. N. Cooper, T. Z. Cooper, Amanda Bryson, Mary Jackson, and Hester Ferguson, Heirs at Law of J. W. Cooper, and Robert N. Archer, Complainants,

vs.

CHARLES HEBARD, Defendant.

Bill of Review.

To the Honorable Judges of the Circuit Court of the United States in and for the Northern Division of the Eastern District of Tennessee:

Your orators, David W. Belding, Milo M. Belding, Alvah N. Belding, Henry Stix, Nathan Stix, Louis Krohn and David M. Hyman, Eugenia H. Bragg, Marion B. Laws and Caleb S. Bragg, his next friend, heirs at law of Mary Bragg and Henry Cooper and Emily Cooper, heirs at law of Robert L. Cooper, and W. N. Cooper, T. Z. Cooper, Amanda Bryson, Mary Jackson and Hester Ferguson, heirs at law of J. W. Cooper, state that on the 16th day of January, 1896, said Charles Hebard filed in the Circuit Court of the United States, Eastern Division of Tennessee, Northern Division at Knoxville, a certain bill in equity, in which he alleged that he was the owner in fee of about 40,000 acres of land lying in the Northern Division of the Eastern District of Tennessee, in the Eastern portion of Monroe County, south of the Little Tennessee River, and adjoining North Carolina State line. That said State line is the Eastern boundary of said 40,000 acres owned by the complainant, and that the title of said lands was derived from the State of Tennessee by grants duly and regularly issued, mesne conveyances and descent terminating in the complaint.

That the defendants, with the exception of the said Robert N. Archer, claimed to own by deeds themselves and as tenants in common a large body of land containing 20,000 acres or more in Graham County, North Carolina, adjoining the lands of complainant, the said State line being the dividing line between the two bodies of land, and the defendants claimed to derive their title by grants from the State of North Carolina and that there was then a conten-

tion between the complainant and the defendants as to the true location of the State line, which contention involved some 8,000 acres of valuable timber lands upon which and from which the defendant, Robert N. Archer by authority from the other defendants, had recently entered and was cutting and removing the timber.

That the land thus in dispute included all the land drained by the water of Slick Rock creek, which has its source in the mountains west of the point where the State line crosses the river. And that the dividing line between North Carolina and Tennessee, as complainant insisted, and after flowing some 6 miles in a northeast course, empties into the Little Tennessee River about ½ mile below, and west of the point where the State line crosses the river. And that the land thus drained by Slick Rock Creek formed an irregular basin the eastern side or rim being what is called Hangover Mountain, running in a northeast and southwest direction and which is higher and more nearly straight than any other mountain on the right or left in that vicinity. That on the south and west side of the basin, the Fodder Stack lead and smaller spurs or ridges from the rim of the basin and are much lower than Hang Over and gradually diminishing until the river is reached. The basin thus formed being about 6 miles in length and extending northeast and southwest with an average width of about 3 miles.

6 The complainant further alleged that in the year 1821, joint commissioners were appointed by North Carolina and Tennessee to locate and establish the line between the two states, and that said commissioners located and established the line.

"Beginning at a stone set up on the north side of the Chattahoochie turn pike, marked on the west side "Ten." and on the other side N. C., 1821, running thence southwest to the Bald Rock on the summit of the Great Iron or Smoky Mountain, and continuing southwest on the extreme heights thereof, and where it strikes the Tennessee River, 7 miles above the Old Indian town of Tallassee.

* * *

"Crossing the Tennessee river at a distance of 65 miles from the beginning, from the Tennessee river to the main ridge and along an extreme height of same to the place where it is called Unicoi or Unaka Mountain."

That the latter clause, to-wit, "from the Tennessee river to the main ridge along the extreme height to where it is called Unicoi or Unaka mountain," is the portion of the State line in dispute, and the said bill described the State line as running southwesterly from the beginning, crossing the Tennessee river about ½ mile above, nearly east of the mouth of Slick Rock Creek, where it crosses the river, following a leading ridge, reaching the main ridge at a place near the Hang Over, thence running along the extreme heights of the Hang Over mountain, passing Stratton's Ball some 6 miles or more from the river, and thus continuing on top of the mountain same course southwestwardly to where the ridge so called Unicoi or Unaka mountain.

It was further alleged that from the Little Tennessee river to the Unicoi or Unaka mount the Hang Over lead is more direct in its

course southwestwardly and Hang Over is from 400 to 1,000 feet higher than any other ridge or spurs in that section, and that along this ridge the old marked line still exists, as made by the commissioners in 1821 when they located and established the line and it was therefore insisted by the complainant that the same is the true State line as established by the commissioners and that the Slick Rock Creek basin, including all the land drained by said creek is entirely within the boundary of the State of Tennessee.

That on the other hand, the defendants insisted that the State line crosses the river from ½ to 1 mile below the mouth of Slick Rock Creek, and thence following low ridges and spurs, first northwest then west, southwest, south and southwest, until it strikes the main ridge at the Stratton Ball intercepting the line as contended for by complainant, and by this line including all the lands in the Slick Rock basin and tributary to its waters within the boundary of North Carolina.

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The complainant thereupon sets out various reasons why the contention of the defendants cannot be correct, and further sets out the history of the title of the lands in controversy, and the fact that in surveying the said lands supposed to be in the State of Tennessee in 1837-1839, in pursuance of an act of the Legislature of Tennessee said survey stopped at the Slick Rock Creek basin, that he derived the same from the State of Tenn., and charges further that the complainant, and those from whom he derives title, have had for many years tenants living upon the land in the Slick Rock Creek dated back as far as 1882, and claims that he and those under whom he derives the title have been in open and continuous possession since 1882, and that they were at the time of the filing of the bill in possession claiming under the deeds as set out.

It is further alleged that the defendant, Robert N. Archer, under contract with the other defendants who were claiming to own said property had entered upon said lands and was cutting and about to remove timber, and that on the 10th day of June, 1895, as action -as brought in the Chancery Court of Monroe County, Tennessee, against Robert N. Archer and others to prevent them from cutting and removing the timber which action was removed on the 31st day of August, 1895, into this Court, where it was at the time of the filing of this bill then pending, and alleged that the complainant was in sole and undisputed occupation of said land and that the respective defendants are not in occupation of said land. The complainant then alleges the collusion of the defendants and refusal to recognize the rights and titles of the complainant, sets out their trespasses and prays that the Court will settle the position of the said State line between the said States of Tennessee and North Carolina at the point designated, and in accordance with the claims of the bill, that the Court will award a writ of possession, and that the defendants be enjoined from cutting and removing timber, or otherwise trespassing upon the said lands, and that upon final hearing the said injunction be made perpetual, and that the cause above mentioned that was removed from the Chancery Court of Monroe County, Tennessee, be

consolidated with this cause and a prayer for general relief and for process.

That such proceedings were had that a preliminary injunction issued in accordance with this prayer, and on June 28th, 1895, complainant filed his amended bill, correcting the name of the said Archer.

8 That both to the Lill in the case that was removed and in this case a plea was filed by the said R. N. Archer, in which he set up the pendency of the suit that was brought in Monroe County, in said Chancery Court, and removed to this Court, as a plea in abatement to the filing to the bill herein.

That the said defendant, J. W. Cooper, on May 30th, 1896, filed his separate answer to the bill, in which he specifically denied that the complainant had any title to that part of the lands set out in the bill, which were bounded and described as follows:

"Beginning at a beech tree in the State line where the Hang Over mountain strikes said line, and near a corner of No. 5051, and running with said line of No. 5051 south 80 degrees, east 320 poles to a mountain oak, then with the line of No. 4455, north 40 degrees, east 320 poles to a Spanish oak; then east 92 poles to a large rock on the second high peak of the Hang Over mountain; then down the ridge with its meanders to a service tree on the bank of the Cheoah river; then down said river with its meanders to the Tennessee river; then down the Tennessee river to a corner of No. 611 at the mouth of Slick Rock Creek and the State line. Then up with said line to the top of said mountain to a locust on said line; then with said line and its meanders to the beginning, containing 14,800 acres, more or less, and alleges that the said line marked by the Commissioners who ran the same in 1821 from the Little Fodder Stack to the Unicoi or Unaka mountain is plainly marked, that said line from the Little Fodder Stack to the intersection of the Hang Over Ridge is 752 poles and nearly a due east course from the said State line as shown by the angles and lines of the defendants' deeds and grants. That to follow the Hang Over mountain and its main heights will end at the Cheoah river 6 miles above Slick Rock Creek, and not at the Tennessee river. The Hang Over top, the Little Fodder Stack top, and the place of intersection of the Hang Over mountain and the State line mountain form a triangle, that to follow the State line mountain by way of the Fodder Stack and the Tennessee river, the same ends about 150 yards below the mouth of Slick Rock Creek, which point is about 7 miles below the old Indian town of Tallassee, and that was the one line which could be run agreeing with the line described in the survey of 1821; that to cross the Tennessee river one-half mile above the Slick Rock creek a line over there could not reach the Little Fodder Stack and Big Fodder Stack, without running a line almost due west, and crossing both Big and Little Slick Rock Creeks and then to go by Hang Over would re-

9 quire another southeast line crossing both creeks again and would be leaving the plain marked line which has been recognized by the citizens of North Carolina for the last 40 years, and has been known and recognized by the citizens of both States since

1821. That the State line does not cross the Tennessee river ½ mile above the mouth of Slick Rock Creek, but on the contrary, that it does cross the said river below the mouth of Slick Rock Creek, and said answer specifically denies the allegations of the said State line as alleged in the bill, and all of the reasons given for said allegations, and denies that the complainant had tenants on any of the said land, or that he is in possession of any part thereof, and asserts that the defendants are and have been in actual, notorious and adverse possession since 1883, under grants issued in 1860, and disclaim any title or possession in any of the lands claimed by the complainant, which are not within the boundary set out in said answer, and after denying all other allegations in the said bill, not specifically mentioned in the answer, states that one McGarry of Grand Rapids, Michigan, was owner of 1-12 of the said property and was a necessary party in order to give the Court jurisdiction of the case, and prays that the complainant's action be dismissed at his costs.

On August 10th, 1895, the other defendants filed their answer, in which they denied that the complainant is the owner of the 40,000 acres of land set out in the bill, deny that the said line is the eastern boundary of said land, deny that he is in possession, and deny that said lands vested in complainant that it was derived from the State of Tennessee by grants duly and regularly issued and by mesne conveyances and descent terminating in complainant.

The defendants further allege that they are the tenants in common of a tract of land of 30,000 acres or more in Graham County, North Carolina, parts of which form the boundary of the State line between North Carolina and Tennessee. Admit that they derived their title from the State of North Carolina, deny that until the suit was brought there was a contention between the defendants and complainants as to the true location of the State line, but admit that that part of the defendants' lands sought to be recovered by the complainant amounts to about 8,000 acres, and *denied* that the said R. N. Archer was trespassing upon any lands of the plaintiff. Deny that the said line between the two said States crosses the said Tennessee river about ½ mile above and nearly east of the mouth of the Slick Rock Creek, deny that the State line was established as set out and alleged, and say that the lands in controversy are in North Carolina. The answer then contains a long history of the title to the property and alleged that the said lands claimed by them were duly granted by the State of North Carolina, being within that State, and that in accordance with the laws of the State by grants and subsequent conveyances were vested in the defendants who have ever since by them and their tenants been in actual, open and notorious and visible possession thereof, and that subsequent to the original running of the said State line under said law, the State of North Carolina, did re-run it, and said State lines re-located corresponded with the line originally located in 1821 and that both of said sets of Commissioners located the lands *within* controversy within the States of North Carolina and that said State line has been ever since recognized by the inhabitants of both states as constituting the boundary line between said states, and it was for this reason

that the State of Tennessee did not survey or cause to be surveyed or granted or transferred prior to 1873, said lands as lands belonging to said State of Tennessee. That the said State of North Carolina has exercised jurisdiction over said lands which has been acquiesced in by said State of Tennessee. That Maps in the Land Department of the United States, locate said State line substantially as claimed by these defendants, and thereupon sets out various charters, grants, treaties, correspondence, compacts, reports, maps and the exercise of jurisdiction over the said lands by the said State of North Carolina and acquiescence therein by the said State of Tennessee as corroborating the contention of the defendants and alleged possession of and title to the said lands and deny any title in the complainant. That on September 28th, 1896, the said Mary Bragg filed her answer which is substantially a copy of the answer of the other defendants just alluded to.

The plea in abatement of Robert N. Archer having been overruled, he on March 9, 1888, filed his separate answer, in which he said that the other defendants all claimed title to the property in controversy, but that his only interest was in the timber under a contract with the owners and in other respects as far as the title in dispute is concerned, substantially follows the answer of the main defendants. Your orators further state that the said complainant having on September 29th, 1896, filed his general replication to the answers, an order was entered appointing a Special Master to report to the Court the true State line between the States of Tennessee and North Carolina, and before said Master, a large amount of
11 evidence was introduced upon both sides, consisting of the evidence of surveyors, some of whom located the line from Tennessee, southwest along the Hang Over ridge, while others located it as crossing the Tennessee river at the mouth of Slick Rock Creek and thence along that creek to the Fodder Stack range, to the Unicoi or Unaka mountain. Both of the lines contended for reach that point. Evidence of the marks upon the trees, evidence of people who had the line pointed out to them by people who were concerned in the original survey, evidence of people in possession of the said land as to where they considered it located. Evidence of the survey of the State of Tennessee of the Ocoee land district which stopped at the Slick Rock Creek, evidence on file in the United States Land Department, and the subsequent re-survey of the State of North Carolina, and the Cession Act relating to the survey and report of the Commissioners of the two States. Other evidence which is summed up in the case of Belding against Hebard in the 103 Federal Reporter on pages 542 and 546 inclusive. Your orators allege that upon the said evidence and argument of counsel the Special Master Commissioners found the said State line as claimed in the bill of the said Hebard and on exceptions the report was confirmed and a final decree entered for the complainant, and in this connection your orators beg leave to refer to the printed record of the said case in the Circuit Court of Appeals of the Sixth Circuit, which is exhibited with this bill, an appeal having been taken, from the

decree of this Court, which record contains all of the pleadings, evidence and decree of the Court.

Your orators say that the original field notes report and the map of the Commissioners who ran and established said State line in 1821, were all lost, and the said defendants after the most diligent search were unable to find any of the said papers in the archives of the State of North Carolina, or of the State of Tennessee, and evidence was given of the search that had been made therefor, which satisfied this Court, and the said Circuit Court of Appeals, that none of said papers were then in existence. That about 1835 the State house at Raleigh, North Carolina had been burned, and it was supposed that said papers had been lost at that time, and destroyed by the fire. But a most exhaustive search among the archives at Nashville, Tennessee, where such papers, if preserved, would have been filed, failed to reveal the existence of any of them, and in the opinion of the Circuit Court of Appeals on appeal in the 103 Federal Reporter, page 532, it is stated that none of said papers were then in existence.

12 Your orators allege, however, that about two years since by the Legislature of Tennessee as your orators are informed and believe, a law was passed, ordering that the rubbish which had accumulated in the basement of the State house at Nashville should be cleared out and destroyed and at some time during the year 1905, as your orators are further informed and believe, but at what particular date they are ignorant, some of the employés of the State of Tennessee, started to clear out this rubbish, and in a barrel, where it had been put loosely and carelessly, and as if it were of no value, the map made by the original commissioners of the States of North Carolina and Tennessee, who ran the line in pursuance of the Cession Acts passed prior thereto was discovered and a certified copy thereof is attached to this bill of review.

That while this suit was pending, the interest of the defendants in the said lands was for a valuable consideration sold and conveyed by the original defendants, excepting the Bragg and Cooper interests, on December 9th, 1899, and by subsequent conveyances all of said interests came to Edward I. Leighton, Fred W. Bruch, George Reeves, John Matthews and William R. Hopkins, and that said conveyance was for the purpose of finally vesting title, and said title has been vested in the persons just above named. That in the latter part of February, 1906, one M. E. Cozad, whose affidavit is filed herewith, heard a rumor for the first time that said map had been discovered in Nashville. That the said M. E. Cozad resided at Andrews, in the State of North Carolina, and was a representative of the said grantees just name- as a care taker of the said property, but he immediately and with due diligence set about ascertaining whether said map in fact had been found, and made two trips to North Carolina to Raleigh, to ascertain whether or not its counterpart could be found in Raleigh, but failed to find it there, but obtained as soon as he could, a certified copy of the Tennessee record which is hereto attached, which he obtained on the 26th day of March, 1906.

And further attempts were made to find said written report accompanying said map and the field notes of said survey. But after the most diligent search no other papers connected therewith could be found, but none of the said grantees had had any information concerning the finding of said map and none of the defendants herein knew of it until on or about July 20th, 1906, and the existence or contents of said report could not have been proven at the trial of the original cause.

That the said map shows that the said line crosses the Little Tennessee River at or near the mouth of Slick Rock Creek as
13 contended herein by the defendants, and that it includes all of the lands and more than were claimed by the said defendants. That said map is new and decisive evidence of the contention of the defendants in the original case, and if it had been found and presented to the Court would have been decisive in favor of the defendants, and would have resulted in a decree in their favor. That it was found in a place where no one would have thought it to be, and your orators and their grantees have exercised true and perfect diligence and could not have ascertained the existence thereof sooner than is above alleged.

Your orators further allege that the original decree had been performed and that since the filing of the original bill in this case, Mary Bragg, R. L. Cooper and J. W. Cooper, have all deceased, the former leaving Eugenia H. Bragg, Marion B. Laws and Caleb S. Bragg, a minor who sues by Eugenia H. Bragg, his next friend as her heirs at law and the said R. L. Cooper leaving Henry Cooper and Emily Cooper as her heirs at law, and the said J. W. Cooper leaving W. N. Cooper, T. Z. Cooper, Amanda Bryson, Mary Jackson and Hester Ferguson, as his heirs at law, that since filing the petition for bill of review and the bill as an exhibit thereto, in the Circuit Court of Appeals, your petitioners have ascertained that Charles Hebard, the original complainant died on or about the 11th day of June, 1897, leaving a last will and testament which was duly admitted to probate and record in the County of Baraga, State of Michigan and that Mary C. Hebard, Charles S. Hebard, Julia E. Hebard, Mary E. Hebard and Daniel L. Hebard are his sole heirs at law and his sole devisees under said will, and Charles Hebard and Daniel L. Hebard above named are the executors named in said will.

Wherefore your orators pray that they may be granted leave to file this bill of review making the above named Mary C. Hebard, Charles S. Hebard, Julia E. Hebard, Mary E. Hebard and Daniel L. Hebard as heirs and devisees and Charles Hebard and Daniel L. Hebard, as executors under the will of the said Charles Hebard, parties defendant thereto and upon filing the same that this Court will re-examine the evidence that was introduced at the former hearing in connection with the map exhibited herewith, and the evidence corroborating the same and will decree that the defendants in the original suit and their grantees your petitioners, are the owners of the lands that were conveyed to them and that are in dispute and will find that the boundary line between North Carolina and Ten-

nessee is as claimed by said original defendants and such other and further relief as your orators may be entitled to, and to that
14 end that they may have the relief prayed for, that this Court will direct its writ of subpœna to issue directed to the said Mary C. Hebard, Charles S. Hebard, Julia E. Hebard, Mary E. Hebard and Daniel L. Hebard and against Charles Hebard and Daniel Hebard, executors and direct that service may be made upon them by publication or by copy of the writ and copy of this bill of review or upon the attorneys of the original complainant as to this Court may seem proper and just, directing that the said defendants to this bill of review answer the same and abide the order of the Court thereon in accordance with the rules and practice of this Court in such cases.

C. B. MATTHEWS,
Solicitor and Counsel for Complainants.

STATE OF OHIO,
County of Cuyahoga:

W. R. Hopkins, having been first duly sworn says that the facts stated in the foregoing bill of review are true.

W. R. HOPKINS.

Subscribed in my presence and sworn to before me this 26th day of July, 1907.

[SEAL.]

A. H. FIEBACH,
Notary Public.

Endorsed: No. —. Circuit Court of the United States in and for the Eastern District of Tennessee, Northern Division. David W. Belding and others, complainants, vs. Charles Hebard, Defendants. Bill of Review. Filed August 6th, 1907. D. L. Snodgrass, Clerk, by W. L. Edington, Deputy Clerk.

Circuit Court of the United States, Eastern District of Tennessee, Northern Division.

DAVID W. BELDING et al., Plaintiff,
vs.
CHARLES HEBARD, Defendants.

Affidavit of C. Z. Denton.

Circuit Court of the United States in and for the Eastern District of Tennessee, Northern Division.

DAVID W. BELDING, MILO M. BELDING, ALVAH N. BELDING, HENRY STIX, Nathan Stix, David M. Hyman, Heirs at Law of Mary Bragg, Heirs at Law of R. L. Cooper, Heirs at Law of J. W. Cooper, and R. N. Archer, Complainants,
vs.
CHARLES HEBARD.

STATE OF NORTH CAROLINA,
Cherokee County:

Personally appeared before me, D. S. Russell, a notary public for said county, C. Z. Denton, who makes oath in due form of law, that he is a citizen of Graham county, North Carolina, and resides about fifteen miles from Slick Rock Creek, that he is thirty-eight years old, and that his occupation is that of a land surveyor. That he has been chiefly engaged in surveying land for a period of about six years, though he had considerable experience in this line of work before he became a regular surveyor. He further states that he was employed by Mr. M. E. Cozad, agent of William R. Hopkins and other- in looking after their landed estate- in North Carolina, about the 10th of July, 1907, to locate and run out a line between Tennessee and North Carolina, beginning at a point near the mouth of Slick Rock Creek where said line crosses the Tennessee River to a point where the Fodder Stack Mountain and the Hangover Lead intersects, being a point near the Stratton Ball. That in pursuance of said employment he went on the ground on the 15th of July, 1907, and entered upon the work of surveying said line, that he had as his assistants and helpers i n the work D. A. Stewart, W. H. Bumgarner, E. E. Debuty and Andrew Orr.

For the purpose of locating said line he was furnished a certified copy of the map of said line, made by the commissioners appointed by Tennessee and North Carolina in 1821, the original map of said copy having been filed in the archives of the capital of the state of Tennessee, said copy of said map is filed with this affidavit — made a part hereof.

Affiant further states that he and his helpers spent about three days in making search for the state line marks along the line indicated on said map, that they had very little difficulty in finding

many trees along the line marked with the state line mark, being three hacks, and the said marks indicated great age.

After tracing said line in this manner about three and one-half miles from said Tennessee river, as indicated on said map, he then by use of his surveying instruments surveyed the line for the same distance. He further states that within said distance he found nineteen trees clearly marked with state line marks, he found several other trees marked, but not plain enough to be certain that they were state line marks, however, he feels sure that they were state line marks, having blocked one and found it to be a state line mark. He also found said trees so marked along this line where the timber was such as to bear the age of such marks, but on slaty ridges along said line where the timber was scrubby and had been somewhat destroyed by fire, he found a less number of marked trees.

16 Affiant further states that in tracing this line on said map where certain angles are indicated he found in going on the ground up Slick Rock Creek and along the mountain that the topography of the country necessitated the exact angles, as indicated on the map; and at the points as shown by the map, provided the commissioners desired to follow the thread of the creek and the crest of the mountain, as the map indicates they did do.)

Affiant further states that because of the limited time allowed him to do this work that he was unable to complete the survey, but by reason of his long and familiar acquaintance with said mountain and the topography of the country through which the line was run as indicated by said map that the courses and distances would lead one along the crest of the Fodder Stack Mountain to the junction of the Hangover Mountain or any spur thereof until it reached said junction. He further states that according to said map and survey made by him said line ran up Slick Rock Creek for about one and a fourth miles and then left the creek bearing west up a ridge, or more exactly speaking, north 65½ degrees west 245 poles to the top of a ridge leading to the main Fodder Stack Mountain, thence to said junction of the Fodder Stack and Hangover leads.

Affiant further says that he has a general knowledge of the Smoky Mountain on the northeast side of the Tennessee River, and that the main lead of said mountain on that side of the river strikes the river below the mouth of Slick Rock Creek and that if the commissioners ran said line as shown by said map, that they followed the lead striking the river below the mouth of said creek. He further states that according to said map the state line did not and could not approach the river at a point opposite the Hangover lead, where it strikes the river.

C. Z. DENTON.

STATE OF NORTH CAROLINA,
Cherokee County:

C. Z. Denton makes oath that the statements set forth in the foregoing affidavit are true.

C. Z. DENTON.

Subscribed and sworn to before me on this the 27th day of July, 1907.

[SEAL.] D. S. RUSSELL,
Notary Public.

Endorsed: No. 1056. In the U. S. Circuit Court at Knoxville. David W. Belding et al. against Chas. Hebard. Affidavit of
17 C. Z. Denton. Filed Aug. 6, 1907. D. L. Snodgrass, clerk. By W. L. Edington, deputy clerk.

Ex. A to dep'n of C. Z. Denton, filed May 8, 1908. R. S. C. Hutchinson, Notary Public.

STATE OF NORTH CAROLINA,
Cherokee County:

D. A. Stewart makes oath in due form of law, that he is 52 years old, that he now resides in Graham county, N. C., about 7 miles from Slick Rock Creek, where he has lived for more than thirty years, that he is well acquainted with the mountains in the neighborhood of Slick Rock Creek, that he assisted C. Z. Denton in the recent survey he made of a part of the state line between Tennessee and North Carolina, that he has heard read the affidavit made by him on this day touching the work performed by him in said survey of said line. Affiant further states that he fully understands all the statements made in said affidavit, and that he fully concurs with him in all of his statements contained in said affidavit in detail.

D. A. STEWART.

Subscribed and sworn to before me on this the 27th day of July, 1907.

[SEAL.] D. S. RUSSELL,
Notary Public.

Endorsed: No. —. In the U. S. Circuit Court at Knoxville. David Belding et al. against Charles Hebard. Affidavit of A. D. Stewart. Filed Aug. 6, 1907. D. L. Snodgrass, clerk. By W. L. Edington, deputy clerk.

In the Circuit Court of the United States, Eastern District of Tennessee, Northern Division.

DAVID BELDING et al.
vs.
CHARLES HEBARD et al.

Affidavit of E. E. Debuty.

E. E. Debuty makes oath that he is forty years old, that he has lived in the neighborhood of Slick Rock Creek all of his life, that he lived on the disputed territory involved in this cause for about

twenty years, that he is well acquainted and familiar with the Smoky Mountains and the other mountains in the neighborhood of the Slick Rock Creek, that he was with C. Z. Denton in the survey recently made by him, as set forth in his affidavit this day made by him in this cause. That he has heard said affidavit read and understands the contents thereof, and that he fully concurs with him in
18 the statements made therein in every particular.

E. E. DEBUTY.

Subscribed in my presence and sworn to before me on this the 27th day of July, 1907.

[SEAL.] D. S. RUSSELL,
Notary Public.

My commission expires Oct. 13th, 1908.

Endorsed: No. —. In the U. S. Circuit Court at Knoxville. David W. Belding, et al., against Chas. *Belding*. Affidavit of E. E. Debuty. Filed Aug. 6, 1907. D. L. Snodgrass, clerk. By W. L. Edington, deputy clerk.

Affidavit of M. E. Cozad.

Circuit Court of the United States in and for the Eastern District of Tennessee, Northern Division.

DAVID W. BELDING, MILO M. BELDING, ALVAH N. BELDING, HENRY Stix, Nathan Stix, David M. Hyman, Heirs at Law of Mary Bragg, Heirs at Law of R. L. Cooper, Heirs at Law of J. W. Cooper, and R. N. Archer, Complainants,

vs.

CHARLES HEBARD, Defendant.

M. E. Cozad of lawful age having been first duly sworn says that he is the M. E. Cozad who is mentioned in the bill of review sought to be filed in this case, and that for over six years last past, he has resided at Andrews, Cherokee county, in the state of North Carolina, and while there has acted as agent for W. R. Hopkins and others, owners of the "Belding lands," and that the duties of his said agency have been the surveying, examination of the titles, and the safeguarding of said company lands.

That during said period of time he had become acquainted with the lands which were in dispute between Charles Hebard and the defendants in the original case in which it is now sought to file a bill of review the principal question that was involved in said dispute in this cause to-wit: The exact location of the state line between the states of Tennessee and North Carolina at the points where said disputed lands abutted on said state line, and he knew that the contention depended upon whether the lands claimed by the original defendants were in North Carolina or Tennessee, and he knew also by hearsay, some of the principal facts connected with the course of

that litigation. He knew that the cause had been referred to a master who had found that the location of said line was as claimed by the original complainant in that case, Charles Hebard,
19 and that said report had been confirmed by the Circuit Court of the United States in and for the Eastern District of Tennessee, Northern Division, and he knew also that the great difficulty in that case was that the field notes, map and report of the commissioners appointed by the states of Tennessee and North Carolina respectively in pursuance of session acts of the two states to locate the said state line and who in the year 1821 did locate the said state line which location was confirmed, were lost and so far as any knowledge was concerned were destroyed. This affiant also knew that said case was appealed to the Circuit Court of Appeals for the 6th Circuit, where on appeal the decree of the Circuit Court was affirmed. That in all of said hearing and proceedings it was assumed from the evidence that had been introduced before the master, that all papers and records showing proceedings of said commissioners were not in existence.

That in the latter part of February, 1906, this affiant for the first time, heard a rumor that the map made by said commissioners in 1821 and which was the result of the work of said commissioners in running and locating said state line had been discovered in Nashville. That immediately and with due diligence he set about ascertaining whether said map in fact had been found, and wrote to a friend in Knoxville, Tenn., asking him to ascertain the fact, and get him a copy of it. But this friend did not send him a copy and he instituted inquiires through Gen. Theodore F. Davidson, an attorney of Asheville, in the state of North Carolina, who wrote a friend of his in Nashville to ascertain the fact, and obtained a copy and on the 26th day of March, 1906, this affiant received a certified copy of said map. That between the last of February and the first of May this affiant made two trips to Raleigh, the capital of the state of North Carolina, to ascertain if the counterport of said map was in existence, that each of said trips consumed about one week of time and this affiant also immediately instituted inquiries at Nashville and searched to ascertain if possible, whether the field notes and written report of the commissioners for the running of said boundary line if any such were ever made, were in existence.

But his inquiries at Raleigh and at Nashville were not successful in finding or ascertaining the existence of the field notes or any written report. And after the most diligent search, both at Raleigh and Nashville, no paper could be found other than the map before mentioned, which was found at Nashville.

20 That this affiant is informed and believes that the legislature of Tennessee had passed an act or resolution directing the clearing out of the rubbish in the cellar of the state house and the attachés of the state house in carrying out said resolution, had some time during the year 1905, but just when this affiant is not informed, found the said map among a lot of loose papers in a barrel in the cellar or basement of said state house.

But this affiant never heard thereof, until in the manner and at

the dates mentioned above. That the said map shows that the said state line crossed the Little Tennesse River near and slightly below the mouth of Slick Rock Creek as contended for by the defendants herein, and that it included all of the lands and more than were claimed by said defendants.

That the certified copy of the plat attached to the bill of review sought to be filed herein is the certified copy that was obtained on the 26th day of March by this affiant. That the said state line is indicated thereon by a hand, commencing at or near the Big Pigeon River, and ending in the upper right corner of said plat at the Southern Boundary of the state of Tennessee as marked thereon and that where said line crosses the Little Tennessee River in the immediate vicinity of the mouth of the creek, that creek is the Slick Rock Creek mentioned in the record in the Hebard case and the said map shows that the true state line as located is west from the point where it was claimed by the said Hebard that the state line crossed said Tennessee River, and includes all the land in dispute and shows that the same are in the state of North Carolina.

That while said suit was in progress the original defendants in the case for a valuable consideration parted with and sold all of their interests in said lands in dispute to certain persons, W. R. Hopkins, E. J. Leighton, Fred Bruch, John Matthews, George Reeves and B. P. Bole.

That since the decree in the original case, R. L. Cooper and J. W. Cooper have departed this life.

M. E. COZAD.

Subscribed in my presence and sworn to before me this 3rd day of August, 1907.

[SEAL.]

J. W. WALKER,
Notary Public.

My commission expires June 21, 1909.

Circuit Court of the United States, Eastern District of Tennessee, Northern Division. David W. Belding, et al., complain-
21 ants, vs. Charles Hebard, defendant. Affidavit of M. E. Cozad.

Endorsed: No. —. In the U. S. Circuit Court at Knoxville. David W. Belding, et al., vs. Chas. Hebard. Affidavit of M. E. Cozad. Filed Aug. 6, 1907. D. L. Snodgrass, clerk. By W. L. Edington, deputy clerk.

Be it remembered that at a Circuit Court of the United States began and held for he Northern Division of the Eastern Dist. of Tennessee at the Federal Court rooms in the city of Knoxville, within said district and the Sixth Circuit on the 1st Monday it being the 4th day of March, A. D., 1907.

Present and presiding the Honorable C. D. Clark, judge of the District Court of the United States for the Eastern and Middle Districts of Tennessee.

The following proceedings were had, to-wit:

TUESDAY, *August 6th*, 1907.

Court met pursuant to adjournment.
Present and presiding, the Hon. H. H. Lurton, judge, etc.

DAVID W. BELDING and Others, Plaintiffs,
vs.
CHARLES HEBARD, Defendant.

It appearing to the court that William R. Hopkins and others have filed a petition in the above cause for leave to file a bill of review accompanied by the bill itself, which said petitioners desire to file and also accompanied by affidavits and a certified transcript of the record in the United States Circuit Court of Appeals for the Sixth Circuit, where said original case was decided on appeal in which court as appears by said transcript a petition for leave to file a bill of review was filed and leave given to apply to this court is ordered and directed that a rule issue and served in accordance with the practice of this court on the Smoky Mountain Land, Lumber and Improvement Company and upon T. E. H. McCroskey, attorney at law, representing said company, of Madisonville, Tennessee, to show cause why the prayer of said petition should not be granted and directing said Smoky Mountain Land, Lumber and Improvement Company to answer hereto on or before the next rule day of this court, to-wit: Sept. 2nd, 1907. Enter this.

CLARK, *Judge*.

Be it remembered that at a Circuit Court of the United States began and held for the Northern Division of the Eastern District of Tennessee, at the Federal Court rooms in the city of Knox-
22 ville, within said district and the Sixth Circuit, on the 2nd Monday, it being the 9th day of September, A. D., 1907.

Present and presiding the Hon. C. D. Clark, judge of the District Court of the United States for the Eastern and Middle Districts of Tennessee, the following proceedings were had, to-wit:

No. 1056.

DAVID W. BELDING et al.
vs.
CHARLES HEBARD.

In this cause the Smoky Mountain Land, Lumber and Improvement Company comes by attorney and enters its appearance for the purpose of entering the petition for leave to file bill of review. And thereupon said company filed its answer to said petition, together with exhibits thereto.

By agreement of counsel representing both parties, it is ordered by the court that both complainant- and defendant file briefs by first day of October, 1907.

Endorsed: No. 1056. In the U. S. Circuit Court at Knoxville. David W. Belding, et al., against Chas. Hebard. Order. Entered "S" p. 354. Sept. 9th, 1907. W. L. Edington, D. Clerk.

Answer of Smoky Mountain Land, Lumber and Improvement Company to Petition.

Circuit Court of the United States in and for the Northern Division of the Eastern District of Tennessee.

September Sessions, 1907. No. —.

D. W. BELDING et al.
vs.
CHARLES HEBARD.

And now comes the Smoky Mountain Land Lumber and Improvement Company, and entering a special appearance for the purpose of this answer to this petition for bill of review, and for no other purpose whatsoever, for answer shows that the original suit now sought to be renewed, to-wit: Charles Hebard vs. D. W. Belding and others, was finally heard and determined in the United States Circuit Court of Appeals for the Sixth Circuit, at Cincinnati, Ohio, in the last days of February or the first days of March, 1900, after having been appealed from this court.

That on August 6, 1907, W. R. Hopkins and others filed in this court their petition for leave to file a bill of review in the above-mentioned suit heretofore heard and determined in this court, and accompanied said petition with their bill of review which they seek to file.

23 That on this same day, to-wit: August 6, 1907, this court ordered and directed that a rule issue and be served on the said Smoky Mountain Land, Lumber and Improvement Company, and upon T. E. H. McCroskey, attorney at-law, representing said company to show cause why the prayer of said petition should not be granted, and directing the said company to answer on or before the next Rule Day of this court, to-wit: September 2, 1907.

Now, therefore, the said Smoky Mountain Land, Lumber and Improvement Company, answering the said petition and responding to the said rule, denies that the prayer of the said petition should be granted for the following reasons:

1. That the said petitioners are not proper parties to file a bill of review.

The deed of conveyance vesting the title of the original defendants in the suit, to the land in question, into the said petitioners, William R. Hopkins, Edward J. Leighton, Fred W. Bruch, George Reeves and John Matthews, was made on March 3, 1903. A certified copy of said deed is herewith filed and marked "Exhibit A."

The petition sets forth that the petitioners purchased said lands October 29th, 1900. The final decree of the Circuit Court of Appeals in the aforesaid suit was entered on July 13, 1900, see Exhibit A, which was prior in time to either the date of the above mentioned deed or the date of the purchase of said lands, as set

forth by the petitioners. At the time therefore that the purchase of the lands by the petitioners was made the final decree of the final court had been rendered, and as will further appear the alleged newly discovered evidence had not been found. Hence the petitioners cannot be a party to this suit, not being aggrieved by said decree and not being a party in interest to said lands, the title to which was decreed as vested in Charles Hebard by the court of last resort July 13, 1900.

The deed from Charles Hebard (who died during June, 1902, and not June 11, 1897, as erroneously alleged in the bill of review sought to be filed) to P. C. Blaisdell, et al., was dated July 16, 1900, see Exhibit C, and on that date said deed was placed in escrow with Drexel and Company, Bankers, Philadelphia, Pennsylvania, and was not delivered until January 9, 1903, nearly three years after final decree in this suit.

P. C. Blaisdell, et al., by deed dated January 28, 1901 see Exhibit D, conveyed all their interest in said lands to the Smoky Mountain Land, Lumber and Improvement Company. As aforesaid, the said deed of Charles Hebard to P. C. Blaisdell, et al.,
24 was in escrow until January 9, 1903, on which date it was delivered to the said Smoky Mountain Land, Lumber and Improvement Company, the successors in title to P. C. Blaisdell, et al.

The said Smoky Mountain Land, Lumber and Improvement Company was the purchaser in good faith of these lands, and did not make said purchase until the original suit of Belding vs. Hebard had been finally determined. The decree in this suit gave to the Smoky Mountain Land, Lumber and Improvement Company a complete title which cannot be affected by a decree rendered on a bill of review.

It is a rule of law that a bill of review does not lie for assignees, as none but parties or privies can have a bill. Thompson vs. Maxwell, 95 U. S., 391; Bank of United States vs. White, et al., 8 Peters, 262.

The Smoky Mountain Land, Lumber and Improvement Company became vested with title to these lands in question nearly three years after the final decree in the suit of Belding vs. Hebard. Now when a suit has been finally determined by a final Court of Appeal, a purchaser in good faith of lands the title to which is determined by said suit in favor of the grantor, has a title which cannot be affected by a decree rendered on a bill of review subsequently filed. A bill of review will not be regarded as a continuation of the original suit to the extent that it will affect a purchaser of the property in controversy from the successful party, after a final decree determining the title, and without notice that a bill of review will be applied for. Rector vs. Fitzgerald, 59 Fed. Rep., 808:

"On the grounds of public policy, it is better to exact of him (the losing party) such diligence in the prosecution of his claim than to suffer the title of valuable property to be clouded for an indefinite period by the possibility that the litigation may be renewed by a bill of review."

2. The petitioners and all other parties are barred by statute of

limitations. By Sections 4848, Shannon's Code of the Statute Laws of Tennessee, it is provided:

No bill of review shall be brought or motion made therefor except within three years from the time of pronouncing the decree, saving to infants, married women, persons of unsound mind, imprisoned or beyond the limits of the United States a right to a bill of review within three years after such disability has been removed.

This section of the code is taken from the Tennessee Acts of 1801, Chapter 6, Section 53. The courts of the United States recognize the statute of limitations of the several states and give them the same construction and effect that are given by all legal tribunes.

The final decree in the suit of Hebard vs. Belding which is now sought to be reviewed, was entered July 13th, 1900, in the United States Circuit Court of Appeals for the Sixth Judicial Circuit, which is a court of last resort, and from which there could be no appeal. The application of petition for leave to file a bill of review was first made in the said United States Circuit Court of Appeals on September 25th, 1906, and in this court, August 6th, 1907, the first application being more than six years and the last more than seven years after the final decree in the original suit was pronounced; therefore, we insist that the application comes too late.

3. The petitioners are guilty of laches.

On the — day of ——, A. D., 1903, as is shown by the affidavits of the state archivist, marked "Exhibit E" and filed herewith, the legislature of Tennessee passed an act ordering that the rubbish which had accumulated in the basement of the state house at Nashville should be cleared out and destroyed. It is not true, as alleged in said petition and bill sought to be filed that the said act was passed "about two years since," but on the contrary the date of said act was as above set forth.

In pursuance of the provisions of said act, as the said affidavit of the state archivist, marked "Exhibit E" will show, the employés of the state house at Nashville, in clearing out the rubbish in the basement of the state house, in a barrel discovered in December, 1903, or January, 1904, or February, 1904, the map mentioned in the said bill, the said map supposedly having been the one made by the original commissioners of the states of North Carolina and Tennessee, who ran the line in pursuance of the Cession Acts passed prior thereto. The said map was not discovered in the year 1905, as stated in said bill sought to be filed.

Therefore, the petitioners cannot legally apply for a bill of review on the ground of evidence discovered nearly three years prior to their application to the United States Circuit Court of Appeals of the Sixth Circuit. If the said map was of any importance, it was the duty of the petitioners to apply at once, and with due diligence to the said court for leave to file a bill, and by neglecting to apply until more than two and one-half years after the discovery of the map, they should be denied the right to have the evidence considered.

In the month of March, 1905, the state archivist of Tennessee,

26 as said archivist's affidavit marked "Exhibit E" will show, made certified copies of the said map; and therefore the allegation in the said bill sought to be filed that the said M. E. Cozad executed due diligence in obtaining a copy of the map, and that by obtaining a copy on March 26, 1906, he obtained it at the earliest possible date, is denied. See also Exhibit F, affidavit of O. W. Muller.

The Report of the Commissioners of 1821 was available and could have been secured by the exercise of proper diligence by the Petitioners. A certified copy of said Report is herewith filed and marked "Exhibit G." We deny that said report could not have been found by Petitioners as is set forth in the Bill sought to be filed.

The rule requiring the exercise of diligence by a party applying for a Bill of Review has been thus stated by Judge Story, in his work on Equity Pleadings, 9th Edition, Section 414:

"The matter must not only be new but it must be such as the party, by the use of reasonable diligence, could not have known, for if there be any laches or negligence in this respect that destroys the title to the relief."

If the petitioners had exercised that diligence which the law requires, they would have discovered the existence of the said Map nearly three and one-half years ago.

4. Immateriality of the newly discovered evidence.

The Map speaks for itself, and there is nothing on the Map which indicates that the line is not that on Hangover Ridge as determined by this Court in the original suit. There is nothing to indicate that it follows the line contended for by the petitioners in the former suit, nor that the line is represented as on Fodder Stack Ridge. At most the Map is no more favorable to the petitioners' claim than it is to the respondents', and therefore not such clear, controlling evidence as to the merit and justice of the cause as to *enable* the petitioners to a Bill of Review.

The Map shows in a crude way a Creek where the State line crosses the Tennessee River on the South West side thereof. There is nothing to identify this creek as Slick Rock Creek. In fact taking the point where the line comes down to the North Bank of the Tennessee River, which is a point in the State line admitted by the petitioners in the original suit, this Creek cannot be intended to represent the Slick Rock Creek, because to reach Slick Rock Creek the line would have to go down the Tennessee River for half a mile, and this the line on the newly discovered Map does not do, but crosses the river in the shortest distance possible. The marked

27 State line to the North bank of the Tennessee River, as admitted by both parties in the original suit, was one-half mile above the mouth of Slick Rock Creek.

It is probable that said stream so represented is intended for Gold Creek (or Gold Branch) or Yellow Hammer Creek, the first streams on the other side of Hangover Ridge, where said Ridge comes to the Tennessee River.

No mention or reference is made to the said newly discovered Map in the Acts of the Legislatures of the respective States, to-wit: Tennessee and North Carolina, adopting the report of said Commission.

Evidence as to the natural monuments and the work done upon the ground is that which controlled the decision in the original cause, and the map itself in no wise contradicts or destroys the evidence given in the previous litigation.

The allowance of a Bill of Review is not a matter of right in the party but of sound discretion in the Court, and the newly discovered evidence must be such as goes to the very merits and vitals of the issue, and must be such evidence, in the judgment of the Court, that had it been in the record it is probable that the decree would have been reversed.

"New evidence, if it be cumulative merely, should be very clear, highly pertinent, and so well proven as to be controlling in its influence."

Craig vs. Smith, 100 U. S. 226.
U. S. vs. Throckmorton, 98 U. S. 66.
Lafferty vs. Acme Ry. Sig. Mfg. Co., 143 Fed. Rep. 321.
Southard vs. Russell, 16 Howard 547.

A Bill of Review may be refused although the evidence, if admitted, would change the decree, when the Court, looking to all the circumstances, shall deem it productive of mischief to innocent parties for any other cause inadmissible. Ricker vs. Powell, 100 U. S. 107.

The Original Bill Filed by the Complainant, Charles Hebard, was for the purpose of removing a cloud upon the title. The final decree intended to remove such cloud by placing title finally in Charles Hebard. And now the petitioners seek to cast a further cloud on the title by the filing of their petition, therefore we pray the petition — denied.

Wherefore the Smoky Mountain Land, Lumber and Improvement Company respectfully prays that said petition for leave to file said Bill of Review be denied and dismissed at the cost of the petitioners.

PECK, SHIELDS & CLARK,
McCROSKEY & PEACE,
WILLIAM A. STONE,
Attorneys for Respondents.

28 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

J. Newton Peck, being duly sworn according to law, says:

I am the Treasurer and Acting Secretary of the Smoky Mountain Land, Lumber and Improvement Company, the petitioner above named. So much of the foregoing answer as concerns my own acts or deeds is true to the best of my knowledge; and so much thereof — concerns the statement of facts *of* the acts or deeds of any other person or persons, I believe to be true.

J. NEWTON PACK.

Sworn to and subscribed before me this 31st day of August, A. D., 1907.

J. NEWTON PECK,
Notary Public.

Commission expires March 12th, 1911.

Endorsed: No. 1056. United States Circuit Court, Knoxville, Tenn. David W. Belding et al. vs. Charles Hebard. Answer to petition. Filed Sept. 9, 1907. D. L. Snodgrass, Clerk, by W. L. Edington, Deputy Clerk.

Know All Men by These Presents:

That whereas, by deeds of conveyance dated respectively, the 9th day of December, A. D. 1899, and the 27th day of March A. D. 1900, Milo M. Belding and Emily E. Belding his wife of New York City, N. Y.; Alvah M. Belding and Lizzie Belding, his wife, of Rockville, Conn., David W. Belding and Jeanette Belding, his wife, Louis Krohn, widower, Henry Stix and Fanny Stix, his wife, Nathan — and Ricka Stix, his wife, all of Cincinnati, Ohio; D. M. Hyman and Betty Hyman, his wife, of Denver, Colo. and Thomas F. McGarry and Nettie B. McGarry, his wife, of Grand Rapids, Michigan, conveyed by good and sufficient deed in fee simple to Robert N. Archer, of Cincinnati, Ohio, and Thomas F. McGarry, of Grand Rapids, Michigan, Trustees, the following tracts of land, among others, situated in Graham County, North Carolina, to-wit:—

Grant.	Entry.	Acres (about).	County.
4	750	100	Graham
42	423	50	Graham
47	3090	100	Graham
85	1883	100	Graham
86	686	100	Graham
87	855	100	Graham
90	745	100	Graham
144	418	300	Graham
29			
8100	1035	16800	Graham
91	1060	50	Graham
92	2339	640	Graham
93	753	100	Graham
94	771	50	Graham
95	2340	640	Graham
96	1063	50	Graham
98	1082	100	Graham
99	1081	100	Graham
101	499 (479)	640	Graham
1761	397	50	Graham
1853	1787	50	Graham
1864	1636	100	Graham
2336	1035	14800	Graham

2435	754	50	Graham
2436	770	50	Graham
2438	757	50	Graham
2903	1969	640	Graham
2904	1947	1000	Graham
2905	1946	640	Graham
2906	1980	640	Graham
2908	1976	640	Graham
2909	1979	640	Graham
2910	1961	450	Graham
2911	1957	640	Graham
2912	1981	640	Graham
2913	1977	495	Graham
2915	1950	640	Graham
2916	1982	640	Graham
2917	1965	640	Graham
2919	1975	640	Graham
2920	1974	50	Graham
2921	1966	640	Graham
2937	4452	150	Graham
2940	4477	640	Graham
2946	5051	640	Graham
2947	5053	540	Graham
2948	5056	640	Graham
2949	5052	640	Graham
2950	4456	3000	Graham
2951	5055	640	Graham
2952	5057	640	Graham
2956	1949	1000	Graham
2957	1998	640	Graham
2959	1959	640	Graham
2960	1997	640	Graham
2961	4871	313	Graham
2963	1972	640	Graham
30			
2964	1973	300	Graham
2966	4454	500	Graham
2967	1945	640	Graham
2968	4872	125	Graham
2969	4455	1500	Graham
2970	4457	640	Graham
2974	4707	640	Graham
2975	1953	640	Graham
2976	5050	640	Graham
2979	931	640	Graham
2980	1963	640	Graham
2981	1978	300	Graham
2983	1958	640	Graham
3500	749	100	Graham
3860	683	100	Graham
3477	2022	540	Graham

Subject nevertheless to all deductions, if any, arising by, through or under the "State Line" suit hereinafter mentioned. Grants Nos. 8100 for 16,800 acres and No. 2336 for 14,800 acres, above mentioned, being for the same lands, and all other tracts and parcels of land situated in Graham County, in the State of North Carolina, in which the grantors therein were or might be jointly interested or in which they might have any estate in common not heretofore conveyed by proper deed of conveyance, together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, and said deeds of conveyance were duly registered in the Records of Deeds in said Graham County, to-wit: in Book "J" commencing at page 24, and in Book "J" pages 403 to 413 inclusive, respectively; and, whereas, said conveyances were made for the purpose of vesting the title to said tracts among others, in the said Robert N. Archer and Thomas F. McGarry as Trustees, for the purpose of carrying out the trusts mentioned in said deeds, and in certain contracts in pursuance of which said deeds were executed and delivered. Said contracts having been entered into between the said Robert N. Archer of the first part, and the said Louis Krohn, and Thomas F. McGarry of the second part, and the Union Savings Bank and Trust Company of Cincinnati, of the third part, dated respectively the 9th day of Dec. 1899, the 24th of February, 1900 and the 15th day of March, 1900; said contracts and deeds having been placed in the custody of the said Union Savings Bank and Trust Company of Cincinnati, Ohio, and,

Whereas, the purpose- of said contracts and deeds and the object of this trust created thereby were to secure the payment to the said Robert N. Archer of the sum of Eighty-five Thousand Dollars
31 ($85,000.) then and there due the said Robert N. Archer, in payments therein mentioned and at times therein designated with interest to-wit:

Fifteen Thousand Dollars	in	4 months
Fifteen Thousand Dollars	in	8 months
Fifteen Thousand Dollars	in	12 months
Twenty Thousand Dollars	in	16 months
Twenty Thousand Dollars	in	20 months

from date, with six per cent. interest on all of said sums. And said purposes were, after said payment, for the purposes of securing further payments as follows, to-wit:

Estate of J. W. Cooper, Murphy, N'th Carolina	$10,536.42
Estate of C. S. Bragg, Cincinnati, Ohio	7,500.00
Henry Stix, Cincinnati, Ohio	20,000.00
Nathan Stix, Cincinnati, Ohio	6,975.00
Louis Krohn, Cincinnati, Ohio	25,000.00
D. M. Hyman, Denver, Colorado	3,500.00
Chas. C. and Geo. H. Hopkins, Lansing and Detroit, Michigan	15,000.00

But the amounts designated to be paid to the estate of J. W. Cooper, and the estate of C. S. Bragg, were only to be paid in case the in-

Now, therefore, in consideration of the premises, and of the payment of One Hundred and Twenty-five Thousand Dollars ($125,000) made to the said Trustees by William R. Hopkins, Edward I. Leighton, Frederick W. Bruch, George Reeves, John Matthews, the receipt of which is hereby acknowledged by said Trustees, with the exception of the sum of Eighteen Thousand and thirty-six dollars and forty-two cents ($18,036.42), which is to be used by said purchasers in purchasing the interests of the Estate of J. W. Cooper and of C. S. Bragg, as above mentioned. The said Robert N. Archer and Thomas F. McGarry, Trustees, do hereby Grant, Bargain, Sell, Remise, and Release unto the said William R. Hopkins Edward I. Leighton, Frederick W. Bruch, George Reeves, John Matthews, their heirs, and assigns forever, all the above described tracts and parcels of land in the said Graham County above described
33 and covered by said two conveyances; and, all of the right, title and interest of the said Robert N. Archer, and Thomas F. McGarry, Trustees, of, in and to every and each portion of said lands, and all the privileges and appurtenances appertaining thereto, to have and to hold said lands to them and their heirs and assigns forever. And the said Robert N. Archer and Thomas F. McGarry, Trustees, do covenant and agree with the said William R. Hopkins, Edward I. Leighton, Frederick W. Bruch, George Reeves and John Matthews, their heirs and assigns that they are seized of said lands in trust, and have good right to convey the same and that they will warrant the same to the said William R. Hopkins, Edward I. Leighton, Frederick W. Burch, George Reeves, John Matthews, their heirs and assigns forever, against and (?) right, title or claim of any person claiming by or through the grantors herein. But there is especially excepted from the covenants of this conveyance, all those lands situated at or near the State line, between the State of North Carolina and Tennessee, which were recovered in a certain action known as the "State Line Suit" which was pending in the United States Circuit Court for the Eastern District of Tennessee and was brought by one Hebard against David W. Belding and others if future proceedings do not recover the title thereof.

In witness whereof, the said Robert N. Archer and Thomas F. McGarry, Trustees, have subscribed their names and affixed their seals this 3rd day of March, A. D. 1903.

ROBERT N. ARCHER, *Trustee.* [SEAL.]
THOMAS F. McGARRY, *Trustee.* [SEAL.]

Witness-:

M. A. SCHELL.
C. B. MATTHEWS.
F. H. ELMORE.
ARTHUR MEIGS.

STATE OF OHIO,
Hamilton County:

I, M. A. Schell, a Notary Public in and for said Hamilton County, Ohio, do hereby certify that the said Robert N. Archer, Trustee, per-

terests of those estates in the above described property were bought in, and those sums were only to be liens upon the interests so bought in.

That by the supplementary agreement of February 24, 1900, above mentioned, the time for making the payments mentioned in the contract of December 9th, 1899, to the said Robert N. Archer was fixed to begin to run from Feb. 1st, 1900, but with interest on the whole sum from the said date of December 9th, 1899, and in the last mentioned contract, it was provided that if any of said payments should remain in default for sixty days after said payments should become due, then the whole of the said sum owing to the said Robert N. Archer should become due and payable at once, and the said Trustees, Robert N. Archer and Thomas F. McGarry, or either of them, should proceed to sell the said lands, or any part thereof, after four consecutive weeks' notice to the parties in interest, at public auction and pay the proceeds of said sale towards the liquidation of the amounts secured on said lands, unless the said Robert N. Archer should exercise his option to assert his original right under certain prior contracts and,

Whereas, the said contracts and deeds further provided as follows: "And the said Trustees, Robert N. Archer and Thomas F. McGarry, are also authorized and empowered at any time to sell said property or any part thereof, at private sale, at such price, in such manner and upon such terms and conditions as they shall deem
32 proper, Provided, however, that no such sale shall be made of the whole, of said property unless sufficient be realized to satisfy the claims of the several parties herein mentioned, principal and interest as hereinbefore scheduled and set forth" and,

Whereas, no part of said payments was ever made and the first and subsequent payments remained in default for more than sixty days and the said Robert N. Archer elected to stand upon said contracts of December 9th, 1899, February 24th, 1900, and March 15th, 1900, and the deeds made in pursuance thereof, and declared the whole amount owing to him then due and payable and thereupon the said Trustees, Archer and McGarry sold the lands above described, situated in said Graham County, North Carolina, at private sale, — the parties hereinafter mentioned, and,

Whereas, said Graham County lands were only a portion of the lands conveyed by the deeds of Dec. 9th, 1899, and March 27th, 1900, and,

Whereas, all events having transpired authorizing the sale of the said Graham County lands at private sale, and,

Whereas, in a certain suit instituted in the Superior Court of Cherokee County, North Carolina, by David W. Belding, against Robert N. Archer, Thomas F. McGarry and Louis Krohn, individually and as Trustees, which was removed to and tried at the Fall Term of 1901, in the Superior Court of Clay County, North Carolina, a judgment was entered in favor of the defendants on the 1st day of October, 1901, finding that the sale to the grantees above mentioned was for a fair price, and was a valid sale, and directing the grantors herein to carry the same out in accordance with the contracts of sale already mentioned herein.

sonally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal, this 3rd day of March, A. D. 1903.

M. A. SCHELL, [L. S.]
Notary Public in and for Hamilton County, Ohio.

STATE OF FLORIDA,
County of Duvall:

I, F. H. Elmore, a Notary Public in and for Duvall County, Florida, do hereby certify that Thomas F. McGarry, Trustee,
34 personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal, this 5th day of June, A. D. 1903.

[L. S.] F. H. ELMORE,
Notary Public in and for Duvall County, Fla.

STATE OF NORTH CAROLINA,
Graham County:

The foregoing and annexed deed of conveyance together with the certificate viz: The certificate of M. A. Schell, a Notary Public in and for the County of Hamilton, State of Ohio, attested by his Notarial Seal, and the certificate of F. H. Elmore, a Notary Public in and for the County of Duvall, in the State of Florida, attested by his Notarial Seal, having been this day exhibited before me for probate, the same is adjudged to be correct; in due form and according to law. Therefore let the deed together with the said certificates and this certificate be registered.

Witness my hand this the 7th day of January, A. D. 1904.

R. V. McELROY,
Clerk Superior Court,
Graham County, N. C.

The foregoing deed of conveyance was this day duly registered in the office of the Register of Deeds of Graham County, N. C., in Book "M" of Deeds on page 170 et seq.

Witness my hand this the 9th day of January, 1904.

ROBERT B. SLAUGHTER,
Register of Deeds,
Graham County, N. C.

NORTH CAROLINA,
Graham County:

I, Robert B. Slaughter, Register of Deeds of said County and State, do hereby certify that the foregoing and annexed instrument is a true and exact copy of a deed from Robert N. Archer and Thomas F. McGarry, Trustees to William R. Hopkins, et als. as appears of record in my office in Book "M" of Deeds on pages 170 to 178 inclusive.

Witness my hand and the seal of said office at office in Robbinsonville, N. C., on this the 5th day of March, 1907.

[SEAL.] ROBERT B. SLAUGHTER,
Register of Deeds
of Graham County, N. C.

(Endorsed:) Deed R. N. Archer & T. F. McGarry, Trustees to William R. Hopkins et als. Exhibit A. Copy. Copying fee $3.60. Certificate and Seal 50. No. 1056. Exhibit A. In re David W. Belding et al. vs. Charles Hebard. Filed Sep. 9, 1907. D. L. Snodgrass, Clerk, by W. L. Edington, Deputy Clerk.

Ex. "A" to Depn. of M. E. Cozad, this May 8, 1908. R. S. C. Hutchinson, Notary Public Knox Co., Tenn.

35 United States Circuit Court of Appeals for the Sixth Circuit.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Tennessee, and was argued by counsel.

In consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause be and the same is hereby affirmed with costs.

July 13, 1900.

United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the decree entered July 13th, 1900, in the case of D. W. Belding, et al., vs. Charles Hebard. No. 783, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this fifth day of September, A. D. 1907.

[SEAL.] FRANK O. LOVELAND,
Clerk of the United States Circuit Court
of Appeals for the Sixth Circuit.

No. 1056. United States Circuit Court of Appeals for the Sixth Circuit. Charles Hebard *vs.* D. W. Belding et al. Exhibit B. Filed Sep. 9, 1907. D. L. Snodgrass, Clerk, by W. L. Edington, Deputy Clerk.

Copy.

This indenture made and entered into on this the 16th day of July, 1900, by and between Charles Hebard, of Pequaming, Baraga County, Michigan, party of the first part, and Mary C., his wife, and P. C. Blaisdell, W. F. Blaisdell, L. B. Seibert, H. H. Cobb, F. L. Andrews, F. A. Raymond and S. A. Holbrook, parties of the second part.

Witnesseth: That the party of the first part, for and in consideration of the sum of Two Hundred and Thirty-three Thousand and Five Hundred Dollars, hereby bargains, sells, transfers and conveys to the parties of the second part all his right, title, claim and interest in and to the following described real estate, to-wit: Containing forty-one thousand (41,000) acres, more or less, situated in the Seventeenth (17) and twentieth (20) Civil Districts of Monroe County, Tennessee, in the Ocoee Land District, being same tracts of land purchased by the party of the first part from J. H. Simonson, John Rhinesmith, Wm. Fleming's heirs, Mrs. Amelia Burgess and her husband, Callaway heirs, Mrs. Mary E. Hopkins and husband, T. E. H. McCroskey and H. M. McCroskey, Geo. P. Wetmore and perhaps from others, the same covered by original grants from said state and by mesne conveyances, and set out by sections and quarter sections and other boundaries as follows:

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Ocoee Land District, 6th Range, East of Basis line, Second (2) Fractional township north, southeast and southwest quarters of section 34, containing 320 acres, under grant No. 4607; southeast and northwest quarters of section 33, containing three hundred and twenty (320) acres, under grant No. 4608; southwest and southeast quarters of section 35, containing 320 acres, under grant No. 4618; sections 2 and 11, containing 1280 acres, under grant No. 6398; all of fractional sections 1 and 12, under grant No. 6399; all of sections 9 and 10, under grant No. 6400; all of sections 20 and 21 under grant No. 6401; all of sections 30 and 31 and northwest and southwest and southeast quarters of section 32, containing 1760 acres, under grant No. 6402; all of sections 17 and 19, and the northeast, southwest and northwest quarters of section 18, containing 1760 acres, under grant No. 6403; all of sections 27, 28 and 29, under grant No. 6404; all of sections 15 and 22, under grant No. 6405; all of sections 7 and 8 under grant No. 6406; all of fractional sections 14 and 23 (?) under grant No. 6407; northwest and southwest quarters of fractional section 26, northeast and southwest quarters of section 33; northeast and northwest quarters of section 34; northwest fractional quarter of section 35, under grant No. 6419.

Ocoee Land District, 6th Range, East of Basis Line, First (1) fractional township south, and southeast and southwest quarters of section 11, under grant No. 4609; northeast and northwest quarters of section 11, under grant No. 4610; northwest and northeast quarters of section 10, under grant 4611; southeast and southwest quarters of section 10, under grant No. 4612; northeast and southeast quarters of section 4, under grant No. 4613; southeast and southwest quarters of section 3, under grant No. 4614; northwest and

northeast quarters of section 3, under grant No. 4615; northwest and northeast quarters of section 2, under grant No. 4616; southeast and southwest quarters of section 2 under grant No. 4617;
northwest and southwest quarters, and a fraction of the north-
37 east and southeast quarters of section 1; northwest and southwest quarters, and fractions of southeast and northeast quarters of section 12; and northwest and southwest fractional quarters of section 13, under grant No. 4608; all of sections 5 and 6 and northwest and southwest quarters of section 4, under grant No. 6409; all of sections 14 and 15, under grant No. 6410; and all of sections 8 and 9 under grant No. 6411.

Ocoee Land District, 5th Range, East of Basis Line, First (1) fractional township North, and southeast quarters of section 14, under grant No. 5096; northeast, southeast and southwest fractional quarters of section 12; all of section 13; and northeast fractional and southwest quarter of section 14, under grant No. 6412; northeast, southeast and southwest quarters of section 35; and all of section 36, under grant No. 6413; sections 24 and 25 and the northwest fractional and southeast fractional and the northeast quarter of section 26, under grant No. 6414; northwest fractional quarter of section 14, southeast fractional quarter of section 15, northeast, southeast, northwest fractional and southwest fractional quarter of section 22; all of section 23, and northeast fractional quarter of section 27, under grant No. 6416.

Ocoee Land District, 5th Range, East of Basis Line Second (2) fractional township north, being all of section 1, and the southeast fractional, southwest fractional, and northeast and northwest quarters of section 2, under grant No. 6415.

Ocoee Land District, Ranges 5 and 6, East of Basis Line, southeast quarter of section 18, fractional township 2, north, Range 6, and northwest quarter of section 35, fractional township 1 north and Range 5, under grant No. 8977.

Ocoee Land District, Range 6, East of Basis Line, First (1) fractional township south, sections 19, 20, 21, 22 and 23, and northwest and southwest quarters of section 25, under grants numbered 6130, 6129, 6128, 6127, 6126, 5475, and 6125, containing thirty-five hundred and twenty (3520) acres, more or less, and known as the Calloway tract.

Ocoee Land District, Range 6, East of Basis Line, First (1) fractional township south, and sections 26, 27 and 28, and southeast, southwest and northwest quarters of section 36, containing 2400 acres, more or less, and known as the Cooke or Hopkins lands.

Fractional township 2, Range 6, north, East of Basis line and
being northeast fractional quarter of section 23, northeast
38 fractional quarter of section 35, and south half of fractional section 36 and northwest forty (40) acres of southwest quarter of section 6, being lands purchased from Geo. P. Wetmore.

Also Five thousand (5,000) acres, more or less, lying in 17th Civil District of Monroe County, Tennessee, beginning in the center of Little Tennessee River, opposite the mouth of Slick Rock Creek; thence up the center of said river with its meanders when reduced

to straight line, south 68 degrees east 162 poles to a point in said river bearing south 2 degrees East from a spruce pine and a rock corner on the north bank of Tennessee River, the southeast corner of what is known as the Sanford tract in Blount County, Tennessee; thence south with the state line to stake and pointers and sweet gum tree on south bank of said river at foot of ridge forming the eastern divide and boundary of the waters of Slick Rock Creek; thence up the leading ridge, giving approximately the bearings, the line running with the main crest of the ridge leading up to Hangover mountain, being state line between Tennessee and North Carolina, and as follows:

South 31 west 11 poles; south 51 west 2½ poles; south 65 west 18 poles; south 72 west 14 poles to a stake on point of ridge; south 86 west 7 poles to a point on ridge; south 19 west 5 poles to blazed pine; south 53¼ west 12 poles to a point on ridge; south 63 west 11 poles to point on ridge; south 85¾ west 11½ poles to a chestnut; north 81¾ west 8 poles; south 69½ west 21¾ poles to a chestnut; south 9½ poles west 21 poles to a black oak; south 40¼ west 14 poles; south 62 west 4½ poles to a hickory; south 3½ east 59-25 (?) poles; south 58 west 15 1-5 poles; south 10 west 15 17-25 poles to a dead tree; south 82 2-3 west 10 poles; south 12 west 15¼ poles to a pine; south 2 west 12 poles, passing a depression at 2 poles, to a point south 29 west 3 4-5 poles; south 45 east 8 poles; south 30 east 22 poles, passing a depression at 10 poles, to a point at turn; south 7½ west 8 poles; south 45½ west 7 poles; south 68 west 10 9-25 poles to a small black oak; north 86¾ west 3 7-25 poles to a point near a stone corner; south 28¾ west 16 1-5 poles, passing Sourwood Gap at 14 poles, to small sourwood; south 15¼ west 17 3-5 poles to a black oak; south 35 east 6 6-25 poles to a point at turn; south 47 west 12 18-25 poles to a black oak; south 76½ west 20 1-10 poles, passing an oak at 2 poles, to a chestnut oak; south 2¾ west 20 poles; south 15 east 8 poles; south 28 west 12 2-25 poles; south 46 west 4 22-25 poles; south 15 west 12 poles to a stake in Slick Rock Creek Gap; thence on southwestwardly, continuing with the
39 state line on the leading ridge forming the eastern watershed of Slick Rock Creek and dividing the waters of Slick Rock Creek from those of Cheoah, including all lands on the waters of Slickrock Creek to the point in the state line between North Carolina and Tennessee where the lands conveyed to Charles Hebard by deeds of Fleming, Simonson and Rhinesmith join to said state line; thence with the said Hebard lands to the beginning, being same land conveyed by T. E. H. McCroskey and H. M. McCroskey to the said Charles Hebard. It is not intended herein to convey section 16 of the school land, which is located in Second (2) fractional township north, Range 6th, Ocoee District, East of Basis Line, nor forty-five (45) acres heretofore conveyed by the said Charles Hebard to W. P. Stratton, which is situated on Sassafras Mountain, and beginning at common corner of sections 20, 21, 28 and 29, First (1) fractional township south, Range 6, Ocoee District, East of Basis Line—and the same are hereby expressly excluded from the foregoing boundaries.

All the above described lands lie contiguous and in one body,

and are bounded on the north by lands of Wetmore and Stephenson heirs; on the east by the state line between Tennessee and North Carolina; on the south by Wetmore and Stephenson heirs; W. R. Reynolds and others; and on the west by Wetmore and Stephenson heirs, the White Oak Flats Lands and the boundary line between the Ocoee and Hiwassee Land Districts.

The title to all the above described lands being in the party of the first part, he doth hereby warrant the title to the same to the parties of the second part, their heirs or assigns, against the legal claims of all persons claiming by, through or under him, but no further or otherwise.

CHARLES HEBARD. [SEAL.]
MARY C. HEBARD. [SEAL.]

Witnesses to the execution of foregoing deed,
JULIA E. HEBARD.
H. S. TUXBURY.

STATE OF NEW YORK,
County of New York:

Personally appeared before me, H. C. Tuxbury, a Notary Public, the above named Charles Hebard and Mary C. his wife, with whom I am personally acquainted, who in due form acknowledged the above indenture to be their act and deed and desired that the same be recorded as such.

And the said Mary C. Hebard, being of full age, and by me examined separate and apart from her said husband, and the contents of the foregoing indenture first made fully known to her, declared that she did voluntarily and of her own free will and accord, seal, and as her act and deed deliver the same, without any coercion or compulsion of her said husband.

In testimony whereof, I have hereunto set my hand and seal, this 18th day of July, One Thousand Nine Hundred (1900).

[SEAL.] HENRY CHASE TUXBURY,
Notary Public.

STATE OF TENNESSEE,
Monroe County:

I, F. J. Allison, Register of said County, do hereby certify that the foregoing deed, together with the Certificate of probate, was received in my office for registration at 2 o'clock P. M. the 18th day of December, 1903, and was duly noted in Note Book No. C, page 94 and recorded in Deed Book No. 8, page 394 et seq. Witness my hand, at office at Madisonville, this the 19th day of December, 1903.

J. F. ALLISON, *Register.*

STATE OF TENNESSEE,
Monroe County:

I, J. F. Allison, Register of said Monroe County, do hereby certify that the foregoing transcript is a full, true and perfect copy of a deed from Charles Hebard to P. C. Blaisdel, et als., in Deed Book No. 8, page 394 et seq., as appears of record now on file in my office.

Witness J. F. Allison, at office in Madisonville, this the 14th day of September, 1907.

[SEAL.]

J. F. ALLISON, *Register.*

(Endorsed:) Exhibit "C." No. 1056. Deed. Charles Hebard to F. L. Andrews et al. In re David W. Belding et al. vs. Charles Hebard. Filed Sep. 9, 1907. D. L. Snodgrass, Clerk, by W. L. Edington, Deputy Clerk.

This indenture, made the twenty-eighth day of January in the year of our Lord, One Thousand Nine Hundred and One, between F. L. Andrews and Mary W. Andrews, his wife, L. B. Seibert and Sue A. Seibert, his wife, H. H. Cobb and Emma Louise Cobb, his wife, F. A. Raymond and Maryette Raymond, his wife, S. A. Holbrook and Phœbe E. Hollbrook, his wife, P. C. Blaisdell and Sarah G. Blaisdell his wife, and Walter Blaisdell and Cornelia Blaisdell, his wife, parties of the first part.

To The Smoky Mountain Land, Lumber & Improvement Company, a corporation incorporated under the laws of the State of Delaware, with its principal office in the City of Wilmington, County of New Castle, in said State, of the second part,

41 Witnesseth: That the said parties of the first part for and in consideration of the sum of One Dollar, lawful money of the United States of America, unto them well and truly paid by the said party of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have remised, released and quit-claimed, and by these presents do remise, release and forever quit-claim unto the said party of the second part, its successors and assigns, all their right, title, claim and interest in and to the following described real estate, to-wit: Containing forty-one thousand (41,000) acres, more or less, situated in the Seventeenth (17) and Twentieth (20) Civil Districts of Monroe County, Tennessee, in the Ocoee Land District, being same tracts of land purchased by Charles Hebard from J. H. Simonson, John Rhinesmith and Wm. Fleming's Heirs, Mrs. Amelia Burgess, and husband, Callaway heirs, Mrs. Mary E. Hopkins and Husband, T. E. H. McCroskey and H. M. McCroskey, Geo. P. Wetmore and perhaps from others, the same covered by original grants from said State and by mesne conveyances, and set out by sections and quarter sections and other boundaries as follows:

Ocoee Land District, 6th Range, East of Basis Line, Second (2) fractional township North, southeast and southwest quarters of section 34 containing 320 acres, under grant No. 4607; southeast and northwest quarters of section 33, containing three hundred and twenty (320) acres, under grant No. 4608; southwest and southeast quarters of section 35, containing 320 acres, under grant No. 4618; sections 2 and 11, containing 1280 acres, under grant No. 6398; all of fractional sections 1 and 12, under grant No. 6399; all of sections 9 and 10, under grant No. 6400; all of sections 20 and 21, under grant No. 6401; all of sections 30 and 31, and northwest and southwest and southeast quarters of section 32, containing 1760 acres,

under grant No. 6402; all of sections 17 and 19, and the northeast, southwest and northwest quarters of section 18, containing 1760 acres, under grant No. 6403; all of sections 27, 28 and 29, under grant No. 6404; all of sections 15 and 22, under grant No. 6405; all of sections 7 and 8 under grant No. 6406; all of fractional sections 14 and 23 under grant No. 6407; northwest and southwest quarters of fractional section 26, northeast and southwest quarters of section 33; northeast and northwest quarters of section 34; northwest fractional quarter of section 35, under grant No. 6419.

42 Ocoee Land District, 6th Range, East of Basis Line, First (1) fractional township south, and southeast and southwest quarters of section 11, under grant No. 4609; northeast and northwest quarters of section 11, under grant No. 4610; northwest and northeast quarters of section 10, under grant No. 4611; southeast and southwest quarters of section 10 under grant No. 4612; northeast and southeast quarters of section 4, under grant No. 4613; southeast and northwest quarters of section 3, under grant No. 4614; northwest and northeast quarters of section 3, under grant No. 4615; northwest and northeast quarters of section 2, under grant No. 4616; southeast and southwest quarters of section 2, under grant No. 4617; northwest and southwest quarters, and a fraction of the northeast and southeast quarters of section 1; northwest and southwest quarters, and fractions of southeast and northeast quarters of section 12; and northwest and southwest fractional quarters of section 13, under grant No. 6408; all of sections 5 and 6 and northwest and southwest quarters of section 4, under grant No. 6409; all of sections 14 and 15 under grant No. 6410; and all of sections 8 and 9 under grant No. 6411.

Ocoee Land District, 5th Range, East of the Basis Line, First (1) fractional township North, and southeast quarter of section 14, under grant No. 5096; northeast, southeast and southwest fractional quarters of section 12; all of section 13; and northeast fractional and southwest quarter of section 14, under grant No. 6412; northeast, southeast and southwest quarters of section 35; and all of section 36, under grant No. 6413, sections 24, 25 and the northwest fractional and southeast fractional and the northeast quarter of section 26, under grant No. 6414; northwest fractional quarter of section 14, southeast fractional quarter of section 15, northeast, southeast, northwest fractional and southwest fractional quarter of section 22; all of section 23, and northeast fractional quarter of section 27, under grant No. 6416.

Ocoee Land District, 5th Range, East of Basis Line, Second (2) fractional township North, being all of section 1, and the southeast fractional, southwest fractional, and northeast and northwest quarters of section 2, under grant No. 6415.

Ocoee Land District, Ranges 5 and 6, East of Basis Line, southeast quarter of section 18, fractional township 2, north, Range 6, and northwest quarter of section 35, fractional township 1, north, and Range 5, under grant No. 8977.

Ocoee Land District, Range 6, East of Basis Line, First (1) frac-

tional township south, sections 19, 20, 21, 22 and 23, and
43 northwest and southwest quarters of section 25, under grants numbered 6130, 6129, 6128, 6127, 6126, 5475 and 6125, containing thirty-five hundred and twenty (3520) acres, more or less, and known as the Callaway tract.

Ocoee Land District, Range 6, East of Basis Line, First (1) fractional township south, and sections 26, 27 and 28, southeast, southwest and northwest quarters of section 36, containing 2,400 acres, more or less, and known as the Cooke or Hopkins lands.

Fractional township 2, Range 6, North, East of Basis Line and being northeast fractional quarter of section 23, northeast fractional quarter of section 35, and south half of fractional section 36, and northwest forty (40) acres of southwest quarter of section 6, being lands purchased from Geo. P. Wetmore.

Also five thousand (5,000) acres, more or less lying in 17th Civil District of Monroe county, Tennessee, beginning in the center of Little Tennessee River, opposite the mouth of Slick Rock Creek; thence up the center of said river with its meanders, when reduced to a straight line, south 68 degrees east 162 poles to a point in said river bearing south 2 degrees east from a spruce pine and a rock corner on the north bank of Tennessee River, an dsoutheast corner of what is known as the Sandford Tract, in Blount county, Tennessee; thence south with the state line to stake and pointers and sweet gum tree on south bank of said river at foot of ridge forming the eastern divide and boundary of the waters of Slick Rock Creek; thence up the leading ridge, giving approximately the bearings, the line running with the main crest of the ridge leading up to Hangover Mountain, being state line between Tennessee and North Carolina, and as follows:

South 31 west 11 poles; south 51 west 2½ poles; south 65 west 18 poles; south 72 west 14 poles to a stake on point of ridge; south 86 west 7 poles to a point on ridge; south 19 west 5 poles to blazed pine; south 53¼ west 12 poles to a point on ridge; south 63 west 11 poles to a point on ridge; south 85¾ west 11½ poles to a chestnut; north 81¾ west 8 poles; south 69½ west 21¾ poles to a chestnut; south 9½ west 21 poles to a black oak; south 40¼ west 14 poles; south 62 west 4½ poles to a hickory; south 3½ east 5 9-25 poles; south 58 west 15 1-5 poles; south 10 west 15 17-25 poles to a dead tree, south 82 2-3 west 10 poles; south 12 west 15¼ poles to a pine; south 2 west 12 poles, passing a depression at 2 poles, to a point; south 29 west 3 4-5 poles; south 45 east 8 poles; south 30 east 22 poles, passing a depression at 10 poles, to a point at turn; south 7½
44 west 8 poles; south 45½ west 7 poles; south 68 west 10 9-25 poles to a small black oak; north 86¾ west 3 7 25 poles to a point near a stone corner; south 28¾ west 16 1-5 poles, passing Sourwood Gap at 14 poles, to a small sourwood; south 15¼ west 17 3-5 poles to a black oak; south 35 east 6 6-25 poles to a point at turn; south 47 west 12 18-25 poles to a black oak; south 76½ west 20 1-10 poles, passing an oak at 2 poles, to a chestnut oak; south 2¾ west 20 poles; south 15 east 8 poles; south 28 west 12 2-25 poles;

south 46 west 4 22-25 poles; south 15 west 12 poles to a stake in Slick Rock Creek Gap; thence on southwestwardly continuing with the state line on the leading ridge forming the eastern watershed of Slick Rock Creek, and dividing the waters of Slick Rock Creek from those of Cheowah, including all lands on the waters of Slick Rock Creek to the point *in* the state lines between North Carolina and Tennessee, where the lands conveyed to Charles Hebard by deed of Fleming, Simonson and Rhinesmith, join to said state line; thence with the said Hebard land to the beginning; being same land conveyed by T. E. H. McCroskey and H. M. McCroskey to the said Charles Hebard, by deed dated November 28, 1895, recorded in Monroe county, Tennessee, Deed Book 3, page 279, and conveyed by Charles Hebard to P. C. Blaisdell and by P. C. Blaisdell to the Smoky Mountain Land, Lumber & Improvement Company.

It is not intended herein to convey section 16 of the school land, which is located in second (2) fractional township north, Range 6, Ocoee District, East of the Basis Line, nor forty-five (45) acres heretofore conveyed by the said Charles Hebard to W. P. Stratton, which is situated on Sassafras Mountain, and beginning at common corner of sections 20, 21, 28 and 29 first (1) fractional township south, Range 6, Ocoee District, East of Basis Line, and the same are hereby expressly excluded from the foregoing boundaries.

All the above described lands lie contiguous and in one body, and are bounded on north by lands of Wetmore and Stephenson heirs; on the east by the state line between Tennessee and North Carolina; on the south by Wetmore and Stephenson heirs, W. R. Reynolds and others; and on the west by Wetmore and Stephenson heirs; the White Oak Flat Lands, and the boundary line between Ocoee and Hiwassee Land Districts.

The equitable title of all the above described lands being in the parties of the first part by contract of purchase between themselves and Charles Hebard of the city of Philadelphia, in the form of an option, which said contract bears date July 16th, 1900, and in which it is set forth that the said Charles Hebard and wife has upon the date of said agreement executed to the said first parties a deed with a clause of special warranty, giving a description of the property contracted to be conveyed, and which deed was upon the same day deposited with Drexel & Co., bankers, of Philadelphia, to be by them held in escrow until final payment should be made.

Totgether *will* all and singular the tenements, hereditaments and appurtenances to the same belonging, or in any wise appertaining, and *in* reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also, all the estate, right, title, interest, property, claim and demand whatsoever, both in law and equity, of the said parties of the first part, of, in to or out of the said premises, and every part and parcel thereof.

To have and to hold the said premises, with all and singular the appurtenances, unto the said party of the second part, its successors and assigns, to and for the only proper use and behoof of the said party of the second part, its successors and assigns, forever.

In witness whereof, the said parties of the first part *here* hereunto set their hands and seals, the day and year first above written.

Sealed and delivered in presence of

P. C. BLAISDELL. [SEAL.]
SARAH G. BLAISDELL. [SEAL.]
L. B. SEIBERT. [SEAL.]
SUE A. SEIBERT. [SEAL.]
H. H. COBB. [SEAL.]
EMMA LOUISE COBB. [SEAL.]
F. L. ANDREWS. [SEAL.]
MARY W. ANDREWS. [SEAL.]
F. A. RAYMOND. [SEAL.]
MARYETTE RAYMOND. [SEAL.]
S. A. HOLBROOK. [SEAL.]
PHEBE E. HOLBROOK. [SEAL.]
WALTER BLAISDELL. [SEAL.]
CORDELIA BLAISDELL. [SEAL.]

STATE OF PENNSYLVANIA,
County of Potter:

On the 7th day of February, in the year of our Lord one thousand nine hundred and one, before me, the subscriber, a notary public, came the above named L. B. Seibert, and Sue A. Seibert, his wife, with whom I am personally acquainted, and they acknowledged the above indenture to be their act and deed, and desired the same might be recorded as such; and the said Sue A. Seibert, being of full age, and separate and apart from her husband, by me
46 examined, and the full contents of said indenture being first by me made known to her declared, upon such separate examination, that she did voluntarily and of her own free will and accord, sign, seal and as her act and deed, deliver the said indenture without any coercion or compulsion of her said husband.

Witness my hand and notarial seal.

[SEAL.]

MILTON J. POTTER,
Notary Public.

STATE OF PENNSYLVANIA,
County of Potter:

On the 7th day of February in the year of our Lord, one thousand nine hundred and one, before me, the subscriber, a notary public, came the above named H. H. Cobb and Emma Louise Cobb, his wife, with whom I am personally acquainted, and they acknowledged the above indenture to be their act and deed, and desired the same might be recorded as such; and the said Emma Louise Cobb, being of full age and separate and apart from her husband, by me examined, and the full contents of said indenture being first by me made known to her declared, upon such separate examination, that she did voluntarily and of her own free will and accord, sign, seal

and as her act and deed, deliver the said indenture without any coercion or compulsion of her said husband.

Witness my hand and notarial seal.

[SEAL.]

MILTON J. POTTER,
Notary Public.

STATE OF TENNESSEE,
County of Potter:

On the 7th day of February, in the year of our Lord one thousand nine hundred and one, before me, the subscriber, a notary public, came the above named F. A. Raymond and Maryette Raymond, his wife, with whom I am personally acquainted, and they acknowledged the above indenture to be their act and deed, and desired the same might be recorded as such; and the said Maryette Raymond, being of full age, and separate and apart from her husband, by me examined, and the full contents of said indenture being first by me made known to her declared, upon such separate examination, that she did voluntarily and of her own free will and accord, sign, seal and as her act and deed, deliver the said indenture without any coercion or compulsion of her said husband.

Witness my hand and notarial seal.

[SEAL.]

MILTON J. POTTER,
Notary Public.

STATE OF PENNSYLVANIA,
County of McKean:

On the 9th day of February, in the year of our Lord, one thousand nine hundred and one, before me, the subscriber, a
47 notary public in and for said county, came the above named S. A. Holbrook and Phœbe E. Holbrook, his wife, with whom I am personally acquainted, and they acknowledged the above indenture to be their act and deed, and desired the same might be recorded as such; and the said Phœbe E. Holbrook, being of full age and separate and apart from her husband, by me examined, and the full contents of said indenture being first by me made known to her declared, upon such separate examination, that she did voluntarily and of her own free will and accord, sign, seal and as her act and deed, deliver the said indenture without any coercion or compulsion of her said husband.

Witness my hand and notarial seal.

[SEAL.]

MOSES SULLIVAN,
Notary Public.

STATE OF PENNSYLVANIA,
County of Pennsylvania:

On the 11th day of February, in the year of our Lord, one thousand nine hundred and one, before me, the subscriber, D. H. Jark, a notary public, came the above named P. C. Blaisdell and Sarah G. Blaisdell, his wife, with whom I am personally acquainted, and they acknowledged the above indenture to be their act and deed

and desired the same might be recorded as such; and the said Sarah G. Blaisdell, being of full age and separate and apart from her husband, by me examined and the full contents of said indenture being first by me made known to her declared, upon such separate examination, that she did voluntarily and of her own free will and accord, sign, seal and as her act and deed, deliver the said indenture without any coercion or compulsion of her said husband.

Witness my hand and notarial seal.

[SEAL.]

D. H. JARK,
Notary Public.

STATE OF NEW YORK,
County of Kings, City of New York:

On the 1st day of April in the year of our Lord, one thousand nine hundred and one, before me, the subscriber, George Eckstein, came the above named Wa-ter Blaisdell and Cordelia Blaisdell, his wife, with whom I am perfectly acquainted, and they acknowledge the above indenture to be their act and deed, and desired the same be recorded as such; and the said Cordelia Blaisdell, being of full age, and separate and apart from her husband, by me examined and the full contents of said indenture being first by me made known to her, declared, upon such examination, that she did voluntarily and of her own free will and accord, sign seal and as her
48 own act and deed, deliver the said indenture without any coercion or compulsion of her said husband.

Witness my hand and notarial seal.

[SEAL.]

GEORGE ECKSTEIN,
Commissioner of Deeds.

STATE OF NEW YORK,
County of Kings:

I, Peter P. Huberty, clerk of the county of Kings, and also clerk of the Supreme Court for said county (said county being a court of record), do hereby certify that Mr. George Eckstein, whose name is subscribed to the certificate of proof or acknowledgment of the annexed instrument, and thereon written, was at the time of taking such proof or acknowledgment, a commissioner of deeds in and for the city of New York, residing in the Borough of Brooklyn in said county, commissioned and sworn and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such commissioner, and verily believe the signature to the said certificate of proof or acknowledgment is genuine, and the same is executed and acknowledged according to the laws of the state of New York.

In testimony whereof, I have hereunto set my hand and affixed the seal of said county and court this 2nd day of April, 1906.

[SEAL.]

PETER P. HUBERTY, *Clerk.*

STATE OF PENNSYLVANIA,
County of Potter:

On the 7th day of February, in the year of our Lord one thousand nine hundred and one, before me, the subscriber, a notary public, came the above named F. L. Andrews and Mary W. Andrews, his wife, with whom I am personally acquainted, and they acknowledged the above indenture to be their act and deed, and desired the same might be recorded as such; and the said Mary W. Andrews being of full age, and separate and apart from her husband, by me examined, and the full contents of said indenture being first by me made known to her declared, upon such separate examination, that she did voluntarily and of her own free will and accord, sign, seal and as her act and deed, deliver the said indenture without any coercion or compulsion of her said husband.

Witness my hand and notarial seal.

[SEAL.] MILTON J. POTTER,
Notary Public.

STATE OF TENNESSEE,
Monroe County:

I, J. F. Allison, register of said county, do hereby certify that the foregoing deed, together with the certificate of probate, was
49 received in my office for registration at 2 o'clock p. m. the 18th day of December, 1903, and was duly noted in Note Book No. C, page 94, and recorded in Deed Book No. 8, page 399, et seq.

Witness my hand at office in Madisonville, this the 22nd day of December, 1903.

J. F. ALLISON, *Register.*

STATE OF TENNESSEE,
Monroe County:

I, J. F. Allison, register of said Monroe county, do hereby certify that the foregoing transcript is a full, true and perfect copy of a deed from F. L. Andrews, et als., to Smoky Mountain Land, Lumber and Improvement Company, in Deed Book No. 8, pp. 399, et seq., as appears of record now on file in my office.

Witness J. F. Allison, at office in Madisonville, this the 4th day of September, 1907.

[SEAL.] J. F. ALLISON, *Register.*

Endorsed: Exhibit D. No. 1056. Deed. F. L. Andrews, et al., to Smoky Mountain Land, Lumber & Imp. Co. In re David W. Belding, et als., vs. Charles Hebard. Filed Sep. 9, 1907. D. L. Snodgrass, clerk. By W. L. Edington, deputy clerk.

STATE OF TENNESSEE,
County of Davidson, ss:

Personally appeared before me, Litton Hickman, a notary public, in and for said county, Robert T. Quarles, who being duly sworn according to law, made oath as follows:

I am archivist of the state of Tennessee and have been since the department of archives and history has been established. The legislature of Tennessee in 1903 authorized the establishing of said department. I began the cataloguing and arranging of the papers pertaining to my office on or about March 1st, 1901. I was officially appointed archivist as aforesaid in February, 1903. In the prosecution of my duties as archivist I found in the basement of the capitol at Nashville in a barrel of disinfectant and seed cotton certain maps and papers purporting to relate to the survey of the state line between Tennessee and North Carolina. One map purports to show the survey of 1821, from the Big Pigeon River to the Georgia line crossing the Tennessee River between said two points.

I did not find the field notes of this survey of 1821. The said map bears signatures purporting to be those of the commissioners and surveyors of the survey of 1821, representing the respective states.

50 I found at the same time and in the same place a map purporting to show the survey made in 1799, from the Virginia line to the Big Pigeon River, and also an agreement between the governors of said states together with certain correspondence relating to running the line and appointing commissioners, etc.

The exact date of my finding the aforesaid maps, etc., I cannot state, but it was on some day in December, 1903, or January or February, 1904.

I made the first certified copy of the aforesaid map or had the same made during March, 1905.

ROBERT T. QUARLES, SR.

Subscribed and sworn to before me on this 23rd day of May, 1907.
[SEAL.] LITTON HICKMAN,
Notary Public.

STATE OF TENNESSEE,
County of Davidson, ss:

Personally appeared before me, notary public in and for said county, Robert T. Quarles, Sr., who being duly sworn according to law, made oath as follows:

I am archivist of the state of Tennessee, and have been since the department of archives and history has been established. In the prosecution of my duties I found in the basement of the capitol at Nashville a certain map, which purports to show the survey of 1821 from the Big Pigeon River to the Georgia line, crossing the Tennessee River between said points.

I made the first certified copy of the aforesaid map or had the same made during March, 1905.

R. T. QUARLES.

Subscribed and sworn to before me on the 30th day of August, A. D., 1907.

[SEAL.] CHAS. H. McCABE,
Notary Public.

My commission expires April 11, 1900.

Endorsed: Exhibit E. No. 1056. In re David W. Belding, et al., vs. Charles Hebard. Affidavit of Robert T. Quarles, archivist of the state of Tennessee. Filed Sep. 9, 1907. D. L. Snodgrass, clerk. By W. L. Edington, deputy clerk.

STATE OF TENNESSEE,
Monroe County:

Before me, S. Y. Minnis, a Notary Public in and for the County and State aforesaid, personally appeared O. W. Muller, who makes oath as follows:

I, O. W. Muller, am a citizen of Monroe County, Tennessee, and have been a surveyor of lands for forty years or more, and was one of the surveyors in litigation over the State line at Slick
51 Rock Creek in case of Charles Hebard vs. D. W. Belding, et als., in the United States Circuit Court at Knoxville, Tennessee. That about the first of March, 1905, at the request of Charles Seymour, an attorney at Knoxville, Tennessee, he, the said Muller, went to Nashville for the purpose of investigating the rumor of a newly discovered map showing location of the State line between North Carolina and Tennessee, and on investigation at Nashville, he found the purported map, and on the 3rd day of March, 1905, he obtained for the benefit of Charles Seymour, a certified copy of said map which he turned over to said Seymour; that on the 5th day of March, 1905, the Knoxville Journal and Tribune, a daily newspaper published in the City of Knoxville, Tennessee, published a description of said map, its discovery etc., and also a sketch outlining the plat of said newly discovered map; that affiant kept a copy of said paper showing said publication and he herewith files as exhibit "A" to this affidavit, the page of said paper giving a history and plat of said map.

O. W. MULLER.

Sworn to and subscribed before me on this the 7th day of September, 1907.

[SEAL.] S. Y. MINNIS,
Notary Public.

Endorsed: No. 1056. Exhibit F. Affidavit of O. W. Muller. In re David W. Belding et al. vs. Charles Hebard. Filed Sept. 9, 1907. D. L. Snodgrass, Clerk, by W. L. Edington, Deputy Clerk. Ex. "A" to dep'n of O. W. Muller, R. S. C. Hutchinson, Notary Public.

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To His Excellency, Joseph McMinn, Governor of the State of Tennessee:

The undersigned, Alexander Smith, Isaac Allen and Simeon Perry, Commissioners on the part of the State of Tennessee; and James Mebane, Montfort Stokes and Robert Love, Commissioners on the part of the State of North Carolina, duly appointed under the authority of the Acts of the Legislature of the said States respectively;

Having met at the town of New Port in the State of Tennessee on the 16th day of July, A. D., 1821, to settle, run and mark the dividing line between the two States, from the termination of the line run by McDowell, Vance and Matthews in the year of our Lord 1799, to the Southern Boundary of the said States, Respectively Report, That we proceeded to ascertain, run and mark the said dividing line as designated in the XIth Article called the Declaration of Rights, of the Constitution of the State of Tennessee, and in the Act of the General Assembly of the State of North Carolina; entitled "An act for the purpose of ceding to the United
52 States of America, certain Western lands therein described, passed in 1789; Which said dividing line as run by us, Begins at a stone set upon the North side of the Catalachee Turnpike road, and marked on the West side Ten. 1821; and on the east side N. C. 1821, running thence a Southwestwardly course to the Bald Rock on the summit of the Great Iron or Smoky Mountain, and continuing Southwestwardly on the extreme height thereof where it strikes Tennessee River about seven miles above the old Indian Town of Tallassee, crossing Porters Gap at the distance of twenty-two miles from the beginning; passing Meigs' boundary line at thirty-one and a half miles; the Equonettly path at fifty-three miles; and crossing Tennessee River at the distance of Sixty-five miles from the beginning. From Tennessee River to the main ridges and along the extreme height of the same to the place where it is called the Unicoy or Unake Mountain, striking the old trading path leading from the Valley Town to the Overhill Towns, near the head of the West fork of Tellico River, and at the distance of ninety-three miles from the beginning. Thence along the extreme height of the Unicoy or Unaka Mountain to the Southwest end thereof at the Unicoy or Unaka Turnpike road, where a corner stone is set up, marked Ten. on the west side and N. C. on the East side; and where a hickory tree is also marked on the South side Ten. 101 m. and on the north side N. C. 101 m. being one hundred and one miles from our beginning. From thence a due course south two miles and two hundred and fifty-two poles to a spruce pine on the north bank of the Hiwassee River, below the mouth of Cave Creek; thence up the said river the same course about one mile, and crossing the same to a Maple marked W. D. and R. A. on the south bank of the river; Thence continuing the same course due south eleven miles and two hundred and twenty-three poles to the Southern boundary line of the States of Tennessee and North Carolina; making in all One Hundred and Sixteen Miles and two hundred and twenty-three poles from our beginning; and striking the South-

ern Boundary line twenty-three poles west of a tree in said line, marked 72. m.—Where we set up a square post marked on the West side Ten. 1821; on the East side N. C. 1821; and on the South side G. The said dividing line run by us in its whole length is distinctly marked with two chops and a blaze on each fore-and-aft tree, and three chops on each side line tree; and mile marked at the end of each mile; agreeably to the plats which accompanies this Report, and which said plats and Report are certified by us in Duplicate, one for each of the said States, in the same words, marks and
53 figures; which we respectfully submit to the Governors of the said States of Tennessee and North Carolina.

Given under our hands at Knoxville in the State of Tennessee on the 31st day of August, A. D., 1821.

A. SMITH,
ISAAC ALLEN,
SIMEON PERRY,
Commissioners of Tennessee.
JAMES MEBANE,
M. STOKES,
R. LOVE,
Commissioners of North Carolina.

STATE OF TENNESSEE,
Department of State:

I, Jno. W. Morton, Secretary of the State of Tennessee, do certify that the annexed is a true copy of the report of the Commissioners to run the line between the States of North Carolina and Tennessee, in 1821, from the Big Pigeon River to the Georgia State line, the original of which is now in my office.

In testimony whereof, I have hereunto subscribed my official signature; and, by order of the Governor, affixed the Great Seal of the State of Tennessee, at the Department in the City of Nashville, this 24th day of August, A. D., 1907.

[SEAL.]

JNO. W. MORTON,
Secretary of State.

Endorsed: Exhibit G. No. 1056. Certified copy of Calls of State Line. In re David W. Belding et al. vs. Charles Hebard. Filed Sep. 9, 1907. D. L. Snodgrass, Clerk, by W. L. Edington, Deputy Clerk. Also marked "Ex. A" to the Dep'n of "Robert T. Quarles." R. S. C. Hutchinson, N. P. Knox Co., Tenn. Jany. 9, 1909.

Replication.

United States Circuit Court, Eastern District of Tennessee, Northern Division.

WILLIAM R. HOPKINS et al., Plaintiffs,
vs.
CHARLES HEBARD, Defendant.

The Replication of the Petitioners Herein to the Answer of The Smoky Mountain Land, Lumber and Improvement Company.

These replicants saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendant, for replication thereunto sayeth that they do and will ever maintain and prove their said petition to be true, certain and sufficient in the law to be answered unto by said
54 defendant, and that the answer of said defendants is very uncertain, evasive and insufficient in the law to be replied unto by these replicants; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied to, confessed or avoided, traversed, or denied, is true; all which matters and things these replicants are ready to aver, maintain and prove as this honorable court shall direct, and humbly as in their said petition they have already prayed.

C. B. MATTHEWS AND
E. P. McQUEEN,
Attorneys for Plaintiff-.

Endorsed: United States Circuit Court, Eastern District of Tennessee, Northern Division. William R. Hopkins et al., Plaintiff-, vs. Charles Hebard, defendant. Replication. Filed Oct. 26, 1907. D. L. Snodgrass, Clerk, by W. L. Edington, Deputy Clerk.

Opinion.

In the United States Circuit Court, Northern Division of Eastern District of Tennessee.

DAVID W. BELDING
vs.
CHARLES HEBARD.

It does seem upon examination of this case that there is no ground on which the success of the proposed Bill of Review might finally be expected. The objections which are made to permitting this bill to be filed go to the very merits of the bill, and can, and in my opinion, should, more properly be taken up by demurrer to the bill if

filed. If, in the exercise of discretion I refuse to allow the bill of review to be filed, it is not certain that my refusal to do so would be subject to review. On the contrary, if the bill is filed and a demurrer should be sustained to it on the same grounds that are now urged against its filing, the action of the Court would be subject to easy review, and so the petitioners for review would suffer no error at the hands of this Court that could not be readily corrected.

In view of these considerations I have determined to allow the Bill of Review to be filed, subject, of course, to all legal objections, by demurrer, answer, plea or otherwise, as the defendants may be advised, and it is ordered accordingly.

CLARK, *Judge.*

Endorsed: No. 1056. David W. Belding vs. Charles Hebard. Opinion. Filed 23rd day of November, 1907. W. L. Edington, Deputy Clerk.

TUESDAY, *December 17th,* 1907.

55 Court met pursuant to adjournment, presiding the Hon. C. D. Clark, Judge, etc.:

Order on Opinion.

In the United States Circuit Court, Northern Division, Eastern District of Tennessee.

DAVID W. BELDING et als. or W. R. HOPKINS et als.
vs.
CHARLES HEBARD et als.

This cause came on to be heard before the Honorable C. D. Clark, at Chambers on this the 17" day of Dec-mber, 1907, upon petition for leave to file bill of review and exhibits thereto, and also upon the answer to said petition and exhibits thereto, from all of which the court is of the opinion, and doth decree, that said petition be granted and that the bill of review tendered with the petition for leave to file the same may be filed, which has been done.

Upon application the respondents have 30 days from this date, within which to demur, plead or answer said bill of review.

O. K.

E. P. McQUEEN,
Attorney for Complainants.
McCROSKEY & PEACE,
Attorneys for Respondents.

Endorsed: No. 1056. In the U. S. Circuit Court at Knoxville. David W. Belding, et als., against Chas. Hebard et als. Order on Opinion. Ent'd Journal "S" p. 387. Filed 17 day of Dec. 1907. W. L. Edington, Deputy Clerk.

The Answer of The Smoky Mountain Land, Lumber and Improvement Company, Respondent, to the Bill of Review.

Circuit Court of the United States in and for the Northern Division of the Eastern District of Tennessee.

No. —.

DAVID W. BELDING et al., Complainants,
vs.
CHARLES HEBARD, Defendant.

The Respondent now and at all times hereafter saving to itself all manner of benefit or advantage of exception or otherwise that can be had or taken to the many errors, uncertainties, and imperfections in the said Bill contained, for answer thereto or to so much thereof as this Respondent is advised it is material or necessary for it to answer, answering says:

First. Respondent avers that the original suit now sought to be renewed, to-wit: Charles Hebard vs. D. W. Belding, et al., was finally heard and determined in the United States Circuit Court of
56 Appeals for the 6th District at Cincinnati, Ohio, in the last days of February or the first days of March, 1900, appeal having been made from this Court. Said final decree was entered July 13, 1900. See "Exhibit B" filed with Answer to the Petition in this case.

Second. Respondent further avers that the application of petition for leave to file a bill of review was first made in the said United States Circuit Court of Appeals September 25, 1906, by W. R. Hopkins, et al.

Third. Respondent further avers that on August 6, 1907, W. R. Hopkins and others filed in this Court their petition for leave to file a Bill of Review in the above named suit, so far heard and determined in this Court, and accompanied said petition with their Bill of Review which they sought to file.

Fourth. Respondent further avers that on this same day, to-wit, August 6, 1907, this Court ordered and directed that a rule issue and be served on the said Smoky Mountain Land Lumber and Improvement Company and upon T. E. H. McCroskey, attorney at law, representing said Company to show cause why the prayer of said petition should not be granted, and directing the said Company to answer on or before the next rule day of this Court, to-wit, September 2, 1907. The said Answer of the Smoky Mountain Land, Lumber and Improvement Company to said petition was filed and is now of record in this case, and for greater certainty in this answer to the Bill of Review filed we pray leave of this Court to refer to the original exhibits filed with the Answer made to said petition. (A copy of this Court's decree allowing the filing of said Bill is hereto annexed.)

Fifth. Respondent further avers that Petitioners and all other

parties are barred by the Statute of Limitations. By Section 4848, Shannon's Code of the Statute Laws of Tennessee, it is provided: No Bill of Review shall be brought or a motion made therefor except within three years from the time of pronouncing the decree, saving to infants, married women, persons of unsound mind, imprisoned or beyond the limits of the United States, a right to a Bill of Review within three years after such disability has been removed.

This section of the Code is taken from the Tennessee Acts of 1801, Chapter 6, Section 53. The Courts of the United States recognize the Statute of Limitations of the several states and give them the same construction and effect that are given by the State tribunals.

As appears in Paragraph 2 of this Answer, the first application of Petitioners to file said Bill of Review was made in the said
57 United States Circuit Court of Appeals September 25, 1906, more than six years after the final decree of the final Court.

Sixth. Respondent further avers that the newly discovered evidence, the map itself, a certified copy of which is filed of record by Petitioners in this case with the said Bill of Review, is not such evidence as is decisive or controlling in character as to the essential merits of the litigation, or such evidence as would justify the Court to grant the relief prayed for in the Bill of Review filed by said petitioners, and particularly not to extend the period for the granting of the prayer of said Bill of Review six and one-half years after the final decree of the final Court in the original cause.

Further the Respondent says:

Seventh. Your Respondent is not informed as to the truth of the allegations contained in the first nineteen paragraphs of said Bill of Review (by count but not numbered in said published Bill of Review) and calls upon petitioners to make proof of the same so far as they may be material to the issue raised by the Bill of Review and amendments thereto, and this Answer.

Eighth. Respondent denies the allegation contained in the Twentieth paragraph of said bill of review (by count but not numbered in said published Bill of Review), "That about two years since by the Legislature of Tennessee, as your orators are informed and believe, a law was passed ordering that the rubbish which had accumulated in the basement of the State House at Nashville should be cleared out and destroyed," but on the contrary Respondent avers that said law referred to in said paragraph was passed by the Legislature of Tennessee on the — day of ——, 1903, as is shown by the affidavit of the State Archivist of Tennessee filed in this case and marked "Exhibit" "E."

Respondent also denies the allegation in said paragraph, "At some time during the year 1905, as your Orators are further informed and believe, but at what particular date they are ignorant, some of the employés of the State of Tennessee started to clear out this rubbish and in a barrel, where it had been put loosely and carelessly, as if it were of no value, the map made by the original commissioners of the States of North Carolina and Tennessee, who ran the line in pursuance of the session acts passed prior thereto, was dis-

covered," but on the contrary Respondent avers that said map, purporting to be as set forth in said paragraph 20 of the said Bill, was found in December, 1903, or January 1904, or February
58 1904, as is shown by the said affidavit of the State Archivist, which affidavit is filed in this case, marked "Exhibit E."

Therefore the petitioners applied for leave to file a Bill of Review on the ground of evidence discovered nearly three years prior to their application to the United States Circuit Court of Appeals for the Sixth Circuit. If the said map was of any importance, it was the duty of the petitioners to apply at once, and with due diligence, to the said Court for leave to file said Bill.

Ninth. Respondent denies the allegation contained in the Twenty-first paragraph of said Bill (by count but not numbered in said published Bill of Review), "That while this suit was pending the interest of defendants in the said lands was for a valuable consideration sold and conveyed by the original defendants, excepting the Bragg and Cooper interests on December 9, 1899," but on the contrary Respondent avers that the deed of conveyance vesting the titles of the original defendants in the suit, to the land in question, into the said petitioners William R. Hopkins, Edward J. Leighton, Fred W. Bruch, George Reeves and John Matthews, was made on March 3, 1903. A certified copy of the said deed is filed of record in this case and marked "Exhibit A."

Respondent further avers that the Petitioners in their Petition for leave to file the Bill of Review and in the Amendment (referring to additional facts set up in "Reply Brief of Petitioners" filed) to said Bill set forth that the petitioners contracted to purchase said lands on October 29, 1900. The final Decree of the Circuit Court of Appeals in the aforesaid suit was entered on July 13, 1900, which was prior in time to either the date of the above mentioned deed or the date of the purchase of the lands, as set forth by the petitioners. At the time therefore that the purchase of the lands by the petitioners was made the final decree of the final court had been rendered and published, and, as will further appear, the alleged newly discovered evidence had not been found. Hence the petitioners had notice of said decree and cannot be a party to this suit, not being aggrieved by said decree and not being a party in interest to said lands, the title to which was decreed as vested in Charles Hebard by the Court of last resort, July 13, 1900.

Tenth. Respondent denies the allegation made in the Twenty-second paragraph (by count but not numbered in said published Bill of Review) of the said Bill of Review that M. E. Cozad, as a representative of petitioners, executed due diligence in obtaining a copy of the said Map on March 26, 1906, but on the contrary
59 the Respondent avers that the petitioners or their representatives were guilty of laches, and that through the public press notice of this map's existence was widely commented upon a year or more previous to March 1906, as shown by W. O. Muller's affidavit marked "Exhibit F." and also that certified copies of said map were made by the State Archivist of Tennessee in the month of

March 1905, as set forth in the said State Archivist's affidavit marked "Exhibit E."

Eleventh. Respondent denies the allegation in the Twenty-third paragraph of said Bill (by count but not numbered in said published Bill of Review) that the written report accompanying said Map could not be found, but on the contrary avers that at the time of the discovery of the said Map, to-wit: In December 1903, or in February 1904, there was found with the map a Report of the Commissioners of 1821, and the said Report was available and could have been secured by the exercise of proper diligence at that time. A certified copy of said Report is filed with the record in this case marked "Exhibit G."

The Respondent admits that the field notes of said survey could not be found as stated in said paragraph 23 of said Bill of Review.

Twelfth. The Respondent denies the allegations contained in the Twenty-fourth paragraph of said Bill of Review (by count but not numbered in said published Bill of Review, as aforesaid), which paragraph reads as follows, viz:

"That the said map shows that the said line crosses the Little Tennessee River at or near the mouth of Slick Rock Creek as contended herein by the defendants and that it includes all of the lands and more than were claimed by the said defendants. That said map is new and decisive evidence of the contention of the defendants in the original case, and if it had been found and presented to the Court would have been decisive in favor of the defendants, and would have resulted in a decree in their favor. That it was found in a place where no one would have thought it to be, and your orators and their grantees have exercised true and perfect diligence and could have ascertained the existence thereof sooner than is above alleged."

The Map speaks for itself and shows the allegations of the first two sentences to be false. The allegation as to diligence is answered by Paragraph Ten.

Thirteenth. Your Respondent is not informed as to the truth of the allegations contained in the Twenty-fifth paragraph of said Bill of Review (by count as aforesaid), and calls upon petitioners
60 to make proof of the same so far as they may be material to the issue raised by the Bill of Review and amendments thereto, and this Answer.

Fourteenth. Your Respondent is not informed as to the truth of the allegations contained in the Amendment filed to said Bill of Review, and calls upon petitioners to make proof of the same so far as they may be material to the issue raised by the Bill of Review and the Amendments thereto, and this Answer.

Fifteenth. Respondent further avers that the deed from Charles Hebard (who we are informed died during June 1902, and not June 11, 1897, as erroneously alleged in the Bill of Review sought to be filed) to P. C. Blaisdell, et al., was dated July 16, 1900, and on that date said deed was placed in escrow with Drexel and Company, Bankers, Philadelphia, Pennsylvania, and was not delivered until Janu-

ary 9, 1903, nearly three years after final decree in this suit. A certified copy of said deed is filed in this case marked "Exhibit C."

Sixteenth. Respondent further avers that P. C. Blaisdell, et al., by deed dated January 28, 1901, conveyed all their interests in said lands to the Smoky Mountain Land, Lumber and Improvement Company. As aforesaid, the said deed of Charles Hebard to P. C. Blaisdell, et al., was in escrow until January 9, 1903, on which date it was delivered to the said Smoky Mountain Land, Lumber and Improvement Company, the successors in title to P. C. Blaisdell, et al. A certified copy of this deed is filed in this case marked "Exhibit D."

Seventeenth. Respondent further avers that the said Smoky Mountain Land, Lumber and Improvement Company was the purchaser in good faith of these lands, and did not make said purchase until the original suit of Belding vs. Hebard had been finally determined. The Decree in this suit thus gave to the said Smoky Mountain Land, Lumber and Improvement Company a complete title which cannot be effected by a Decree rendered on a Bill of Review.

Eighteenth. Respondent further avers that the final decree in the suit of Hebard vs. Belding, which is now sought to be revived, was pronounced July 13, 1900, in the United States Circuit Court of Appeals for the Sixth Judicial Circuit, which is a court of last resort, and from which there could be no appeal. The application of petition for leave to file a Bill of Review was first made in the said United States Circuit Court of Appeals on September 25, 1906, and in this Court August 6, 1907, the first application being more than six years and the last more than seven years after the final
61 decree in the original suit was pronounced; therefore we insist that the application came too late.

Wherefore, the said Smoky Mountain Land, Lumber and Improvement Company, Respondent, respectfully prays that the said Bill of Review be dismissed at the cost of the petitioners.

And it will ever pray, etc.

PECK, SHIELDS & CLARK,
WILLIAM A. STONE,
McCROSKEY & PEACE,
Attorneys for Respondent.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Before me, a Notary Public of the Commonwealth of Pennsylvania, in and for the aforesaid County, personally appeared J. Newton Peck, who, being duly sworn according to law, says that he is the Secretary and Treasurer of the said Smoky Mountain Land, Lumber and Improvement Company, the Respondent above named, and that so much of the foregoing Answer as concerns the acts or deeds of the said Smoky Mountain Land, Lumber and Improvement Company is true and correct to the best of his knowledge, and so much thereof as concerns the statements and the acts or deeds of any other person or persons he verily believes to be true.

J. NEWTON PECK.

Sworn to and subscribed before me this 28th day of December, A. D., 1907.

[SEAL.] ANNA H. HARE, *Notary Public, Philadelphia, Pa.*

Commission expires March 12, 1911.

In the United States Circuit Court, Northern Division of Eastern District of Tennessee.

DAVID W. BELDING
vs.
CHARLES HEBARD.

It does seem upon examination of this case that there is no ground on which the success of the proposed Bill of Review might finally be expected. The objections which are made to permitting this bill to be filed go to the very merits of the bill, and can, and in my opinion, should, more properly be taken up by demurrer to the bill if filed. If, in the exercise of discretion I refuse to allow the bill of review to be filed, it is not certain that my refusal to do so would be subject to review. On the contrary, if the bill is filed and a demurrer should be sustained to it on the same grounds that are now urged against its filing, the action of the Court would be subject to easy review,
62 and so the petitioners for review would suffer no error at the hands of this Court that could not be readily corrected.

In view of these considerations I have determined to allow the Bill of Review to be filed, subject, of course, to all legal objections, by demurrer, answer, plea or otherwise, as the defendants may be advised, and it is ordered accordingly.

(Signed) CLARK, *Judge.*

Endorsed: No. 1056. David W. Belding vs. Charles Hebard. Answer of Smoky Mt. Land, Lumber & Imp. Co. Filed January 2, 1908. W. L. Edington, D. C.

within said District and the Sixth Circuit, on the first Monday, it being the 2nd day of March, A. D., 1908.

Present and presiding the Hon. John E. McCall, Judge of the District Court of the United States for the Western District of Tennessee, the following proceedings were had, to-wit:

WEDNESDAY, *March 4th*, 1908.

Court met pursuant to adjournment, present and presiding the Hon. John E. McCall, Judge, etc.

No. 1056.

D. W. BELDING et al.
vs.
CHARLES HEBARD et al.

In this cause it is agreed by the parties, and so ordered by the Court, that each party have two months from this date within which to take their proof in chief, and one month thereafter, within which to take rebuttal testimony.

And by consent of parties it is ordered by the court that in taking proof the parties will be governed by rules of practice in the Chancery Court of the State of Tennessee, as to time, place and officer before whom same is taken.

This order being made at the request and by consent of both complainant and respondent.

By agreement of parties it is further ordered that notice to take proof served on E. P. McQueen, Atty. for Complainant, and T. E. H. McCroskey, Atty. for Respondents will be sufficient notice.

E. P. McQUEEN,
Sol. for Comp'l't.

T. E. H. McCROSKEY,
Sol. for Resp'd't.

Circuit Court of the United States in and for the Eastern District of Tennessee, Northern Division.

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W. R. HOPKINS et al.
vs.
CHARLES HEBARD et al.
and
D. W. BELDING et al.
vs.
CHARLES HEBARD et al.

The depositions of D. B. Burns, C. H. Burns, H. E. Libby, and C. Z. Denton, taken by consent at the Imperial Hotel, in Knoxville, Tennessee, in the presence of C. B. Matthews and D. P. McQueen, Counsel for Complainants, and T. E. H. McCroskey, and T. W. Peace, Counsel for Defendants, on this the 7th day of May, 1908,

Replication.

Circuit Court of the United States in and for the Northern Division of the Eastern District of Tennessee.

No. 1056.

WILLIAM R. HOPKINS et al., DAVID W. BELDING et al., Complainants,
vs.
CHARLES HEBARD, Defendant.

The Replication of the Complainants to the Answer of the Smoky Mountain Land, Lumber & Improvement Company.

To the Judges of the Circuit Court of the United States, Sixth Circuit, in and for the Northern Division of the Eastern District of Tennessee, in Chancery sitting:

Now comes the complainants and by way of replication herein, saving and reserving to themselves all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of The Smoky Mountain Land, Lumber & Improvement Company, for replication thereunto saith that they do and will aver, maintain and prove their said bill to be true, certain and sufficient in the law to be answered unto by the said Smoky Mountain Land, Lumber & Improvement Company, and that the answer of the said respondent is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all of which matters and things this replicants are ready to aver, maintain and prove as this honorable court shall direct and humbly prays as in and by their said bill they have already prayed.

C. B. MATTHEWS,
E. P. McQUEEN,
Solicitors for Compl'ts.

63 Endorsed: No. 1,056. Circuit Court of the United States, in and for the Northern Division of the Eastern District of Tennessee. William R. Hopkins, et al., David W. Belding, et al., Complainants, vs. Charles Hebard, Defendant. Replication of the Complainants to the answer of The Smoky Mountain Land, Lumber & Improvement Company. Filed February 10, 1908. D. L. Snodgrass, Clerk, by W. L. Edington, Deputy Clerk.

Be it remembered that at a Circuit Court of the United States began and held for the Northern Division of the Eastern District of Tennessee, at the Federal Court Rooms in the City of Knoxville,

to be used as evidence on behalf of Complainants. Said depositions being taken before R. S. C. Hutchinson, Notary Public.

First witness, D. B. BURNS, being duly sworn, deposed as follows:

Examined by Mr. E. P. McQUEEN:

Q. 1. Please state your age, residence and occupation?

A. My residence is 704 Morgan street, Knoxville, Tennessee; my age is 31 years; my occupation is Civil Engineer.

Q. 2. Please state where you were educated as a civil engineer and when?

A. I was educated at the University of West Virginia and — there with the degree of B. S. C. E. in the year 1901.

Q. 3. What experience have you had as a civil engineer?

A. From the time I was about 16 or 17 years old I have been engaged in surveying, just common land surveying, and in the year of 1898 I entered the University of West Virginia to take the civil engineering course at that University; and while I was in school there I was constantly engaged at all my spare moments in engineering work, such as staking out town lots and making land surveys, etc., and some street paving. I graduated in the year of 1901 and since that date have been constantly engaged in engineering work. My first position was chief draughtsman for the W. K. Niver Coal Company, at Berlin, Pennsylvania. I had charge of all their office work in which I had the calculations and the mapping of about 23,000 acres of coal lands. I was with them for about eleven months and resigned my position and went back to Morgantown and was engaged in engineering work for Professor Morris, in which we were engaged in a business under the head of Morris and Burns, Civil Engineers, about two years, and during that period, I had experience in various branches of engineering. I surveyed more than 7,000 acres of coal lands for the Cochran Coal & Coke
65 Co. at Uniontown or near Uniontown, Pennsylvania. I also did various railroad work, including a location for the Morgantown and Kingwood Railroad from Morgantown to the mouth of Little Whitley Creek on the Monongahela River, a distance of about 25 miles. My next position was with the Coal & Coke Railroad in which I was masonry inspector on a residency of about seven miles long. I remained with them until the completion of the work, which was about eight months—something less than a year—and I went to the Baltimore and Ohio Railroad and the greater part of the time I was with them I was in charge of a party on preliminary and location surveys from Uniontown, Pennsylvania, to Wheeling, West Virginia. I was with them for a little more than two years. The last five or six months I was at Hancock, Maryland, where we were surveying for a higher grade line along the Potomac River from Cumberland about 60 miles east along the B. & O. Road. I resigned my position with them and went to the Lake Shore and Michigan Southern Railroad Company at Cleveland, Ohio, at which time I was engaged for the most part in getting up masonry plans and designs for the new work around Cleveland, and I resigned my

position there the first of February, came south with Mr. Libby to go into business for ourselves under the head of Burns & Libby, Civil Engineers. That brings me up to date.

Q. 4. State whether or not you have been continuously engaged in the line of your profession since leaving the College in 1901 up to the present time?

A. Yes, sir.

Q. 5. That has been your principal business?

A. Yes, sir.

Q. 6. And your only business?

A. Only business.

Q. 7. You speak of being associated with Mr. Libby. Is Burns & Libby a firm of engineers now?

A. Yes, sir.

Q. 8. And where are the headquarters of the firm?

A. Knoxville, Tennessee.

Q. 9. How long have you been located at Knoxville?

A. Since February the first—about that time.

Q. 10. 1908?

A. 1908.

Q. 11. If you have been called on to locate any part of the state line between North Carolina and Tennessee please state by whom and when?

66 A. Yes, sir, I was called upon about five weeks ago by Mr. Cozad, the agent of complainants, to locate a part of the State line between North Carolina and Tennessee.

Q. 12. Then in point of fact you have been doing that work for the complainants in this case?

A. Yes, sir.

Q. 13. How long were you engaged in doing the work for which you were employed?

A. I was about three weeks engaged in the field work and about two weeks in getting up the maps after the field work was completed.

Q. 14. At what point on the line did you begin the work and at what point did your work terminate?

A. I began work on the Smoky Mountains where the State road crosses the Smoky Mountains about three miles and a half north of the Little Tennessee River and ended my work near the Stratton Bald at the junction of the Hangover Lead with the main Fodder Stack Mountain.

Q. 15. Do you mean to say that you began the work on the State line on top of the Smoky Mountain where the turnpike crossing the mountain leading up the Tennessee River to what is known as Rock Point, and further one?

A. Yes, sir.

Q. 16. How far is that from the Tennessee River as you made your survey?

A. Well it is about thirty miles and a half.

Q. 17. Now you may go on and tell all about how you ran the

line, but before doing so you will state why you began at that particular point?

A. Well I began at that point because it was an undisputed point in the State line.

Q. 18. Did you have the map, or any map at the time you began the work?

A. Yes, sir, I had the old map of 1821.

Q. 19. Was that the map of the Commissioners running the line in 1821?

A. Yes, sir.

Q. 20. Was the beginning point of your work a fixed point as shown by that map?

A. Well the beginning point—the map didn't show the turnpike road across the mountain, but it did show the general course, or near that point the general course on the map made an angle, but the State road isn't shown on the map of 1821.

Q. 21. Well was or was not that a point in the State line?

A. Yes, sir.

67 Q. 22. As shown by the map?

A. Yes, sir.

Q. 23. Have you any information as to whether or not there was a path in 1821 crossing that mountain, and if so, have you learned its name?

A. There was a path shown on the map of 1821 called the Tallassee Trail. It must have crossed pretty close to where this turnpike road crossed, but I don't know at just what point it did cross. Back in there somewhere.

Q. 24. Now you may go on and state just exactly what you did in detail in locating the State line between the points you have mentioned. State fully.

A. Well I was given this map of 1821 as a guide from which to locate the line as nearly as possible to where it was run at that date, and in order to do so I took the prominent points in the general directions of this line and got the bearings of these general courses from the North point as they show it on their map; I was guided by that general course to find in what general direction they ran this line, and then in detail was governed by the marks that they left on the trees. Now in order to explain fully I would have to have the maps. (Maps here produced and handed to witness.)

Q. 25. You will please exhibit the said map of the Commissioners of 1821 which you used as a guide, together with any other map that you may have used in locating the line or as an aid in doing so, also the map that you have made of your work.

A. I herewith file as Exhibit "A" to my deposition a certified copy of the map of the Commissioners who ran said line in 1821, which I used in my work. Also I file the map of my work marked Exhibit "B" to my deposition.

Q. 26. Now you may proceed to answer the question.

A. Now this tracing here before us, Exhibit "A," was handed to me by Mr. Cozad in which to follow and locate as near as possible just where it was run on the ground in 1821. Now in the beginning

of this I commenced on the Smoky Mountain side at a point which was undisputed——

Q. 27. You mean the North side?

A. The north side of the Tennessee river.

Q. 28. Designate that as the North side please.

A. I ran to a point on the South side near Stratton Bald at the junction of the Hangover ridge and the main Fodder Stack mountain. Now we find on this map Exhibit "A" that we have no courses and distances, so I lay down from the Tennessee River a line on Exhibit "A" to the first prominent bend or break in the
68 general course of their line going southwest, and then I take from the North point on Exhibit "A" and find the bearings of this general course on Exhibit "A" and then I take my instrument—my transit—and set up my transit and set on this course that I find from Exhibit "A" to find what general course it took me in the field, and I used that general course as my guide in finding that portion of where they ran in 1821. Then I ran my line from the Smoky Mountain where the State road crosses the Smoky Mountain and followed that ridge down to the Tennessee River. That part as I understand is undisputed. And I also laid down another general course from the point indicated on Exhibit "A" on the North side of the river where the general course breaks at that point and I found that the general bearings I get from Exhibit "A" corresponds almost exactly to the general bearings I get from running this main lead down to the Tennessee River, and then I have explained before how I got from the point at the Tennessee River to my next general break in Exhibit "A" which is the Big Fodder Stack on the main line about six miles and a half—or a little over that—from the Tennessee River; and then I take from Exhibit "A" another line or the general line to the next general break in the course of Exhibit "A" and find that the bearings I get from Exhibit "A" corresponds almost exactly to the bearings that I get from my line, the general bearing, up to the junction of the Hangover ridge with the main Fodder Stack mountain, which is another undisputed point in the State line. Now we have just been discussing the general courses on Exhibit "A" and the general courses on Exhibit "B." Now Exhibit "B" is an exact tracing of that point of Exhibit "A" on this map here between where I started the line on the Smoky Mountains to the point near the Bald.

Q. 29. The junction you mean?

A. Yes, sir. On Exhibit "B" we have a square traced out here in which we have labeled "Tracing of a Portion of the Map of the State Line Survey of 1821;" that, of course, we understand is an exact tracing of that portion of this map, Exhibit "A." Now going back to our general courses that I started awhile ago, as we go back from this general break in the Smoky mountains, near where we started our point, we see that the map of 1821 bends to the right of our general bearing. We find the same thing is true on the map in which I ran as shown on Exhibit "B;" we get down a mile—a little more than a mile—from the Tennessee river we find that the

map of 1821 comes to the left of my general bearing. We
69 find that the same thing is true on the map in which I ran.
We then cross the Tennessee River and we find that going up that on our general bearing on the map of 1821 we first have a portion of the State line to the left shown on the map of 1821, which I also show on my map; then we go up a little further and we find that it follows very nearly on the line for a little piece, which is shown right along about a mile or a little less than a mile from the Tennessee River from tree No. 30 back to the Tennessee River. From this general bearing of my line and the general bearing on the map of 1821 the very place that I deviate on the map of 1821 I have deviated on the map that I have actually run in the field. The first mile and a half from the Tennessee River the State line falls on the left of this general bearing of 1821; it also shows on the left of my map; and then for about the next mile we follow very closely along this general bearing; in both the map of 1821 and my map that is shown in that portion right in there (indicating on map) and then we have a mile and a half, and another mile and a half makes three miles there, and then from this point on to the Big Fodder Stack which is about two miles from the Big Fodder Stack. From the Big Fodder Stack northeast the deviation from the map of 1821 is to the left, and also we show the same thing on my map, the same deviation, and we find after we get to Big Fodder Stack going towards the Stratton Bald—I have laid down another general course on my map and have made the same general courses or connected the same points in the points of 1821 which shows us practically the same general courses. Now for the first mile on the map of 1821 the line follows the general bearings almost exactly. You see that on the map of 1821, you see it on the map which I have made. About the first mile from the Big Fodder Stack towards the Bald the first mile shows practically on the general course of my points. From the same points here on the map of 1821 we show the same thing, and from that point on to the Stratton Bald, or to the junction of those two ridges there—the Hangover and the Fodder Stack ridges—we find that the bearing on the map of 1821, or the line on the map of 1821, is a little to the left of the general bearing that I have laid down here. We find the same thing on the map which I have run. Well, now it might be well to state in this connection the way in which this survey and this map was made. I started as I have designated before from this road where it crosses the Smoky mountain. I started the transit line at that point in
which I turned all the angles and measured with a horizontal
70 chain all the distances over the line. In order to get my
bearing I took observations on the North Star to get a true North and South bearing, or true meridian you might say, and in running this line about half way——

Q. 30. (interrupting). Wait a minute, please; don't use that word "this;" just designate that line in some way, so that others may understand it. On paper it won't be understood.

A. (continuing). At a point about two miles from the mouth of Slick Rock creek I took another observation on Polaris, the North

Star, and I found that my course was still right; there was practically no variation from the beginning. And then at a point a mile and one-half from the end of the line I took a third observation on Polaris and found that my course was still exactly right. Well, now, in working up this survey I figured on every line the exact amount south and the exact amount west; every angle in that line makes from the beginning point. Now that system was carried clear through the survey, and this map Exhibit "B" shows a series of parallel lines one way and crossed another way, in which one set of them are the true North and South and the other set of them are the true east and west, and we will find the numbers written along these lines which designates how far each one is south and how far each one is west from the beginning point of the survey. That is at the bottom of this Exhibit "A." This work was thoroughly worked up and checked up so that we are sure that there is no error in the exact position of every point with reference to the true South and the true West. So that in the platting of this survey we believe it to be, and in fact is absolutely correct, or as nearly so as can be scaled to a scale of that size; and also I guess it is necessary for me to state that I have run two other lines in connection with the one that I have just described, beginning on the Smoky mountain side, Station 144, plus 80, on the North side of the Tennessee River, and I started there another line in which I followed the ridge leading up to the Hangover and from there to the Stratton Bald, and thence to the junction of the Fodder Stack mountain. Well now this system about these lines which I spoke about a while ago—about running North and South—I used the same system in platting this line going by the Hangover Lead which I have just described. I have used the same care in the platting of that line that I have in the other line which I have just described. Now, in running the first line from a number of points along that line I turned angles from my
71 survey to the Hangover, which is a large rock, known as the "Hangover" in that country. There is a check on the accuracy of this survey that I have run over the Hangover Lead, and I find that all these angles that I turned lead me right square over the Hangover, and which I have located on this map. That is just a test of the accuracy of the work. It is so close that you can't designate by a scale any error in it. I have run also a third line, which commences about a mile and a quarter south of the Little Tennessee River, and ran up a lead leading to the Little Fodder Stack, and thence from the Little Fodder Stack around the main lead to the Big Fodder Stack, and I have also used the same care in figuring and platting that line that has been used on the other two. With a careful examination of these three different routes that has been run and explained on Exhibit "B" there is only one of them that corresponds to the map of 1821, and that line corresponds surprisingly close to that map, and that line goes from the point at which I commenced on the Smoky Mountains to the Tennessee River at the Mouth of Slick Rock creek, and thence follows up Slickrock creek to the Big Fodder Stack lead, thence up said lead to the Big Fodder Stack, thence along the main lead to the Stratton Bald, or a little

west of the Stratton Bald at the junction of the Hangover ridge. All along this line that I have just described, which runs up Slick Rock creek, I have found various marked trees and blocked a number of said trees, which clearly points out to my mind that the line was actually run in 1821 over that route and no other route.

Q. 31. What does this red line on Exhibit "B" indicate?

A. That red line on Exhibit "B" indicates the transit line which I ran. You see, going up Slick Rock Creek here I deviate just slightly from the creek, cutting off some of the sharp bends, but in every instance locating the creek by measuring an offset line. It is clear to my mind that the creek is meant for the state line; where I deviated from the creek the state line should follow around the creek. The red line just indicates where I ran, while the creek indicates the state line where I believe it to be.

Q. 32. Does that red line correspond with the state line as shown by the map of 1821?

A. Well, the general course of it does, but the creek I think—as I said a while ago—the creek is where the map of 1821 intended the line to be.

Q. 33. Now what determined the location of this red line as shown on the map (Burns' map) that you made?

A. The red line is the transit line which I ran.

72 Q. 34. I understand; what determines that line, though; what do you find along there?

A. Why, marked trees were found in a great many places along this creek, which determines or proves clear to my mind that that is where the line was run in 1821.

Q. 35. Now, I would like to get you to identify the letters and bearings and the colors, the yellow and red lines, as you made here on this Exhibit "B"?

A. Now, I explained a while ago about this.

Q. 36. Don't say "this"; start with your letters, A, B, and so on.

A. How do you want me to define this square in here (indicating)?

Q. 37. You will indicate the small map in the square as B No. 2 and the whole map as Exhibit No. 1.

A. Well, now, B No. 2 in laying out these general courses I call one point A, one B, another C, another D, and on B No. 1 the same points are designated by the same letters A, B, C, and D. Now, the general bearing on B No. 2 is South 70 degrees and 30 minutes West, which was determined from their North point, that is, from A to B. Now the bearing from A to B on B is South 74 degrees and 25 minutes West. You will note how close the general bearing is, almost exactly. The bearing from B to C on Exhibit B 2 is South 43 degrees and 25 minutes West. The bearing on Exhibit "B" from B to C is South 44 degrees and 28 minutes west. See how close they are. The bearing from C to D on Exhibit B2 is South 19 degrees and 15 minutes east; the bearing from C to D on Exhibit "B" is South 18 degrees and 12 minutes east. The variation in those is so slight that I don't think there can be any question about

the line which I have indicated in red as being the course in which they ran the line in 1821.

Q. 38. Now, what point does B designate on both of these maps?

A. B is the mouth of Slick Rock Creek, right on the Little Tennessee River, right at the mouth of the creek.

Q. 39. Is that where the state line intersects with the river?

A. B, yes, sir.

Q. 40. Well, go ahead with C now.

A. C is the top of the Big Fodder Stack and D is the junction of the Fodder Stack mountain with the Hangover ridge. A is the point back on the Smoky mountain about three miles and a half North of the river, the first general break in the course of the map of 1821. I would like to call attention to the fact—I have just
73 spoken of the bearings of this line A, B, C, and D, on both Exhibit B2 and B; notice the angle between AB and BC on Exhibit B2 is 27 degrees and 5 minutes, and notice that the angle of Exhibit B between AB and BC is 29 degrees and 27 minutes. The only thing in my mind is where the general break in the bearing changes in the map of 1821 and in the map of today over the same country, and at that point where that general break commences takes me on the ground today to the Big Fodder Stack.

Examination by Mr. MATTHEWS:

Q. 41. Mr. Burns, when you started your examination, did you stand and look south?

A. Yes, sir.

Q. 42. What did you see?

A. You could just see the Big Fodder Stack up in there I think all the time; that was all along this Smoky mountain ridge; down here you can see from the beginning point Big Fodder Stack looking right at you all the time.

Q. 43. What seemed to be in the general straight line southwest what range?

A. Well, that was the main Fodder Stack Lead, the main mountain.

Q. 44. What is the main ridge?

A. Well, the main ridge, as I understand what a main ridge means, would be the ridge that bears up, keeps the height until it gets down to the stream; that is, it holds up its height until it gets nearer the river.

Q 45. On a great average height?

A. On a great average height.

Q. 46. Which is that?

A. That undoubtedly is the Fodder Stack, in my mind.

Q. 47. In running from that starting point, about three miles and a quarter away, say?

A. About three and one-half miles.

Q. 48. In running this line according to that map of 1821, what obstacles did you strike?

A. You mean in trying to conform exactly to the other line?

Q. 49. That is exactly what I mean?

A. Well, I think their map was platted on such a small scale that they couldn't indicate on that scale every little nook or crook that they did make, and the best way out of it was—the only way to get the best result—was to take their general courses there, that is what shows to be practically in a straight line, take that general course and that general course indicated their trend.

74 Q. 50. What point did these lines trend to on the Tennessee River?

A. Oh they trended—they were making no doubt right for the Big Fodder Stack lead.

Q. 51. How about the Slick Rock creek?

A. Well, of course, in order to get to the Big Fodder Stack they had to go up the Slick Rock basis.

Q. 52. Did they or did they not trend towards the mouth of the Slick Rock Creek?

A. The main lead of the Smoky Mountains goes right down towards the mouth of the Slick Rock Creek and then it seems to fall off in a little branch there and it is very uneven ground, the fact of it is it is so rough that it is impossible to get a line over really where the map indicates that it should go.

Q. 53. Now how much of that distance is that very rough country that you speak of: I am talking about the North side?

A. I would say about a mile, something like that. Of course there is just a bluff there.

Q. 54. When these lines were trending towards the mouth—now I mean on the North side of the Tennessee River—of the Slick Rock Creek and a change came, was there any physical difficulty there that suggested to you as an expert why that change was made?

A. The easiest way to get down there was to follow this old ridge; it took them down there to the mouth of a little branch, and they couldn't get down over this rough uneven ground that they would naturally want to go, and they then followed down in any way they could get down and got down in about half a mile above Slick Rock. There is no doubt in my mind that they were making all the time for the mouth of Slick Rock creek, but after they get down here (indicating on the map) the mouth of Slick Rock is visible all along that ridge; about a mile from the mouth of the creek you can see the mouth of the creek.

Q. 55. Where they deviated and instead of approaching the mouth of Slick Rock Creek by a straight line say one-half or three-quarters of a mile they have approached it by a line another way on account of the physical conditions there?

A. Yes, sir, they couldn't get down to the mouth of Slick Rock Creek on account of the topography of the country and they were forced to go down to the river; the natural trend of the ridge led them down to a point about half a mile above the mouth of

75 Slick Rock Creek. There is no doubt in my mind but that they were making for the mouth all the time.

Q. 56. And thus it was the physical contour of the country that prevented them from making the straight line?

A. That is my opinion.

Q. 57. How on the map did they get there as a matter of drafting?

A. As a matter of drafting if they wanted to go a straight line from a point about a mile up here on the North side of the river they could run down the natural boundaries of the country, the easiest way to get there, and then run down the river to the mouth of Slick Rock Creek and thence they could determine their straight line from back on the ridge to the mouth of Slick Rock over this topography in which they could not go.

Q. 58. In other words you could make a line on paper that you can't follow on the ground?

A. Yes, sir, I think that was their intention.

Q. 59. How was the general direction of this whole line from the point where you started say three and one-half miles North of the Tennessee River down to the Stratton Bald, correspond in straightness with the line that would go to the Hangover?

A. The angle going over the Hangover when you reach the Hangover is to the right to get to the Bald.

Q. 60. To the right?

A. Yes, sir, starting from the North side of the river and going to the Hangover after you reach the Hangover the general course would have to be an angle to the right to get to the Fodder Stack lying half a mile west of the Bald, while on the map of 1821 after they reach the top of Big Fodder Stack the angle is decidedly to the left, and that is what they show on the map of 1821 and that is what also shows on my map Exhibit B.

Q. 61. And from the mouth of Slick Rock what kind of an angle would it be?

A. To what point?

Q. 62. The same point, but by the different directions by Hangover or by the Fodder Stack and Slick Rock Creek?

A. I don't quite understand your question.

Q. 63. What kind of an angle would it be from the mouth of Slickrock Creek here if the line from there went over Hangover or went about here, how would it be on B2?

A. It would be a very decided angle to the left, very decided.

Q. 64. How much of an angle?

A. It would be, I would say, about 45 degrees.

76 Q. 65. How much of an angle would it be if it crossed the river there at the Hangover ridge, how much of a deviation if anything?

A. I can't quite understand what you are trying to get at.

Q. 66. I mean this: How much straighter line is it from where you started to the Stratton Bald to go the way you went than if you had to go by the Hangover?

A. Oh! Well the distance to the—one thing I was asked to explain in this map that I didn't put in.

Mr. PEACE: You didn't answer his question.

A. Well, as to how much straighter it is, one is about as straight as the other. The point I was going to bring out was in regard to the distances. The distances as shown by the mile circles on the

map of 1821 from the Tennessee River to the Big Stack is 6—a little short of 7 miles—about 6.6. The distance that we actually get in our survey over the same ground is 6.6 and the distance from the same point, the mouth of Slick Rock Creek to the Bald, as shown by their mile circles is 10 miles and the distance that we get by our actual survey is 9.97 miles. Now the distance over the Hangover ridge from the river to the Bald is 8.51 miles and the distance over the Little Stack is 11.99 miles. That is taking the river as a basis, and the only one that corresponds to th map of 1821 is the line up Slick Rock Creek to the Big Fodder Stack and hence to the Bald, and that difference is surprisingly close, only 3-100 of a mile in 10 miles.

Examination by Mr. McQUEEN:

Q. 67. Now, Mr. Burns, I will get you to state whether or not it is possible for the State line to have run over the Hangover ridge as shown by the map of 1821 either by distance or bearing?

A. It is absolutely impossible and altogether inconsistent with the map of 1821.

Q. 68. Now I will ask you whether or not the map of 1821 conforms substantially to the line as run by you over the Fodder Stack ridge and shown in red on map Exhibit "B" to your deposition?

A. Yes, sir, it shows almost identically; scarcely any variation at all.

Q. 69. You mean Big Fodder Stack?

A. Yes, sir.

Q. 70. I will get you to state the distance between the Big Fodder Stack, the summit of Big Fodder Stack, across to the summit of Hangover?

A. How far it is across there?

77 Q. 71. From the summit of Big Fodder Stack to the summit of the Hangover as near as you can?

A. Well, it is about 18,000 feet; that would be three and one-half miles.

Mr. MATTHEWS: Mr. Burns, on Exhibit "B" where this state line crosses that particular creek is simply labeled "creek;" is that the Slick Rock creek?

The WITNESS: Yes, sir, in my mind there is no doubt of it. Everything points to it.

Q. 72. How do you know that?

A. Well, the general course of the line takes me there, any everybody in the country of course recognizes the creek as Slick Rock Creek. Everything goes to point that this is the creek; that is called Slickrock Creek nowadays.

Q. 73. Now, taking the state line as the map of 1821 locates it in crossing the river and as you have located it in your survey, is there any other creek than Slickrock Creek near that point where the line crosses the river?

A. No, sir.

Q. 74. Now, do you know of any other way of naming or designating that creek as Slick Rock creek?

A. Yes, sir; we platted up our surveys as indicated by the red line of Exhibit "B" on a scale which fits the government map. This government map was enlarged four times, makes it four times the scale it is actually shown from the government sheet, which I file as Exhibit "C." And now I have platted up on the same scale in which this government sheet is now, our line as indicated by the red line, and we have taken the end of our line, the point of the Bald here—the junction of the Hangover ridge and the Big Fodder Stack Mountain—and established that point which is undisputed in our line on the government sheet and then being governed entirely by the North point, which in my line on Exhibit "B" is the true meridian, and the true meridian as indicated on the government sheet, and fit on this line on the same scale and I find that it follows the Big Fodder Stack route where we surveyed the line to. It also follows down the ridge of the Big Fodder Stack mountain to the creek and then follows very closely Slick Rock creek to the mouth; and then on the other side the line follows approximately the Smoky mountain ridge and ends exactly in the state road as is shown on the government sheet.

Exception by Mr. McCroskey: Respondents except to the introduction of the government sheet Exhibit "C," because the same is not authenticated, and further because it is not proven to be
78 an accurate survey of the country by proper authority; and further, it would not be competent evidence in this case in any event, as the respondents were not present when the same was surveyed or the map was made.

Q. 75. I will ask you to state, being a civil engineer, if you are acquainted with the government sheet published as such, and whether or not the sheet you exhibit as Exhibit "C" which you say is four times the scale of the published government sheet, is the correct map or approximately so?

A. To the best of my ability it is approximately correct.

Q. 76. Well, first get the question of being acquainted with the government sheet?

A. Yes, sir; I actually used the government sheets—well, ever since I have been engaged in civil engineering—and while there are some slight errors in them, I find that the high peaks as a rule are accurate, very accurate, while some of the streams, some of the intermediate points and ridges between the high peaks, are very often more or less inaccurate; but the high points as a rule are accurate and very accurate.

Exception taken by Mr. McCroskey: Respondents except to the foregoing answer seeking to prove the general maps of the government and thereby establish the correctness of the present one.

Q. 77. I will get you to state whether or not this map Exhibit "C," covers a territory of country through which you traveled in making your survey and the same territory through which the commissioners traveled in making their survey of 1821?

A. Yes, sir, it does.

Q. 78. I will get you to state whether or not the Exhibit "C" designates Slick Rock Creek?

A. It is so marked on the sheet, "Slick Rock Creek," on the government sheet.

Q. 79. I will get you to state how near Slickrock Creek is to the point on the Tennessee River where the State line crosses it as per your map and the map of 1821 shown by the government map, Exhibit "C"?

A. Slickrock creek is indicated by the map of 1821 and by my survey from practically the same point. There is a slight deviation in the creek as shown by the government, but the general trend coincides almost exactly with my survey.

Q. 80. Now I will get you to state if the Fodder Stack and
79 the Hangover are represented on Exhibit "C" as to point and distance between the two as it is on the map of 1821 and your map?

A. Yes, sir; in regard to the distance they are very close.

Q. 81. Does the map of 1821 show the Hangover and Little Fodder Stack at all?

A. That is pretty hard to state. They show a good many ridges and sketched in all the general topography, and I believe possibly one of them is the Hangover, but they haven't got it quite in the right place if it is.

Q. 82. They haven't got it labeled?

A. No, sir; it isn't marked so.

Mr. MATTHEWS: That creek where the State line passes is Slickrock Creek?

The WITNESS: There is no doubt of that in my mind.

Q. 83. Now, taking your survey line and placing it on Exhibit "C," government map, could it be possible that the State line ran over the Hangover?

A. No, sir.

Q. 84. Now, it is possible that it could run over the Little Fodder Stack?

A. No, sir.

Q. 85. You have stated that you ran three lines while you were in the field, one exhibited on your map in red lines, the other two in dotted white representing the Fodder Stack ridge, the Little Fodder Stack and the Hangover. Now, is it possible for the State line to have run over the Little Fodder Stack if it was properly run as shown by map of 1821?

A. Absolutely impossible.

Q. 86. In other words, taking the map of 1821 as a guide, and taking the general bearings between prominent points given there, would it be possible for it to run over Little Fodder Stack?

A. Well, the general trend of the ridges——

Q. 87. I mean, taking the map of 1821 and its bearings, as it is shown in B2, is it possible for it to have run over Little Fodder Stack?

A. No, sir, it is not.

The further taking of this deposition adjourned until 1:30 P. M., at which time the same was resumed.

Continuation of direct examination by Mr. McQUEEN:

Q. 88. Referring to the red line on map Exhibit "B," I will get you to explain the variation of the angles along that line, please.

A. Now, before I was discussing these yellow lines, as I have indicated by A, B, C and D, as the general courses, but I want
80 to state that these lines, as designated by A, B, C and D, are just merely test lines and have nothing to do with the red line as marked on the map. Now, what defines the course of this red line is the meanders of ridges and streams; all these little angles are the meanders of the ridges, and show marked trees along those ridges and the stream as well. Now, these yellow lines, this point A, point B, point C and point D on Exhibits "B" and B2 are just merely to test the work after it is completed in comparison with the map of 1821. Now, this point B, as stated before, I believe is where the state line crosses the south bank of the Tennessee River, and the point C is the most westerly point shown on the map of 1821 in this immediate section; and the point D is a point about three miles and a half further, where it makes a decided angle to the right again. Those points are easy picked out on the map of 1821, and these yellow lines are *out* there to compare the map of 1821 with Exhibit B, and have nothing to do with the red lines as indicated on the map. We notice all along this red line here we see tree No. 1, tree No. 2, etc., clear to the end, and we have prepared a schedule of state line trees as located on Exhibit "B" in the upper right hand corner, and we will call it for convenience Exhibit 3. Now, in this schedule we have sub-divided into different headings, call "Tree Number," "Block Number," "Kind of Tree," "The Diameter," "Location," and how the tree is marked. The number of the trees are forty-eight in all.

Q. 89. That you have found, you mean?

A. Yes; and those trees are marked just as they come along the red line. You can see all along the trees No. 9 and No. 10, and all the way up now in the part we headed under "Location" in this schedule B3 we have the exact location of each tree.

Q. 90. Now, begin with A and B, and locate them as that map or that schedule shows it.

A. Well, we will say *three* No. 20 is 10 feet to the right of station 191 plus 25. The same is shown at the mouth of the creek. You might take tree No. 36, it is a mountain oak, 2½ feet in diameter, 4 feet to the left of station 544 plus 12. It is shown near Big Fodder Stack. It is marked with three hacks on the right side of the tree. Now, this schedule shows here is a number of trees that have been blocked—eight in all—and one tree was blocked twice.

Q. 91. By your party?

81 A. By our party. I blocked one side of it, and Mr. Denton blocked the other side of it. Tree No. 32 is located at the foot of Big Fodder Stack Lead. That schedule shows the list of trees that we located, how they are marked and everything.

Q. 92. I notice a great many angles shown on the red line of said

map where there is no bearings. You may make any explanation that you decide.

A. On this map, being such a small scale, we didn't attempt to letter the bearings on this small scale map; but we are preparing a larger scale map of 400 feet to the inch, in which we will show the course and the distance of every line upon the whole red line survey. I will complete it within the next few days and file it with the Clerk of the Court as Exhibit "D" to my deposition.

Mr. McCroskey: Respondents agree to this, reserving the right to further cross-examine the witness, in case it is deemed necessary.

Q. 93. Now, I notice that you have a map of 1821 marked on your large map and designated as B2, and I notice yellow lines on that map, as well as your map. I wish you would begin with the first letter and state whether or not the lines are made to correspond on the two maps?

A. I think I have already explained that but will explain it again to make it sure. The point A in Exhibit B2 being a point about three miles from the Tennessee River northeast, in which the general bearing breaks at that point—a double angle at that point; the point B being a point where the State line crosses the south bank of the Tennessee River; the point C being a point six miles and a half further in which the line of 1821 makes a decided angle to the left, or in fact the most westerly point in this immediate section; and the point D being the next point in which the general bearing takes a decided break for the right. Well, now, as I said, these lines are merely test lines, and after completing my survey, as is shown by the red lines here, I find that this break in my line corresponds very closely to the distance from the Tennessee River back; we can almost positively identify that it is exactly the same point where the map of 1821, makes the same angle, and I find that the bearings as taken off of the map of 1821 reads: "South 70 degrees and 30 minutes West" I find that the line A B on Exhibit "B" gives me a bearing of South 74 degrees and 25 minutes West. Now my point South as I have defined as being a point as the most westerly point given on map of 1821, I find that this bearing on the map of 1821 reads: "South 43 degrees and 25 minutes West." I see that
82 my line B C on Exhibit "B" gives me a bearing of South 44 degrees and 28 minutes West. Now there was no way of determining from the map of 1821 what this point C was; there were no points marked on it, as you understand, but the point that corresponds to the point C on my map is the Big Fodder Stack. Following on down to the point D which I have already described I get from the map of 1821 a bearing of south 19 degrees and 15 minutes east. I get on my bearing C D on Exhibit "B" south 18 degrees and 12 minutes east. Now the point that I want to be thoroughly understood on is this: That these general bearings which I have taken off of the map of 1821 has nothing whatever to do with the red line as I have located and as is shown on Exhibit "B." but these test points where we find a break at this point—where we find a break on Exhibit B2 we find a corresponding break on Ex-

hibit "B" at almost exactly the same distance and gives us almost the same bearings and same angles and it is just merely a matter of the proof of the red line as I have located it on the meanders of the ridges and the water courses governed by the marked trees—it is just a matter to prove that there is where the line was run in 1821. I want to be thoroughly understood on it that those yellow lines are merely test lines and have nothing to do with the survey as I ran it.

Mr. MATTHEWS: Mr. Burns, on the map of 1821, as shown on Exhibit B2 the bearing between points B and C is shown as South 43 degrees 25 minutes west and that on your survey line shown in red on Exhibit "B" the bearing between points B and C is shown there as south 44 degrees 28 minutes west. This point C you called the Big Fodder Stack. If point C had been intended to represent Hangover summit, what would have been the bearing on the line from B to C?

The WITNESS: That bearing would give us south 10 degrees and some minutes west.

Q. 94. Is that much of a variation?

A. Well, I think so.

Q. 95. How much difference would that angle make in that distance between the Tennessee River and the summit?

A. I don't clearly catch your question.

Q. 96. Measured across?

A. It is about three miles. I scaled it this morning at 18,000 feet.

Q. 97. What is the difference across from Fodder Stack to Hangover?

83 A. About three miles or three and a half. I scaled it this morning.

Q. 98. I notice a black line on your map Exhibit "B" on the north of the river. Will you please explain that?

A. We notice that the map of 1821 indicates a straight mile from the south side of the Little Tennessee River northeast. I have indicated on this map Exhibit "B" a black line which indicates the direction and distance from the point B to where it strikes the ridge as run down by the river and shown in red, the line being as scaled off 5,800 feet.

Q. 99. That is your full explanation now of the black line?

A. Yes, sir; that is the explanation of the black line.

Q. 100. If I understand your answer to that question I understand that in running your line from the beginning point running southeast to a point near where it crosses the yellow line A B you make an angle to the right. Now why did you not continue your line in a southwesterly direction from where you had come on down to Slick Rock Creek?

A. Because the marked trees and the natural boundaries took me down the other way.

Q 101. Now is it a fact that the marked trees along that line down to that point where you make the black line come out at that place?

A. No, sir.

Q. 102. I am talking about that black line now. Could you find any marked trees on that black line down to Slick Rock Creek?

A. No, sir. I looked all over that whole country.

Q. 103. What course did you take from the point of the black line to the river?

A. I just followed the meanders of the ridge as shown by this red line down here, which took me right down to that point about half a mile from the mouth of Slick Rock Creek.

Q. 104. Is it possible for you to have or the original surveyors to have continued that southwest line along the black line down to the mouth of the creek?

A. It is not possible for them to get over that country on account of the topography of it, it is so steep and rough and cliffs in there that I think it would be an impossibility for you to get over it unless you had ropes or something like that.

Q. 105. Then state whether or not it was necessary to take the course of the marked trees down to the river a half a mile
84 above the mouth of Slick Rock in order to reach the mouth of Slickrock?

A. I don't think there is any doubt of that in the world; that is the best and easiest way to get down there and I couldn't have gone straight down there on account of the topography of the country.

Q. 106. Well on paper you can go straight?

A. Yes, sir.

Q. 107. Now in point of fact if the surveyors of 1821 could have continued the southwest course along the black line to the mouth of Slick Rock Creek they would have been on the direct line from the point where they began to the creek?

A. Yes, sir.

Q. 108. As their map indicates?

A. There is not a bit of doubt in my mind as to what they were—you might say from the time they left the high point of the Smoky Mountains or the Gregory Bald that they had picked out their course clear to the Big Fodder Stack. It was natural to suppose that not having any topographical maps to guide them that they would pick out a general course for miles ahead and no doubt in my mind that they had in mind to go right straight to the mouth of Slick Rock Creek.

Mr. McCroskey: Respondents except to the opinion as given by the witness, as it is facts only that are competent.

Q. 109. Now you have stated that you found several marked trees along the red line marked on your map. I will get you to schedule those trees as shown by the caption "Schedule of State Line Trees located," marked Exhibit B3, and state whether or not they bear the mark of the State Line tree and what you did to ascertain that fact. Trace the entire line of trees where you found them. I want you to locate each tree. Now name the block and locate it on this line by number of blocks.

A. Beginning back at the State road on the Smoky Mountain

north of the river, taking up tree No. 1, which is a chestnut about two feet in diameter just 2 feet to the left of Station 6 plus 00 marked with a blaze and 2 hacks over the blaze fore and aft. Tree No. 2 is a white oak 2 feet in diameter, 2 feet from the left of station 19 plus 20, marked with a blaze and 2 hacks fore and aft. No. 3, is a black oak 2½ feet in diameter 3 feet to the left of Station 20 plus 57, marked with three hacks on the right side. Tree No. 4 is a white oak a foot and a half in diameter 3 feet to the right of station 22 plus 00, marked with three hacks on the left side.

Tree No. 5 is a white oak a foot in diameter, 2 feet to the
85 left of station 26 plus 19, three hacks on the right side. Now that tree is blocked.

Q. 110. Is, or was, by you?

A. It was blocked by me, No. 1.

Q. 111. What does block No. 1 mean?

A. It means the first tree that was blocked. The next tree is No. 6 which is a black oak 2½ feet in diameter 15 feet to the left of station 32 plus 05, three hacks on the right side. Tree No. 7 is a chestnut three feet in diameter 29 feet to the left of station 68 plus 95, blaze and two hacks fore and aft. Tree No. 8 is a hickory a foot and a half in diameter 9 feet to the left of station 82 plus 14. This is marked with a blaze on the fore side, three hacks on the left side, and is said to be a mile tree by the people in that country. Tree No. 9 is a black oak two feet in diameter 24 feet to the left of station 96 plus 00, blaze and two hacks fore and aft. Tree No. 10 is a hickory one foot in diameter, three feet to the left of station 124 plus 42, three hacks on the right side. No. 11 is a hickory one foot in diameter, 3 feet to the left of station 124 plus 60, three hacks on the right side. That tree was blocked by me and called block No. 2 on this Exhibit. Tree No. 12 is a spanish oak 2 feet in diameter, 34 feet to the left of station 140 plus 00, two hacks on the right side visible. No. 13 is a black oak 1½ feet in diameter, 20 feet to the left of station 140 plus 20, two hacks on the left side are visible. Tree No. 14 is a red oak 1½ feet in diameter 6 feet to the left of station 140 plus 65, two hacks on the left side are visible. No. 15 is a white oak one foot in diameter, 5 feet to the left of station 141 plus 80, two hacks on the fore side, supposed to be 64 mile tree, No. 16 is a poplar 1½ feet in diameter, 14 feet to the left of station 141 plus 86, three hacks pointing to tree No. 15 and two hacks on the aft side. Tree No. 17 is a white oak 1½ feet in diameter, 11 feet to the left of station 145 plus 68, blaze and two hacks fore and aft. Tree No. 18 is a hickory with a dead top, one foot in diameter, 13 feet to the right of station 147 plus 10, blaze and two hacks fore and aft. No. 19 is a hemlock 1½ feet in diameter, 4 feet to the right of station 157 plus 25, blaze and two hacks on fore side, aft side formerly blocked. Tree No. 20 is a maple 1½ feet in diameter, 10 feet to the right of station 191 plus 95, formerly blocked by Hazen and Bogle. No. 21 is a water birch one foot in diameter, 18 feet to the left of station 193 plus 82, blaze and two hacks fore and aft. No. 22 is a water birch 1½ feet in diameter, 20 feet to the left

of station 203 plus 70. That water birch is Block No. 3.
86 No. 23 is a birch with a dead top 1½ feet in diameter, 20 feet to the left of station 204 plus 00, three hacks on the right side. No. 24 is a double birch on a large rock, one foot in diameter, 25 feet to the left of station 205 plus 23, three hacks on the right side. No. 25 is a poplar with dead top, 2½ feet in diameter, 20 feet to the right of station 218 plus 42, blaze and two hacks fore and aft. No. 26 is a beech 2½ feet in diameter, 40 feet to the left of station 221 plus 30, marked with three hacks on the right side. No. 27 is a hemlock, 2 feet in diameter, 34 feet to the left of station 243 plus 05, three hacks on the right side. This tree was blocked by me and designated as Block No 4. No. 28 is a birch 1½ feet in diameter, 30 feet to the right of station 258 plus 05, marked with three hacks on the right side. No. 29 is a hemlock, 1½ in diameter, 30 feet to the right of station 258 plus 95, three hacks on the right side. No. 30 is a double hemlock, one foot in diameter, 24 feet to the left of station 265 plus 56, three hacks on the left side. No. 31 is a cucumber, one foot in diameter, 12 feet to the right of station 293 plus 33, blaze and two hacks on the left side. This cucumber blocked by me and is called Block No. 5. No. 32 is a hemlock, three feet in diameter, 5 feet to the right of station 452 plus 61.5. This hemlock was blocked on both sides, called Block No. 6 and No. 7. Mr. Denton blocked the fore side of it and I blocked the aft side of it. No. 33 is a hemlock, 3 feet in diameter, 65 feet to the left of station 455 plus 37, two hacks on the fore side, formerly blocked below hacks. No. 34 is a poplar 2½ feet in diameter, 30 feet to the right of station 457 plus 73, three hacks on the left side. No. 35 is a hemlock 1½ feet in diameter, one foot to the right of station 536 plus 37, blaze and two hacks fore and aft. No. 36 is a mountain oak, 2½ feet in diameter, 4 feet to the left of station 544 plus 12, three hacks on the right side. No. 37 is a mountain oak 2½ feet in diameter, 16 feet to the left of station 568 plus 80, blaze and two hacks fore and aft. No. 38 is a mountain oak 2½ feet in diameter, 25 feet to the left of station 582 plus 65, blaze and two hacks fore and aft. No. 39 is a mountain oak 2½ feet in diameter, 25 feet to the left of station 582 plus 19, blaze and two hacks fore and aft. No. 40 is a mountain oak 3 feet in diameter, 25 feet to the left of station 585 plus 77, blaze and two hacks fore and aft. This tree is blocked No. 8, blocked by men of our party. No 41 is a double mountain oak, 1½ feet in diameter, 25 feet to the left of station 587 plus 08, blaze and two hacks fore and aft. No. 42 is a sarvis,
87 one foot in diameter, 5 feet to the left of station 594 plus 90, blaze and two hacks fore and aft. No. 43 is a hemlock, 2 feet in diameter, 30 feet to the left of station 623 plus 88, formerly blocked by Hazen and Bodle. No. 44 is a hemlock 2 feet in diameter, 16 feet to the right of station 677 plus 72, three hacks on the left side. No. 45 is a hemlock, hollow, one foot in diameter, 25 feet to the left of station 634 plus 00, blaze and two hacks on aft side, formerly blocked on the fore side. No. 46 is a mountain oak, 2 feet in diameter, one foot to the left of station 638 plus 56, blaze

and two hacks fore and aft, blocked on fore side by me, Block No. 9. No. 47 is a mountain oak, 2 feet in diameter, 15 feet to the left of station 675 plus 14, three hacks on the right side. No. 48 is a beech, down, one foot in diameter, 6 feet to the right of station 716 plus 25, beginning corner of entry No. 1035. That completes the list of trees.

Mr. McCroskey: Respondents except to the foregoing answer in relation to the trees that he found marked, because the same trees had been testified to and described in the original suit in the depositions of Hyde, Hayes and Carver and the testimony of the present witness is only accumulative and in nowise in support of the newly discovered map.

Q. 112. You have stated that you had with you in making your survey the map of 1821. In order to test whether or not you were on the line, or in order to enable you to ascertain where the line was as shown by said map, was it necessary to examine for State line trees?

A. Yes, sir; the State line trees are a very important factor in the case.

Q. 113. How many trees did you and the men with you block?

A. Yes, sir; I think—well, there was one that was blocked twice you know.

Q. 114. By your men?

A. Eight trees in all were blocked. One was blocked twice, makes 9 blocks.

Q. 115. Had any of those trees been previously blocked?

A. One of those, block No. 3 indicated here, that tree was blocked by Mr. Denton in August, I believe, before.

Q. 116. What year?

A. This past August, 1907.

Q. 117. Now you have stated that those trees that you blocked as well as other trees that you found had the State line marked on them two hacks above blaze as a fore and aft tree and three hacks for the side line trees. You haven't reported any trees in this list have you that bore any other marks than the State line marks?

88 A. All the trees that I reported in that list bear the State line marks. Some of them of course might have been hacked at recent date, in fact were you know, but all the trees reported in there bear the old State line marks in addition to other marks that might be on them.

Q. 118. Now what was the age—what age did those marks indicate?

A. The blocks that we took out indicated 86 growths on top of the hack.

Q. 119. How would that age correspond with the year 1821?

A. That would make 87 years ago, 86—possibly this last growth would make 86 years that would be visible on that now.

Q. 120. So those marks as you count the age of the mark indicates that they were made in 1821?

A. Yes, sir.

Q. 121. What did you do with the blocks that you cut out?

A. We brought them here.

Q. 122. I will ask you to please mark them exhibits to your deposition to be filed.

A. I present the blocks to be filed as exhibits to my deposition and indicate them in Roman letters I to IX inclusive.

Q. 123. Have you personally counted the age of the mark?

A. Yes, sir, I personally counted all of them except No. 3 that Mr. Denton took out last August; I have not counted that.

Q. 124. I will get you to please state what experience you have had in the handling and examination of timber?

A. My father being a lumberman I have been in the woods the greater part of my boyhood days and until I was grown, for a number of years afterwards, and in that way I have become familiar with the different kind of trees as they stand in the woods, and also during my period of land surveying before I entered college I had occasion to block a number of trees.

Q. 125. For the purpose of testing their age?

A. Yes, sir, for the purpose of testing their age.

Q. 126. Then you are able, are you not, to read the age of a tree by blocking it?

A. Yes, sir, I am certainly able to do that. I don't claim to be an expert in determining the age of wood that way, but at the same time I have had a great deal of experience in determining the age of trees in that way.

89 Mr. McCroskey: Respondents except to the introduction of the exhibits for the same reason as in the former exception, because the same is accumulative and is shown by the depositions of Hyde, Hayes and Carver in the original case and are not in support of the newly discovered evidence.

Q. 127. Please state who was with you when you made this investigation of the State line?

A. Mr. H. E. Libby, my partner, Mr. Charles H. Burns, my brother, sitting right there, Mr. G. M. Burns, my father over there, and then we had two or three extra axemen that we picked up out there.

Q. 128. Did you all travel and work together or did you divide up, so to speak?

A. The four that I have just spoken of were with me continually, except during the period that my father was laid up with a lame leg and couldn't get out with me. The axemen, some would work a while, and then we would get others.

Q. 129. Was there any other party surveying the state line besides the party you mention for the complainants? If so state who they were and whether or not they were with you at any time during the survey?

A. Mr. C. Z. Denton, seated over there, was running a survey at the same time, an independent survey, I should say, at the same time. He had with him Mr. W. H. Bumgarner, and Mr. Jeff Ashe;

I don't know what his initials are. There was another axeman or two.

Q. 130. Now state if this party run the same lines that you did?

A. Run an entirely independent line from me, that is their angles and my angles were not the same. He ran his line over the same ridges and the same water courses over which I ran my lines.

Q. 131. Have you examined their work?

A. His notes you mean?

Q. 132. Yes, sir.

A. No, sir.

Q. 133. Do you know anything about the lines he ran?

A. No, sir, I don't know anything about his notes.

Q. 134. Has Mr. Denton examined your work and compared it with his?

A. Yes, sir, to a certain extent; only in a general way; that is, not in detail.

Q. 135. Did you come out at the same point?

A. Yes, sir.

90 Q. 136. While speaking of the trees and blocks I ought to have asked you something about trees on the Hangover ridge, whatever you call it, and the Little Fodder Stack. I will get you to state if you examined the Hangover ridge, if so, to what extent, and whether or not you found any state line marked trees on that ridge, or any other marked trees and located them?

A. I made a careful examination of the Hangover ridge and found some marked trees and found no trees bearing the state line mark, nothing that was near that old, and while examining that timber I blocked some of the oldest trees I could find and counted the growths. The oldest one that I blocked was thirty-four years, the other one was twenty-four years. I found some land corners on that ridge that were fairly old, but not as old as the state line. I mean thirty-four years was the age of the growth of the mark or the growth of the trees from the date of the marks. I also have the blocks of two trees I marked on the Hangover and file them with the other blocks filed and they are marked A and B.

Q. 137. Were these trees that you blocked the oldest marks that you found on the Hangover, and were there any marks as old as 1821?

A. Yes, sir, that block that I dated back thirty-four years was the oldest mark that I found there, or it looked to be the oldest—the oldest I could find, at least. There was none as old as 1821, not by a good deal. I went down the entire ridge from the junction of the river over the Hangover. None of the trees I found on the Hangover contained state line marks.

Q. 138. I will get you to state whether or not you found some land corner trees marked along the Hangover and the age of those marks, if you know?

A. Yes, sir; I found some land corners, along the Hangover ridge and what I know about the age of those corners was told to me by people in that country, and they claimed that it dated back fifty-two years.

Q. 139. What kind of marks were they?

A. Those marks were marked with three hacks on the side the line went in and three hacks on the side it left.

Mr. McCroskey: Respondents except to the last two questions and answers as to what the witness testified as to being told as to the age of the marks being hearsay and incompetent. Respondents also except to all of the evidence in regard to marks on the Hangover ridge, because the same has been testified to in the original suit by Hale, Muller and Wilson, witnesses for complainant, and
91 Hyde Hayes and Carver witnesses for respondent in the original suit, and the same being cumulative and does not in any way support the newly discovered map.

Q. 140. What was the character of the timber along the Hangover ridge as to its ability to carry state line marks in 1821?

A. The timber from the river up pretty near to the Hangover rock is very good and would be capable of carrying the original marks of 1821, that is if they were ever marked, the timber was of a character that would show it now.

Q. 141. Did you make the same examination as to the timber on Little Fodder Stack and find the same results?

A. Yes, sir.

Mr. McCroskey: Respondent excepts to the evidence of the witness as to the character of the timber on the two ridges because the same was in proof by the same witnesses heretofore mentioned in former exception and is only cumulative and not in support of the newly discovered matter.

Q. 142. Did you search for State line trees on the Little Fodder Stack, if so, what was the result?

A. Yes, sir, I made a thorough examination of the Little Fodder Stack route and found no trees that bore the old state line hack, or at least that was satisfactory to me. Of course there was a number of trees marked along that ridge of recent date bearing the state line marks, but nothing old enough to have been done in 1821.

Mr. McCroskey: Respondents again except because the evidence is accumulative and the evidence is detailed in the original suit by the witnesses mentioned in the last above exception.

Q. 143. Taking the general bearings of the line shown by red mark on your map and on the map of 1821, on the north side of the Tennessee river, and if continued across the river in the same direction and the same course, where would it land you?

A. That general course continuing from the north side of the river would take you up the Little Fodder Stack lead undoubtedly.

Q. 144. Well how do you vary—in running your map how do you vary that general course and bearing from the Little Fodder Stack lead.

A. You mean how do I vary it, or about what I vary it?

Q. 145. Both?

A. Well, we would have to go back to our line from B to C, as

shown both on exhibit B2 and B, and the bearings I show
92 as B2, taken off the state line of the original survey of 1821, shows a bearing of south 43-25 west.

Q. 146. Taking the bearing of the line on the north side of the river, what is its general course across the river?

A. General course is southwest.

Q. 147. Now where would southwest—where would that land your survey to Big Fodder Stack?

A. The southwest course continued from the south side of the river would take you to the Little Fodder Stack.

Q. 148. Then you would vary the bearings in finding the line up Big Fodder Stack, would you not?

A. Yes, sir; it varies at the river.

Q. 149. At the river?

A. Yes, sir.

Q. 150. What is the general bearings from the river to Hangover?

A. From the river to the Hangover is south 10 degrees and some minutes west, practically a due south course.

Q. 151. What is the bearing up Slickrock basin?

A. General bearing is south 44-28 west.

Q. 152. Taking the state line for five miles north of the Tennessee river, what is the general bearing there?

A. South 74-25 west; well, after you pass five miles it swings back when you get up about the Bald, which would be the same general course about south 45 west. The whole tread of the line from the Gregory Bald to the Big Fodder Stack is practically a straight course—makes a little bend at the river.

Q. 153. Now, then, a continuation of the bearing up Slick Rock and to Big Fodder Stack—the bearing shown up Slick Rock and to Big Fodder Stack is practically a continuation of the general bearing, is it not?

A. Yes indeed. This point A is the most extreme point, it is the greatest angle to the right, but if you go back of that about three miles further than you got from that point the general course of the line to the Big Fodder Stack is practically straight and has a bearing of about south 45 west.

Q. 154. Coming along the state line on the north side of the Tennessee river, say four or five miles north of the river, what is the general bearing of the ridge as you look ahead across the river?

A. Southwest; about south 45, practically.

Q. 155. What would you see in that direction in the way of the topography of the country?

A. The whole Slick Rock basin, and the Big Fodder Stack standing right up in front of you, and you are going right for the
93 Big Fodder Stack in going down the Smoky mountain.

Q. 156. Could you see the main ridge running from the Fodder Stack there to what is known as Stratton Bald?

A. Most of the time you could see it.

Q. 157. In looking in that direction, where was Hangover?

A. Away to the left.

Q. 158. What point of the compass?

A. About south, pretty near due south.

Q. 159. Away to the left and pretty near due south, you say?

A. Yes, about south 10 west from the river—to the Hangover is the general bearing.

Q. 160. Well, now, if you were standing at the junction of the Fodder Stack and the Hangover ridges and going in the direction of the Tennessee River, what ridge would you take as the main leading ridge from that point to the river?

A. I would take the Fodder Stack ridge.

Q. 161. Where would that take you?

A. That ridge would take you to the Big Fodder Stack and thence to the Little Fodder Stack, and then really it would take you to about a mile and a half or two miles below the mouth of Slick Rock.

Mr. McCroskey: Respondents except to the evidence as to the locality of the Hangover and Fodder Stack ridges as detailed by the witness, because the same is accumulative and has been heretofore testified to and adjudged, as shown by the evidence of Hale, Muller and Wilson for the defendants and Hyde, Hayes and Carver for respondents in the original suit, and as shown by final decree in said cause.

Q. 162. Are you acquainted with the elevations of the Hangover and the Fodder Stack from the junction of the two ridges to the river?

A. Well, only in a general way.

Q. 163. Have you been over both ridges so as to ascertain the respective elevation or comparative elevation of the two ridges?

A. Yes, sir; I have been over it sufficiently to determine that, or at least give you my opinion in regard to it.

Q. 164. Have you any data in your possession which would indicate the elevation approximately of the two ridges?

A. I have data in which I could determine the relative positions of the Little Fodder Stack right from about a mile and a
94 quarter south of the river up to the top of the Big Fodder Stack; I have data that would give me practically all those elevations. And then I have data that gives me the relative heights of the Hangover ridge from the junction of the Hangover with the Fodder Stack mountain to the river.

Q. 165. Now, by relative elevations you mean the elevation of all these ridges to the river?

A. Yes, sir. Shows the high places and the low.

Q. 166. Did you find higher points on one ridge than the other?

A. Yes, sir.

Q. 167. On which one?

A. The Hangover—the Haoe and the Hangover; those two points are the highest places.

Q. 168. Now explain why you call the Fodder Stack the main ridge?

A. Because it keeps up its elevation; after you leave the Hangover it is pretty nearly cut in two at the Slick Rock gap, and after you get

down over the main Hangover the ridge is low you might say from there to the river, while the Fodder Stack keeps up to a greater elevation all the way through, and I think that the elevation—the average elevation so to speak—in the two routes the Fodder Stack route will be the higher.

Mr. McCroskey: Same exception as above.

Q. 169. How does the regular published Government contour map show these ridges in that respect?

A. It shows Hangover ridge as being considerably lower after you get down off of the Hangover rock from there to the river.

Mr. McCroskey: Respondents except because Government map is not competent evidence in this case.

Q. 170. Can you give any reason for the State surveyors of 1821 not having crossed the Tennessee below Slick Rock and following what you call the main ridge?

A. Well, of course I can only give you my opinion of it. My opinion is this: That as soon as they left the high point—possibly the Gregory Bald—that they had picked out their course from there to the Big Fodder Stack, and I think that they were working to that end when they crossed the Tennessee River. That is my opinion.

Mr. McCroskey: Respondents except to the opinion of the witness because the same is not competent.

Q. 171. I will ask you as a civil engineer in view of your experience as such if you were undertaking to locate the State line
95 under the directions of the Cession Act, beginning at the summit of the Great Iron or Smoky Mountains and continuing southwestwardly on the extreme heights, then to where it strikes the Tennessee River and crossing the Tennessee River and from the Tennessee River to the main ridge and along the extreme height of the same to the place where it is called the Unicoy or Unaka mountain, where would you cross the Tennessee River and what ridge would you follow to the point on the south side of the Tennessee River to the designated point, Unaka Mountain?

A. I would interpret "extreme heights" in that case to mean the average high points in both ridges or in all the ridges practically leading up to the point designated and in that case I would turn off from where they have run the line from possibly a couple of miles south of the Gregory Bald there is a ridge that turns off and crosses the Tennessee River at the second big bend below the mouth of Slickrock, possibly a mile and a half or two miles below, then I would take up that main ridge which leads around the Little Fodder Stack and thence to the Big Fodder Stack. That would be the way I would run it.

Q. 172. Now in answering this question did you take into consideration your investigation recently made of this particular territory, especially on the south side of the river?

A. Yes, sir.

Q. 173. It seems from the map of 1821 that the State line as

you have located it in the red line on your map, that that was not the course exactly taken by the commissioners of 1821. Have you any explanation to make of that?

A. Well, of course everybody don't look at a thing in the same way. I think their idea was after getting down to the river from the north side to strike the main mountain on the other side, and it seems as if they made to the highest peak on the main mountain, that is to follow their general course. Of course the Bald around there is a little higher. I am speaking of getting on the main mountain after coming down from the Bald on the Smoky mountain side.

Q. 174. Is the line that you would have made as you have stated in former answers, along the same general direction of the line surveyed by the Commissioners of 1821 as they would see it coming down the ridge from the north side of the river from the Gregory Bald, for instance?

A. Yes, sir; that is the same general course, southwest course.

Q. 175. Would the Little Fodder Stack from that point
96 or the Big Fodder Stack be prominent, if so, which one of them the most prominent?

A. The Big Fodder Stack is the most prominent, and then the Little Fodder Stack is next. Both are prominent peaks on that ridge.

Q. 176. When you went out on this survey did you have any prejudice one way or the other as to the location of this line relative to the Fodder Stacks, or any information as to where the map would lead you along that territory?

A. I had no prejudices whatever when I was sent out to run this line, but I was told that I would possibly find the line to the left of Slickrock Creek about a mile and a quarter or at the lower falls, and by going up to the Little Fodder Stack lead and thence to the Big Stack, thence to the junction of the Hangover.

Q. 177. Did this information influence you in testing the line up Little Fodder Stack?

A. None whatever. I found out the first day that I was on the ground that the line couldn't possibly go to the Little Fodder Stack and conform to the map of 1821.

Q. 178. From what point on the north side of the river did you ascertain that fact?

A. Right opposite the mouth of Slickrock.

Q. 179. Speaking as a civil engineer, taking into consideration your experience in your line of business and your investigations of the location of the State line in your territory embraced in your work, have you any doubt in your mind as to where the State line was located by the Commissioners of 1821 between the Tennessee River and the junction of the Big Fodder Stack and the Hangover and other ridges?

A. No, sir; I have no doubt whatever; it was one of the plainest cases I have ever seen. I think it is clearly proven and shown from this Exhibit "B" and B2.

Mr. McCroskey: Respondents except to the opinion of the wit-

ness as to the result of his testimony, because that is a matter of adjudication for the Court upon the evidence.

Q. 180. Have you any doubt touching the location of the line as shown by the map of 1821?

A. No, sir; I have no doubt in the world.

Mr. McCroskey: Respondent again excepts for the same reason as given in the exception to the foregoing question and answer.

Cross-examination by Mr. McCroskey:

X Q. 1. I see circles marked at different places on the 1821 map. What do they indicate?

A. They indicate mile circles.

X Q. 2. So that from one circle to another would be one mile?

A. Yes, sir.

X Q. 3. Your map Exhibit "B" shows your beginning on the State road north of the Tennessee River?

A. Yes, sir.

X Q. 4. How far is that point north of the river?

A. About three and one-half miles.

X Q. 5. What does the red line indicate extending from the said road to the Tennessee River?

A. The red line indicates the meanders of the ridge and also in connection with that the location of the trees clear down to the river.

X Q. 6. Do you mean that to be the State line?

A. Well, I think that it is the ridge that they ran the State line on in 1821. As to every angle that they made I don't pretend it to be the same. The route corresponds.

X Q. 7. So that you are satisfied in your own mind that the marked trees were trees marked by the surveyors when they were locating the state line in 1821?

A. Yes, sir.

X Q. 8. North of the Tennessee River?

A. Yes, sir.

X Q. 9. In locating this line on the map, does it show the line as actually run by you?

A. This red line does; yes, sir.

X Q. 10. And that shows the actual top of the ridge and where you understand the State line to be?

A. Yes, sir.

X Q. 11. The terminus of the red line as I understand you is about one-half a mile above the mouth of Slick Rock Creek?

A. Yes, sir.

X Q. 12. You understand that to be where the Commissioners struck the river?

A. That is where I found their last mark.

X Q. 13. The black line from the river on the north side extends back northeast; for what purpose is that made?

A. Well, that black line—you will notice on the map of 1821

they show a straight line which ends on the south side of Little Tennessee River, and that black line is put there from the same bearing that is indicated on the map of 1821 for that straight mile and is produced back until it intersects the ridge indicated by the red line and scales 5,800 feet—a little over a mile.

98 X Q. 14. Then from that 5,800 feet as indicating the line shown on the old map of 1821 does not correspond with the line as you marked it and shown by your red line from that point on to the river; is that correct.

A. It don't correspond with the marks I found which led me down to the Tennessee River at that point.

X Q. 15. And it does not correspond with the red line as shown on your map Exhibit "B"?

A. No, sir; that red line does not.

X Q. 16. The black line shows the line as indicated on the map of 1821, does it?

A. Yes, sir; that is it.

X Q. 17. And the red line indicates——

A. Where I found the marks.

X Q. 18. Back northeast of where the red line and the black line intersect, did you undertake to survey and locate the line on the map of 1821?

A. Back of this point (indicating on map).

X Q. 19. Yes, sir.

A. Well, I just surveyed the meanderings of the ridge there and located the State line marked as I went along.

X Q. 20. Did you undertake to survey and locate the State line as shown on the map of 1821?

A. You mean by that question to show every little angle that they have shown?

X Q. 21. Yes, sir.

A. No, sir, I didn't try to do that.

X Q. 22. Did you undertake to run that line at all?

A. Which, the line of 1821?

X Q. 23. Yes, sir.

A. I undertook to—I took that map of 1821 and with my line it run the leading natural boundaries, that is the main ridges and the leading water courses that that map of 1821 was run on.

X Q. 24. Please answer my question: Did you undertake to survey and locate the line as shown on the map of 1821, following the angles, mile marks, etc.?

A. I didn't attempt to show all the little angles shown on the map of 1821; no, sir.

X Q. 25. Did you undertake to locate and follow that line at all as shown by contour of the line itself, the circles, angles, etc.?

A. I undertook to follow the ridges that conform the closest to that map of 1821 and the water courses. I was governed by the marked trees that I found along those ridges and water courses.

99 X Q. 26. How do you know that any ridge conforms to this line as shown on the map of 1821?

A. I designated that proof by my test lines A, B, C, and D of Exhibit B2 and Exhibit B on my map beginning at the point A. On Exhibit B you will find about the first mile and a half of the line on Exhibit B2 is to the right of my test line A B; you will find that the first mile and a half of the line which I run is about as much to the right, as is shown on Exhibit B2, and then our test line crosses at about a mile and a half north of the Tennessee River as shown on Exhibit B2, to the left of the test line.

X Q. 27. You did not understand my question evidently. Did you take this map of 1821 and undertake to follow that particular line as located on the map, following the degrees and the angles, showing the mile marks exactly as it is shown on that map? Please answer that question yes or no.

A. You stated in your question, as I understood it, if I tried to run the course and distances in the map of 1821. You will notice in the map of 1821 there are no courses and distances, so all I could do to answer your question intelligently as I can is to take the platting of the map of 1821 and test its accuracy by these test lines which I have shown. That is the only way that I can answer your question.

X Q. 28. At the left-hand end of said map — 1821 the points of the compass are given showing exactly north and south; the line as marked by the commissioners shows different deviations and angles from the direct north and south line. Did you take the map itself and the deviations as shown thereon and undertake to get the exact degrees and the exact angles on each line and changes in the lines as shown by the map?

A. No, sir; I didn't try to locate every little angle as is shown in there. You see the only resort——

X Q. 29. Wait, no explanation. Can you take any part of that line on either side of the river and point out to me where and how much of that particular line you undertook to survey showing the exact degree and the exact angles as shown on that map?

A. Well, as I stated before, there is no exact degrees or exact angles shown on the map, that is, there are no figures on it, and not having those figures, of course it would be impossible to try to scale off and exact distance which they measure on the ground on a scale that small, and therefore, I couldn't attempt to try to show every little angle, but I do show——

100 X Q. 30. Never mind that; I don't want you to argue it.

Mr. MATTHEWS: Well let him answer and you can note your exception and have it ruled on by the court.

A. I do show the general bearings of the map of 1821 to conform almost exactly to the survey which I indicated by the red line in almost every detail.

Mr. MCCROSKEY: Respondents except to the last part of the witness' answer because the same is not called for.

X Q. 31. At some places on this map of 1821 it is shown a distance of a mile which is perfectly straight; did you undertake at

any point where these distances are shown to ascertain the degree of that particular mile or any other part of it?

A. The only straight mile shown on 1821 that I tried to get a course off of was the straight mile which ends on the south side of the Little Tennessee River and is indicated and discussed as this black line on Exhibit B.

X Q. 32. Is it possible for you or any other competent surveyor to take this line as indicated on the map of 1821 and follow the degrees and angles of the same?

A. It is possible to locate——

X Q. 33. Mr. Burns, please remember the question and answer that. Read the question to him. (Question last above read by the stenographer.)

A. Well, it is like this. You put a question to me that I simply can't answer by yes or no. I try to do my best about that.

Mr. MATTHEWS: You can say yes or no and make your explanations.

A. I can't answer the question by yes or no. I can answer your question in this way, that I can't follow every little detail in the angles shown on the map of 1821, that is to get the exact course and the exact distance and all those little tallies on the map of 1821, but I can show in a general way and a general course that the ridges which I have followed correspond almost exactly to every nook and crook and turn of the map of 1821. I don't claim that the angles that I have turned in this red line, indicate the minor angles—the meanders of the ridge—I don't mean to indicate every angle that has been indicated in the map of 1821.

X Q. 34. Then all that you did was to take the general outline and general course that is indicated and in that way undertake to locate the line; is that correct?

A. Yes, sir, I undertook to establish the ridges——

X Q. 35. Well I said locate; you can make it establish if you want to.

101 A. —to indicate the ridges and water courses as they appeared; that was my intention.

X Q. 36. The marked line as indicated on the map "B" terminates north of the river about half a mile above the mouth of Slick Rock creek. Isn't it a fact that the spurs of the Hangover—the ridge—come down just opposite that?

A. Just opposite that point the Hangover ridge—well really there are two leading ridges from the Hangover ridge opposite that point; one of them goes down to the mouth of Slick Rock Creek and the other one a few hundred yards above; possibly a quarter of a mile above that point and right opposite this point is just simply a very steep bluff you might call it. There are no ridges that lead up to that point. The ridges come in above and below.

X Q. 37. So that the Hangover ridge does come down in a general way opposite where you strike the river on the north side?

A. In a general way, yes, sir.

X Q. 38. How far does the map of 1821 show that the surveyors

followed the stream after they got on the south side of the Tennessee River?

A. It shows that the Big Fodder Stack Lead followed that course.

X Q. 39. Please read the question again. (Question last above read by the stenographer.)

A. It is marked "Creek" on the map of 1821, and the map shows—just looking at the map of 1821—it shows about a mile and a quarter or a mile and a half—about that.

X Q. 39. Doesn't the map show first it follows up the stream about half a mile then comes off from the stream a short distance then runs back to the stream a short distance and then leaves the stream?

A. Just looking at the map as it looks there of course it looks that way.

X Q. 40. I am asking you only as to what the map shows Mr. Burns and not what you think?

A. Well, to answer your question, just looking at the map as you see it there, of course anybody can see that they have sketched the stream up there about a mile and a quarter and then have sketched the stream off from their line to the left.

X Q. 41. Their map shows that they leave the stream not more than a mile from the mouth of the creek or mouth of the stream, doesn't it?

A. Just looking at their map it does.

102 X Q. 42. And the map further shows that they continued to get further from the creek for three or four miles, doesn't it?

A. Yes, sir.

X Q. 43. And they never get back to the creek at all do they, by that map?

A. After they left the creek they show that they took a ridge I think and continued on the ridge from there.

X Q. 44. The map then would indicate within one mile of the mouth of the creek they left it and followed the ridge, wouldn't it?

A. That is what it shows looking at it, yes, sir.

X Q. 45. Your survey north of the river shows the track of the compass does it not?

A. Shows what?

X Q. 46. Your red line north of the river shows the track of the compass, does it not?

A. Yes, sir; that is the line that I ran, the red line.

X Q. 47. The red line south of the river and up Slick Rock Creek shows the track of your compass, does it not?

A. Yes, sir.

X Q. —. And that red line still continues to show the track of your compass until you get to the junction of the Fodder Stack and Hangover leads, does it not?

A. Yes, sir. You speak of my compass; in fact, you understand, I ran the line with a transit. That indicates the track in which I ran.

X Q. 48. Do all competent surveyors let their line show the track of the compass, so far as your experience goes?

A. I don't understand exactly what you mean by the question.

X Q. 49. Read the question to him again. (Question last above read by the stenographer.)

A. Why, certainly, when you go to map it up it shows where they surveyed. I would like to make an explanation of that question.

X Q. 50. Sure.

A. There are very often lines run in which to determine lines at different places where you don't run; for instance when I got to the Tennessee river I couldn't take my chain and measure the distance across the river, so I was compelled to measure out a base line and take my angles to a point on the other side and calculate the estimated distance of the line across the river. That is very often done to get around obstacles in surveying. Very often where people want a line where they haven't access to it on account of
103 rough topography or houses, or some obstacles that it is necessary to run what we call base lines or triangulation lines in order to ascertain accurately the bearings and distances over those portions which are not possible to go directly over.

X Q. 51. Does the map of 1821 for three and a half miles north of the river show the state line just as you located it north of the river, and also show where you reached the river on the north side?

A. I think that the map of 1821——

X Q. 52. Can't you answer that yes or no?

A. If you will permit the explanation of this black line——

X Q. 53. Read the question. (Question last above read by the stenographer.

A. I will say yes, then an explanation. The explanation is that the map of 1821 shows the river to be about a half a mile wide and we have the last half mile of the line which crosses the river lying wholly within the water. Well, now, finding where the line touches the river by their marks on the north side we could confirm the map of 1821 by putting half a mile of our line into the water where it would be naturally by taking the natural boundaries after striking the river; the river would be the line to the mouth of Slick but as to whether or not they actually intended that to be the case I can't explain; I don't pretend to.

X Q. 54. Are not tentative lines often surveyed and marked and then abandoned?

A. Well, I suppose they sometimes are; I can't say that they are often.

X Q. 55. South of the river the map of 1821 shows that the surveyors left the stream a mile or so above its mouth and followed the ridge; that being so, why didn't you follow the ridge instead of following up the creek?

Mr. MATTHEWS: I object to that because he does not explain what stream is meant and because the survey of 1821 didn't leave the stream a mile above its source.

X Q. 56. Answer the question subject to exception?

A. At about a mile and a half above the mouth of the creek there is a ridge comes down to the creek at what point which is close to the lower falls and that ridge leads up to the Little Fodder Stack and that ridge I did run and have shown on the map Exhibit B, and I didn't take that line because it was inconsistent with the general course of the map of 1821 and because I could find no state line marks on the Little Fodder Stack route.

104 X Q. 57. The map however does show that a mile or a mile and a half above the mouth of the creek the surveyors did leave the creek and followed the ridge doesn't it?

A. Well, it shows the creek leaves their line, but as to whether they left the creek or not is a doubt in my mind, very serious doubt: I think the river was sketched in—I think the creek was sketched in——

X Q. 58. Mr. Burns, you don't answer my question: I am asking you not what your opinion is, but what the map shows?

A. I stated while ago that the map of 1821 shows that it leaves the creek about a mile and half above it.

X Q. 59. And follows the ridge?

A. And follows the ridge, yes, sir.

X Q. 60. How far up did you follow the creek?

A. Up to the Big Fodder Stack lead.

X Q. 61. How far is that?

A. That is about five miles; something close there.

X Q. 62. When you follow the old map as it indicates following the ridge five miles from the mouth of the creek, how far are you then from the creek as shown on the map?

A. Well, I would have to scale that.

X Q. 63. Well, give your opinion just across here; it is two and a half miles to the inch?

A. It looks like two and a half miles, well possibly three miles, just determining it roughly or guessing at it.

X Q. 64. So that as indicated by the map when you got five miles from the mouth of the creek following the line as indicated on the map, you would at least be three miles from the creek, would you not?

A. Yes, sir; that is as shown on there.

X Q. 65. The call of the State line in the Cession Act is "beginning at a stone set on the north side of Chattalooche turnpike road and marked on the west side Ten. 1821, and on the north side N. C. 1821, running thence on a southwestwardly course to the bald rock on the summit of the Great Iron or Smoky Mountain, and continuing southwestwardly on the extreme height, then to where it strikes the Tennessee river about seven miles above the old Indian Town or Tallassee and crossing the Tennessee River at a distance of sixty-five miles from the beginning; from the Tennessee River to the main ridge and along the extreme height of the same to the place where it is called the Unicoi or Unaka mountain." etc. I believe you stated in your examination in chief that had you been following those calls before you reached the Tennessee river, some three or four miles,

you would have turned to the right and followed a ridge
105 which struck the Tennessee river at a big bend and a mile and a half below the mouth of Slick Rock Creek, then crossing the river following a ridge until you struck the Big Fodder Stack lead, and thence over Little Fodder Stack and Big Fodder Stack to where the two lines come together. Am I correct?

A. As Mr. McQueen put the question——

X Q. 66. I am asking the question, Mr. Burns.

A. I think you put the question a little different to what it was put to me before.

X Q. 67. Well, answer my question just as it is, that is all.

A. As the question was put to me I understood it to mean—with instructions to follow the leading ridges and their high peaks, so to speak, as I explained a while ago, I would mean by the highest peaks the average mountain, that is the highest peaks—would make a general average of the highest elevation all along, and there is a ridge that butts off from this side of the Gregory Bald possibly two miles that leads down to the Tennessee river at this big bend that I spoke of, and there it follows this other main mountain as it looks to me and which rises to a high elevation almost immediately after crossing the river, and the general bearing on the ridge tends to hold up higher—average set of elevations—than any of the ridges that come down in that neighborhood, is my opinion.

X Q. 68. That would have been the portion that you would have taken?

A. With the instructions that were given to me I think I should have taken that course.

X Q. 69. Please state now again just where you would have deviated from what you understand now to be the state line on the north side of the river where you would have struck the Tennessee river below the mouth of Slick Rock Creek and how it would have run from there if you had been following these calls?

A. At that first big bend the ridge seems to butt in and bends around that ridge.

X Q. 70. About how far below the mouth of Slick Rock Creek?

A. Possibly a mile or a mile and a half below; I never measured the distance and am only estimating it from the Government sheets and the general appearance of the country.

X Q. 71. Following that ridge back northwest from the river, about how far from the river do the two ridges come together?

106 A. After it comes back to the Fodder Stack——

X Q. 72. No, no; I mean on the northeast side?

A. How far back to the river until it comes to this ridge here (indicating)?

X Q. 73. Yes, where the two come together there?

A. I don't know; I should say about three miles or four. I was not that high up on this ridge; just from the general appearance of the country and the information from the government sheet is what points this route out to me. I wasn't on top of that place.

X Q. 74. Then you would have crossed the river a mile or a mile and a half below the mouth of Slick Rock Creek, and followed the

leading ridges from there until you struck what is called the Fodder Stack lead?

A. Yes, sir.

X Q. 75. Passing a place called Stiff Knee on your map?

A. Yes, sir.

X Q. 76. And passing Little Fodder Stack and Big Fodder Stack and so on. At Stiff Knee you would have been three or four miles from Slick Rock Creek, would you not?

A. Yes, sir; it must be that far I suppose.

X Q. 77. Taking those calls then as I read to you, you adopted that line instead of the line that you insist now that the surveyors did adopt; is that correct?

A. Yes, sir.

X Q. 78. Approaching Tennessee from the north side are you not mistaken in saying that there is no ridge coming down to the river opposite or nearly opposite the mouth of Slick Rock Creek?

A. I don't think that I stated that there wasn't a ridge coming down there. I don't remember of it. There is a ridge that leaves this main ridge about two miles I suppose, something like that, maybe further, and bears around to the right and comes down pretty close to the mouth of Slick Rock on the opposite side of the river.

X Q. 79. You are satisfied then the surveyors didn't follow the ridge?

A. No, sir, they didn't follow that.

X Q. 80. You are satisfied they didn't approach the river op-osite the mouth of Slick Rock Creek?

A. You mean coming directly down?

X Q. 81. Yes, sir.

A. No, sir; I don't think they did.

X Q. 82. I said approach, not leaving. In following the ridge and the marked line as you found it, when you got within a mile of the river the ridge begins to fall off, slope down gradually does it not, towards the river?

107 A. Yes, sir, it gets lower.

X Q. 83. You then have a good view of the country in front of you, do you not?

A. Yes, sir.

X Q. 84. Isn't it a fact that the Hangover ridge is the most prominent and nearest ridge to you as you approach the river?

A. I don't think it is the most prominent, it is the nearest on the opposite side from where you come down to the line.

X Q. 85. Isn't Big Fodder Stack five or six miles from you?

A. Big Fodder Stack peak, yes, sir.

X Q. 86. And can you not, looking right up from along the gorge or basin of Slick Rock Creek, see Fodder Stack?

A. And you can see the Fodder Stack from all along the ridge there down to the river.

X Q. 87. Can you on looking across and right up the gorge or basin of Slick Rock Creek see it?

A. Yes, sir.

X Q. 88. Five or six miles away?

A. Yes, sir.

X Q. 89. There is no gorge between you and that leading to t Fodder Stack is there?

A. Between where we struck the river?

X Q. 90. Between where you come in sight of the river for mile or from there down to the river?

A. No, sir; not until after you get across Slick Rock Creek.

X Q. 91. So that in approaching the river from the north si following the state line, the immediate and most prominent rid on the opposite side is Hangover, isn't it?

A. Well, there is no lead that takes up directly opposite whe we come to the river. The Hangover lead, as I stated a while ag appears at that point and one runs down to the mouth of Sli Rock while the other runs up the river about a quarter of a mi Directly opposite the point that should strike the river stand- a b steep bluff, you might call it, right in front of you.

X Q. 92. Isn't the nearest and most prominent and continuo ridge the Hangover ridge, right in front of you?

A. No, sir.

X Q. 93. What other ridge is there as continuous and near than the Hangover ridge as you approach the river from the nort side?

A. Well, there is no other ridge, as I stated a while ago, until yo pass the mouth of Slick Rock.

108 X Q. 94. I am speaking now when you get on the nort side of the river and approaching the river going down t spur and after you get across the river?

A. The ridge that I would take under those circumstances wou be the ridge leading up from the mouth of Slick Rock to the Litt Fodder Stack. I wouldn't attempt to climb to the top of that hig bluff opposite the point where we strike the river.

X Q. 95. You wouldn't follow Slick Rock Creek then?

A. Yes, sir; to trace this map of 1821 I would follow the Sli Rock Creek undoubtedly.

X Q. 96. I am not asking you about tracing the map.

A. Will you state your question and then we will get it clear.

X Q. 97. I am asking you that if you had been following thos calls as you approached the river on the north side, following th line as you followed it north of the river and within a mile or le of the river, which is the most prominent lead and nearest ridge

A. Well, I think the best ridge to take if you were going to tak a ridge after leaving the river under the circumstances which yo have stated, I would take the ridge at the mouth of the creek leadin up the Little Fodder Stack.

X Q. 98. Mr. Burns, I am not asking you which is the best ridg to take, I am asking you which is the most prominent and leadin of those ridges?

A. Undoubtedly the most prominent ridge in that country i my mind are the Fodder Stack ridges.

X Q. 99. Isn't it a fact that the Hangover and Haoe are five hun dred feet higher than Big Fodder Stack?

A. They are higher points, yes, sir.

X Q. 100. Isn't it a fact that they are five hundred feet higher?

A. I expect they are more than that.

X Q. 101. What is the difference in the height of Big Fodder Stack and Little Fodder Stack, if any?

A. I have data that I could work that information up, but I haven't done it.

X Q. 102. Well, approximately?

A. I would say about 500 feet—400 or 500 feet; that is only a guess.

X Q. 103. Have you ever been on the state line between North Carolina and Tennessee before this?

A. No, sir; not before this—that is, you mean have I ever surveyed on the line before?

X Q. 104. Yes, sir.

109 A. No, sir.

X Q. 105. Have you ever been on the line before this, and if so, where?

A. No, sir.

X Q. 106. You have had no experience whatever in locating or surveying the line?

A. Yes, sir; I have had various experience in surveying lines.

X Q. 107. I mean the State line?

A. I haven't surveyed any on this State line before; no, sir.

X Q. 108. Have you ever been up on that section before?

A. That was my first visit.

Redirect examination by Mr. McQueen:

R. D. 1. Mr. Burns, please explain what you mean by running a line by transit instead of by compass?

A. I mean by a transit line that I put a hub at each angle in the line and turned the angle by sighting to the back hub and then to the hub ahead, and leading that angle to the nearest half minute.

R. D. 2. How do you read the angle?

A. By the Vernier on the transit.

R. D. 3. Is that more accurate than the needle?

A. The needle just simply gives the magnetic course and acts only as a check on the line as turned by the angle. If you make any serious error the magnetic needle would tell you.

R. D. 4. Do you mean that you first read the angle by Vernier and then check it by the needle?

A. Just read the needle on every angle and insert that in the notes.

R. D. 5. Which is the more exact?

A. Oh, the transit line is turned by angles and read from the Vernier is the only accurate way to run a line when it comes to that. Magnetic bearing is only a rough guide in which to check the accurate work.

R. D. 6. Where you are following a ridge these angles as you show on your red line are turned by the highest points on the ridge you are following; I mean by the meanders of the ridge?

A. Yes, sir; these lines indicate the meanders of the ridge which we ran on.

R. D. 7. Is it possible to reach the exact angles of the various turns in the course of the state line as shown on map of 1821?

A. No, sir.

110 R. D. 8. Is it possible to measure between short distances on that map exactly?

A. No, sir.

R. D. 9. Taking the prominent points on the map of 1821, drawing a straight line between them and securing the bearing from the north point on the map how are lines so drawn compared with the true bearing?

A. In taking those general courses between prominent points, is it possible to determine with a close degree of accuracy the bearing of the line, and in comparison with lines connecting the same points upon the ground today in which the true meridian is used, it varies only about by a degree, a little less—from one to three degrees—something like that.

Mr. MATTHEWS: What does a degree mean?

A. A degree is one three-hundred-and-sixtieth of a circle.

Q. What does it mean on earth?

A. It means the same thing to me.

R. D. 10. How do the distances along the line, say, drawn between the prominent points from three to ten miles apart, agree with the work as actually surveyed and measured?

A. Why, it agrees surprisingly close—closer than you would have any idea it could possibly be.

R. D. 11. Now, Mr. Burns, the nooks and corners that you have spoken of on the respective maps do not exactly agree, as you have stated, when compared one to the other. How do you explain that?

A. Well, the map of 1821 was platted on such a small scale that I don't think it would be possible to show each angle on that line and then it might be possible that in running the line of 1821 that they took the most prominent points in the ridge sufficiently close together so as not to deviate from the ridge materially, and in that way eliminate say, many of the slight variations, as is shown on the red line of Exhibit "B."

R. D. 12. Now, Mr. Burns, you have been asked in chief if you had been acting as a surveyor under the clause as laid down in the Cession Act what ridge you would strike on the south side of the river, looking from the north side some miles away. You said that you would follow the ridge that brought you down to point below the mouth of Slick Rock Creek. Now, on cross-examination you were asked as I remember, that if you were standing at the point where the line was surveyed down to the river, above the mouth of Slick Rock Creek, and then were to draw a line, that you

111 would strike, I believe you said, the Fodder Stack Ridge?

A. Yes, sir.

R. D. 13. Wait a minute. Now, in determining your answer in the two instances, you would be governed by the location that

you occupy when you were looking to the respective points along the line?

A. Yes, sir, most decidedly.

R. D. 14. Now, then, when you were up on top of the ridge looking across below the mouth of Slick Rock Creek, you would have determined your course before you ever got down to the river, would you not, at that point?

A. Yes, sir, I would have determined the course in which I would have run from the high peak on the north side of the river.

The further taking of this deposition adjourned until 7.30 o'clock P. M., at which time the same was resumed.

Continuation of redirect examination by Mr. McQUEEN:

R. D. 15. Mr. Burns, you were asked, on cross-examination, if it was not a fact that, according to the map of 1821, the line ran up Slick Rock Creek for a distance of about a mile or a little more, and then left the creek, and followed the ridge. I do not remember your answer, but you may now make any explanation that you desire.

A. The map of 1821 shows that immediately after leaving the creek it takes a ridge, and the map of 1821 is only misleading in the fact that it does not show miles enough between the Tennessee river and the point where the Big Fodder Stack lead runs down to it, and I think the error was made in just sketching the creek into the wrong point. When we start up the Big Fodder Stack Ridge, the creek leaves about the same angle as they have indicated on the map. As I said, the only difference they don't show miles enough between the Tennessee River and the ridge.

R. D. 16. Do you mean to say that you think the error consists in sketching the location of the line along the creek by the original commissioners of 1821?

A. I mean in sketching the creek along the line.

And further deponent saith not.

D. B. BURNS.

Sworn to and subscribed to before me this, the 8 day of May, 1908.

[SEAL.] R. S. C. HUTCHINSON,
Notary Public.

112 H. E. LIBBY, the next witness, called on behalf of the complainants, being first duly sworn, testified as follows:

Examination by Mr. McQUEEN:

Q. 1. Please state your age, residence and occupation.

A. Twenty-three years old; reside in New York City, and am a civil engineer.

Q. 2. Is New York City your home now, or Knoxville?

A. New York City is my home.

Q. 3. What are you doing in Knoxville?

A. Engaged in the practice of civil engineering.

Q. 4. How long have you been in Knoxville in that kind of business?

A. Three months—since February.

Q. 5. Well, now, do you mean to say that you came to Knoxville to locate, and consider New York your home, or that you are here temporarily?

A. Well, I am here temporarily. My home is New York City.

Q. 6. What did you say your occupation was?

A. Civil engineer.

Q. 7. How long have you been engaged in the business of civil engineering?

A. The past four years.

Q. 8. Of what college are you a graduate, if any—what technical school?

A. I received my education in the day schools of New York City, and I graduated in the Manual Training School in June 1904, of Brooklyn, New York.

Q. 9. How many years did you stay there?

A. Four years.

Q. 10. What has been your experience in that line of business?

A. For eight months I was employed as a draughtsman for the New Jersey Foundry and Machinery Company in structural steel work. For two years after that I was employed by the B. & O. Railroad on railroad surveys and locations through West Virginia and Pennsylvania, both in the field and office. For six months after that I was in charge of party for F. G. Ross, of Pittsburg, Pennsylvania, on extensive farm and topographical surveys in the northern part of New York State, along the St. Lawrence River. The following six months I was employed by the Lake Shore and Michigan Southern Railway in the main office at Cleveland, Ohio, that time being spent on map work. The past six months I have been engaged in the practice of engineering in Knoxville, in partnership with Mr. D. B. Burns. That makes us to date.

113 Q. 11. Were you employed with Mr. Burns by the complainants to survey any part of the State line between North Carolina and Tennessee?

A. I was.

Q. 12. About how long were you engaged in that work?

A. Been engaged in the field three weeks and two weeks in office work.

Q. 13. Were you with Mr. Burns all the time in making that survey and helping to make it?

A. I was with him throughout the work.

Q. 14. I will ask you to examine the map *as* Exhibit "B" to the deposition of Mr. D. B. Burns and state who prepared that map, and where?

A. I have examined the map and find that it is the same map that I made, compiled from the notes which he gave me from this survey.

Q. 15. You were present when the notes were made yourself, were you not?

A. Yes, sir.

Q. 16. Did you help to make the calculations on which this platting was done on the map and help to complete it?

A. Mr. Burns did most of the calculations and I made the map, platted it and finished it up while he made the calculations.

Q. 17. Now, in the field work, you were present when all the work was done, as shown on this map, were you not?

A. I was.

Q. 18. Can you testify to the correctness of the work done in the field?

A. I can testify to the correctness and authenticity of it all.

Q. 19. Are you satisfied as to the correctness of this map marked Exhibit "B" as representing the work which was done in the field by you, Mr. Burns and others?

A. I am.

Q. 20. Now, Mr. Libby, I will ask you if you have examined the map of 1821, Exhibit "A" to the deposition of Mr. Burns?

A. I have.

Q. 21. Does the map you have made conform with the map made by the commissioners in 1821 touching the State line?

A. It does, inasmuch as this is a tracing of the original map. The map was laid on this and traced off.

Q. 22. Now, in your judgment how does the State line compare in this map as shown on map Exhibit "A"; I mean how
114 does the map that you made, called Exhibit "B" compare with the map of 1821, designating the State line?

Mr. McCroskey: Excepted to, because it is not the judgment of the witness; it is a matter for the Court.

A. The two lines coincide remarkably well.

Q. 23. What is Exhibit B2, where did it come from and what does it mean?

A. It is a tracing of a portion of the map and State line surveyed in 1821.

Q. 24. How is it shown?

A. By certified copies.

Q. 25 Of what?

A. Certified copies as signed by the commissioners of the map of 1821.

Q. 26. Who traced that line of the map, Exhibit B2, from the original 1821 map?

A. Mr. Burns traced part of it and I traced part of it.

Q. 27. Are you satisfied that the tracing was correctly done and properly, and that Exhibit B2 represents correctly the map of 1821?

A. I am.

Q. 28. Now, Mr. Libby, from the work which you performed in the field and in the office, are you satisfied that the red line on Exhibit "B" properly represents the State line between North Carolina and Tennessee, as shown by Exhibit "B," known as a copy of the map of the commissioners of 1821?

A. I am convinced there is no other ridge or creek in that country that could fit that map, except as shown on that red line.

Q. 29. Mr. Libby, you understand the location of the Hangover ridge and the Fodder Stack lead, do you not?

A. The location of it?

Q. 30. Yes, sir.

A. I do.

Q. 31. Now, I will get you to state whether or not it is possible for the State line, as represented by the map of 1821, to have been run over the Hangover lead?

A. Didn't I answer that in the last question?

Q. 32. I think not; I haven't asked it that I remember of.

A. It is impossible to go over the Hangover lead and fit the map of 1821.

Q. 33. Can you make the same answer as to a line over Little Fodder Stack?

A. I can.

Cross-examination by Mr. McCROSKEY:

115 X Q. 1. Who took these field notes as a survey was being made?

A. Mr. Burns.

X Q. 2. Did you have anything to do with the taking of the field notes as the survey was progressing?

A. No, sir, except that I added data as I went along.

X Q. 3. What do you mean by adding data?

A. Giving location of trees and various information that I though- the map required.

X Q. 4. Then you have no personal knowledge of the field notes, except as given you by Mr. Burns?

A. I have personal knowledge of all I did, inasmuch as I was on the ground and did the chaining.

X Q. 5. Did you see Mr. Burns when he put down every field note?

A. I didn't see him put down every note, but he must have put them down, or I wouldn't have gone away until he had put them down.

X Q. 6. Do you mean that you watched and saw that he put down each one of the calls or field notes as they were surveyed out?

A. No, I didn't watch him, as I say; but he repeated the distances back to me every time I called them before I left the spot.

X Q. 7. He kept the book didn't he?

A. He did.

X Q. 8. And you took that book afterwards and from that made this map?

A. No, sir, he worked up the notes and handed me the notes in a book after the notes were all calculated; although I used some of the pluses and information from the transit book.

X Q. 9. And the transit book was kept by him?

A. The transit book was kept by him.

X Q. 10. The red line north of the river follows the top of the main ridge, does it?

A. Follows the meanderings of the ridge, yes, sir.

X Q. 11. It follows the top of the main ridge, does it?

A. Yes, sir, it follows the top of the ridge.

X Q. 12. Map Exhibit "B" shows that after crossing the river and following up the stream or creek for a mile or so it leaves the stream or creek and follows a ridge, does it not?

A. Yes, sir.

X Q. 13. Have you ever had any experience in locating State lines?

A. No, sir.

116 X Q. 14. Except this?

A. No, sir.

X Q. 15. Have you ever been in that section of the country before?

A. No, sir.

X Q. 16. So that all you know in regard to it is what you found while you was on the trip with Mr. Burns and on that survey?

A. Yes, sir; this and the information I secured from the map of 1821.

X Q. 17. What information did you secure from the map of 1821?

A. Secured the information of the general course of the whole state line, especially in the portion we were working on.

X Q. 18. To take the line as indicated on Exhibit "A" to Mr. Burns' deposition, it would be impossible for you or any other surveyor to take the distances and degrees as indicated on the map and correctly locate that line, would it not?

A. It would be impossible for any civil engineer or surveyor to take that map and locate it according to the North point there and fit it on any ridge that is in that country today.

X Q. 19. It is also impossible to take that map and fit it on Slick Rock Creek, or fit the bed and meanders of Slick Rock Creek, isn't it?

A. I don't understand your question; let me have it again, please.

X Q. 20. It is also impossible to take the map Exhibit "A" and follow its calls and make it fit the meanders of Slick Rock Creek, as shown by red line on Exhibit "B" is it not?

A. I would like to answer that direct, but as a matter of fact, it don't show any meanders on this.

X Q. 21. Read the question please. (Question last above read by the stenographer.)

A. Yes, sir.

Redirect examination by Mr. McQUEEN:

R. D. 1. Now, why is it impossible to make that map fit the meanders of the creek, as stated by you?

A. This map was made on a scale about 13,000 feet to the inch—Exhibit B2—is made on a scale about 13,000 feet or 800 poles to the inch, and they cannot show the meanders of the creek as they really

117 are; and I think we are justified in saying that they connected the main bends and only showed long meanders, when, in fact, there are numerous short ones.

R. D. 2. I will ask you whether or not the creek is properly located on the map of 1821?

A. The creeks and rivers are probably sketched in, inasmuch as they show the Tennessee River being about half a mile wide, when as a matter of fact it is only about 300 feet.

R. D. 3. It is sketched in?

A. It is sketched in after the line was platted.

R. D. 4. Do you think that would account for the apparent discrepancy in the location of Slick Rock Creek?

A. I don't think there is any other way it could be explained.

R. D. 5. Mr. Libby, from your examination of the map of 1821 and the work you have done in the field, in spite of the small scale upon which the map is shown, what is your judgment as to the general accuracy of the map in locating the State line only and not as to the side notes of the topography showing the creek and the rivers so far as you have examined the State line between the points of the survey?

A. I consider the results of the comparison remarkably accurate.

R. D. 6. Please read the question again. (Question last above read by the stenographer.)

A. I consider it is remarkably accurate.

The further taking of this deposition adjourned until 9 o'clock A. M. May 8, 1908.

Friday May 8, 1908, resumed taking depositions at 9:00 o'clock A. M.

Continuation of redirect examination of E. H. LIBBY by Mr. MCQUEEN:

Q. Mr. Libby, in view of your examinations of the map of 1821, Exhibit "A" to the deposition of D. B. Burns, and your work in the field and office, I will ask you whether, in your judgment, a competent surveyor who had no previous knowledge as to the location of the State line could, with this map of 1821 in hand, start out and trace the State line as it was run by the commissioners in 1821?

A. Yes, sir, which is proved by the fact that we went there as strangers, and, within twenty-four hours, had established in our minds without a doubt that the line went up the Big Fodder Stack.

Q. Now, Mr. Libby, how did your subsequent work in the field substantiate that fact, or that discovery?

118 A. By laying off the general courses of the most prominent points A, B, C and D, on Exhibit B2, we found them later to correspond with the same points A, B, C, and D on Exhibit B.

Q. Did you find the test line or lines, or the bearings of those lines on map Exhibit B, drawn to connect those points A, B, B, C and C, D substantially, corresponding on both Exhibits as to bearings?

A. Yes, sir.

Q. How did they correspond as to distances between the points?

A. The distances corresponded at all points also.

Q. How did you find the relation of the State lines to the test lines where drawn when you compared Exhibit "B" with Exhibit B2?

A. I found that the two relations corresponded inasmuch as the yellow line on Exhibit B was on the same side as the yellow line on Exhibit B2, in reference to the red line as shown on Exhibit B throughout the line.

And further deponent saith not.

H. E. LIBBY.

Sworn to before me this 8th day of May, 1908.

[SEAL.] R. S. C. HUTCHINSON.
Notary Public.

Stipulation.—It was agreed between counsel for both parties hereto, that the notary public might sign the name of the witness to his deposition.

The next witness, C. Z. DENTON, being duly sworn, deposed as follows:

Examined by Mr. MCQUEEN:

Q. Mr. Denton, please state your age, residence and occupation?

A. I am 39 years old; I live two miles east of Robbinsville, Graham County, North Carolina; my occupation is that of a land surveyor of about seven years' experience.

Q. I will get you to state where you were born and raised?

A. I was born in the town of Benton, Polk County, Tennessee. I was principally raised in Graham County, North Carolina.

Q. Does Graham County, North Carolina, join Monroe County, Tennessee?

A. Yes, sir.

Q. And Polk?

A. No, sir.

Q. How far is it from Benton to Robbinsville?

119 A. Well, sir, I don't know; for a rough guess I would say about 65 miles.

Q. Now, please tell how well you are acquainted with the mountain territory along the State line between Monroe County, Tennessee, and Graham County, North Carolina?

A. Well, sir, I guess I am as well acquainted with that section of the country as any other man.

Q. Go on, and tell how, now?

A. In the State of North Carolina I have herded cattle there.

Q. Give the points where you have herded cattle and where you have lived, and where you have moved, without my asking other questions to bring it out. Just go on and tell it from start to finish, to show your familiarity with that country?

A. I had a cabin near Hooper's Bald on Huckleberry Knob.

Q. Locate that relative to the State Line.

A. That is a point on the east of the State line. It is about three miles east of the State line, on that portion of the State line known as Laurel Top. I herded cattle there four or five or six years. Later I had a cabin near the John Stratton meadows at a point near the State line between the State of North Carolina and the State of Tennessee. I herded cattle there a year or so, and I have herded cattle in the neighborhood of Stratton Bald, on the head of Slick Rock Creek and Citico Creek.

Q. Aside from those various places, now where you have herded cattle, have you lived, or frequently passed through, this territory in dispute in this cause?

A. Yes, sir; I have passed through this territory a good many times.

Q. Now, you may state whether or not you are thoroughly acquainted with the topography of the country along the State line now in dispute?

A. Yes, sir; I think I am thoroughly acquainted with it.

Q. Have you at any time been employed by the complainants to trace the State line along the line now in dispute?

A. Yes, sir.

Q. I will get you to state whether or not you were with the Burns surveying party who have recently made a survey of the State line in that territory, and why you operated with them?

120 A. Yes, sir; I have camped with them at night. I was down there making a survey of the state line at the same time that they were there.

Q. Were you making the State line in connection with them or were you making it separately?

A. I was making an independent survey of my own.

Q. Now, in making that survey, did you confer with them touching the survey they had made during the field work?

A. Well, we talked some at nights along about some particular things, is about all I believe.

Q. Did you block any trees along the line up Slick Rock Creek?

A. Yes, sir; we blocked some trees, and we did try to make it a point, and had an understanding, I believe, that when they blocked a tree, or when I blocked a tree, we would try to have both parties present. Our object in this was to do as little blocking as possible, and destroy as few of the original State line marks as possible.

Q. State whether or not it is a fact that you all started out together under the same line of employment by complainants to endeavor to locate the State line?

A. Yes, sir; we all left Robbinsville together and went down together to the point of the Smoky mountain, and I started my survey down there on the same day and near the same point that they started theirs.

Q. Did you run along the same line?

A. Yes, sir; practically the same. I did not pay much attention to their angles along there down that mountain.

Q. Now, you have examined their work and compared it with your work since you left the field of operation?

A. Yes, sir; I have been here and I have been here in the office and with them while this map was being made.

Q. The map Exhibit "B"?

A. Yes, sir; and I have compared my description of the trees located along that line with the description that Mr. Burns has, etc.

Q. Did your work practically conform to their work when compared?

A. Yes, sir; practically. There was some difference in our methods of measurement.

Q. Now please state what you did from the beginning to the end in an effort to locate the State line, just in your own way—take your own time for it.

A. You want me to state where I began and what I did?

Q. Certainly.

121 A. I began my survey at the point where the old State road leaving from Rocky Point on the Little Tennessee to the Tallassee Ford on the Little Tennessee River crosses the top of the Smoky Mountain. I ran a line down the top of the Smoky Mountain southwesterly to a point on the north bank of the Little Tennessee River about half a mile above the mouth of Slick Rock Creek.

Q. In making that line from the beginning point to the Tennessee River, what were your bearings? From what did you get your bearings, or what were you governed by in running the line?

A. This point is an undisputed point in the State line, as I understand it, and the object of my survey there was to trace the State line from that point down to the bank of the Little Tennessee River as run and marked by the surveyors and commissioners in the year 1821.

Q. Well, did you find marked trees along that line?

A. Yes, sir; I did.

Q. Down to the bank of the river as shown by the map Exhibit "B"?

A. Down to a point near the bank of the river—down to a point marked "Tree No. 19" on map Exhibit "B."

Q. Did you have with you the map of 1821, or a copy of it?

A. Yes, sir; I had a blue-print of that map with me at this time.

Q. Were you governed by that in any way in getting your bearings along that line?

A. Yes, sir; I was governed by that map to some extent.

Q. What is there on this map now that indicates the bearings as shown by the map of 1821?

A. That is this test line in yellow ink from A to B.

Q. Now I will get you to state, Mr. Denton, if the map of 1821, or if your work, as you attempted to locate the line, corresponds with the map of 1821 and with Exhibit "B." How does the work done by Burns and Libby and yourself compare, or the work that you did, compare with the work done by Libby and Burns as shown by the map Exhibit "B"?

A. The line that they ran and the line that I ran from this point

on Smoky Mountain, near where the old State Road crosses the top of said mountain to the bank of the Little Tennessee River, is practically the same. The line that they ran on the south side of the Little Tennessee River from the mouth of Slick Rock Creek to a point near Stratton Bald and the line I ran are practically the same.

122 In running from the mouth of Slick Rock Creek, I will say further, to this point near Stratton's Bald, I tried to follow the meanders of Slick Rock Creek for a distance of about five and one-half miles, the way I ran, while their transit line cut through some of the small bends in that creek, was all the difference that amounts to anything.

Q. By that you mean that you stayed closer to the center of the creek than they did?

A. Yes, sir.

Q. What distances, Mr. Denton, did you go from the mouth of Slick Rock Creek to the end of the survey marked "D" on map Exhibit "B"; what distance did you get?

A. Ten and one-half miles and twenty-five poles from the mouth of Slick Rock Creek.

Q. To a point designated by the letter "D." Is that horizontal or surface measure?

A. A surface measure.

Q. And run by compass or transit?

A. Compass.

Q. Did you find any trees along that line?

A. Yes, sir.

Q. What were they, I mean, did you find any State line marked trees?

A. Yes, sir.

Q. You may refer to the schedule made on map Exhibit B, called B-3, for the purpose of answering that question, if you wish to; have you examined that map?

A. Yes, sir; I have.

Q. Does that represent the trees you found?

A. I have seen all the trees described in this schedule except, I think, one sarvis marked tree, No. 42.

Q. Did you examine the marks on those trees along up that line?

A. Yes, sir.

Q. Did you block any of them?

A. Yes, sir.

Q. Did you count the age of the mark by the block?

A. Yes, sir.

Q. The growth?

A. Yes, sir; I counted—I attempted to count all of them but one, I believe.

Q. About what age did you make the marks according to the blocks?

A. Eighty-six years old for all those that I counted.

Q. Are those blocks you speak of the blocks shown in schedule B-3?

A. Yes, sir; there is a cucumber tree here—Tree No. 31, in

block 5, that I did not count; and there is a white birch in
123 this schedule, marked tree No. 22, in block No. 3, that I have attempted to count. I have not been able to determine accurately the number of years' growth that is shown over the hacks in that block, but I am satisfied in my own mind that that block contains the original marks put on the tree by the surveyors in 1821.

Q. With the exception of the trees you have mentioned, are you satisfied as to the age of the other blocks?

A. Yes, sir; I am.

Q. As containing the State line marks?

A. Yes, sir.

Q. Did you notice any difference in the appearance of the marks on the south side and north side of the Tennessee River, where the line was undisputed?

A. No, sir, the marks that we found down along the State line on the north side of the Tennessee River have about the same appearance as the marks we find on the trees on the line that we surveyed on the south side of the Little Tennessee River.

Q. Now, if I understand you, you ran some miles on the north side of the river by State-line marked trees that are absolutely undisputed; that is right?

A. Yes, sir.

Q. And you find the same character of marks on trees on the north side, where it is undisputed, that you found on the south side?

A. Yes, sir.

Q. Have you examined trees—I mean State-line marked trees—on the State line, that are not in dispute in this lawsuit south of the river and south of the junction?

A. Yes, sir; I have; but along the top of the mountain, between th- waters of Santeelta Creek and Citico Creek which is south of the junction of the Hangover and Fodder Stack.

Q. How do those marked trees, or marks, compare with the trees you found on the undisputed territory on the north side of the Tennessee River and those found on the disputed territory and shown on map Exhibit "B"?

A. Well, sir, those trees out along there, the marks on them, are exactly the same.

Q. Now, if I understand you, Mr. Denton, you say that all the State line marked trees that you found in the disputed territory and outside of that are the same; am I correct?

A. Yes, sir.

Q. Mr. Denton, I understand from what you say, that in running the line from the beginning point down to the Tennessee
124 River, you were governed principally by marked trees along the line?

A. Yes, sir.

Q. Now, in running to the map of 1821, how did the line run for a distance of a mile on the north side of the river to the Tennessee River?

A. Well, there was a slight discrepancy there on the line shown on the map of 1821——

Q. Explain that please.

A. And what you find on the ground.

Q. Did you try to run a line corresponding to the line shown there by the last mile on the north side of the river on the map of 1821?

A. Yes, sir; I had taken that bearing off of their maps as nearly as I could, and went down to a point near the mouth of Slick Rock Creek, and set up a compass and started Mr. Charlie Burns and W. H. Bumgarner measuring a straight line back there on this new bearing as nearly as we could get it, and run up against rocky cliffs and all sort of bluffy places, and couldn't get through there very straight.

Q. Do you mean to say that the character of the mountains and the landscape there was so precipitous that you couldn't penetrate it by running through on a direct line?

A. Yes, sir; I mean to say when you start a direct line on that bearing from the mouth of Slick Rock Creek back here for a mile, that you run up against some bad, rocky cliffs and a great deal of small gorges, and some terribly rough country.

Q. State whether or not the same obstructions would meet you if you were to follow the bearings of the line towards the river?

A. Yes, sir.

Q. Now, in view of those obstructions, in order to get to the river, was it necessary to come down along the line indicated by the marked trees to the bank of the River? In other words, how could you approach the river from the point a mile on the north side of the river where you made the obstructions?

A. We could not have approached it on a straight line for a mile without having ropes and ladders, etc. In getting down to the point, we ran our line down to the river and we were not governed altogether by that; we were governed largely by what we found on the ground by the marked trees that we found, in other words.

Q. Mr. Denton, I will get you to state whether or not there is a variation as run by the commissioners in 1821, as shown by
125 their map, for that line, for a mile on the north side of the Tennessee River, and the red line as made on this map running from that point by marked trees down to the bank of the river?

A. Yes, sir; there is a variation.

Q. Can you explain the cause of that variation?

A. Yes, sir; I think I can.

Q. Proceed.

A. I am satisfied when they ran this line in 1821 and got down there within about a mile of the mouth of Slick Rock Creek, they could see the mouth of this creek, and they took the bearing of that point or of the mouth of that creek and started towards it, and after going a little ways there they ran up against rocky cliffs, and gorges——

Q. And for that reason did they have——

A. And for that reason they — taken down a gorge there the easiest and best way to get to the river and kept on marking the way they went until they got to the bank of this river.

Q. How do you account for the straight mile on their map from the point you speak of on the ridge to the mouth of Slick Rock Creek?

A. The only way I have for accounting for their taking the bearing of the mouth of Slick Rock Creek from a point here—from a point on the north side of the river about one mile of the mouth of that creek and starting towards the mouth of the creek, and when they found they could not go straight through, they never changed their notes, measured on down to the river, and then down the river to a point opposite the mouth of the creek; they just drew a straight line over here on this same bearing that they had noted.

Q. Now, in doing that, do you understand that they abandoned the marked tree line from the point on the ridge down to the bank of the river as they ran it?

A. They have abandoned it apparently, on their map.

Q. I want to ask you about the topography of the country on the south side of the river, and as to what ridges are the most prominent ridges on that side of the river, the south side of the river, looking from this point north of the river? I mean the ridges in the neighborhood above and below Slick Rock Creek?

A. The most prominent part of the ridge in that country is the ridge that leads from a point below the mouth of Slick Rock Creek up to the Little Fodder Stack, next to the Big Fodder Stack, and thence from the top of the Big Fodder Stack to the junction
126 of the Hangover and Fodder Stack divide. That is the most prominent ridge, taken as a whole.

Q. Now, from the point mentioned on the north side of the river looking across on the south side of the river, what ridge or ridges seem to be the most prominent on that side of the river?

A. Well, sir, as you come along down this State line, on the north side of the river here where the old State road crosses the top of Smoky Mountain, I mean the road that leads from Rocky Point to the Tallassee Ford, coming down along the top of that mountain there and going towards Little Tennessee River, following the State line, the most prominent mountain and the mountain that stands right up before you all the time, is the Big Fodder Stack. As you come along down this mountain surveying that line, every time you look up, this Big Fodder Stack is standing up over in front of you. Now, there is a higher peak than that, about three and one-half miles to the left of the top of the Big Fodder Stack, called "Hangover."

Q. Does that lie in the same general course from your viewpoint on the north side of the river, that high peak on the Hangover, going south?

A. No, sir; that high peak on the Hangover is not on the same general course; it is off to the left.

Q. About three and one-half miles, you say?

A. Yes, sir.

Q. But you have stated before that the Big Fodder Stack does lie in the same general course looking from the north side of the river?

A. Yes, sir; it is in the same general course. Really, it is a little to the left of the same general course, where a straight line is drawn.

Q. Coming down on the north side of the river, looking across to the south side, did the Commissioners who ran the line in 1821 see the Fodder Stack Mountain standing out more prominently than any other on that side of the river?

A. Why, if they had a clear day, and could see any of those mountains, and were striking through there for the main mountains——

Q. They could?

A. Why, yes, sir—yes, sir; if it was—they could. That mountain stood up before them (higher) than any other mountain. Now, I would like to explain about this.

Q. Go ahead and say anything you want to?

A. As they came down here, approaching this river from the north side of said river, looking across to the south side of
127 the river, the ridge that leads up from a point below the mouth of Slick Rock Creek is almost cut in two by a low gap near the head of Little Slick Rock Creek. That ridge would appear broken to a stranger, and it would be hard to tell whether the ridges to the right and below the mouth of Slick Rock Creek were one continuous ridge and lead back up to the top of the main mountain. The ridge above the mouth of Slick Rock Creek that leads from a point near the mouth of Slick Rock Creek up to the Hangover rock, is almost cut in two by a low gap. This gap is known as Slick Rock Gap, and is almost cut in two again by another low gap known as Big Fat Gap, and would appear broken; and I think it would be hard for any one who was not acquainted with the country to tell from the north side of the river whether or not it was one continuous and unbroken ridge that would lead up to the top of the main mountain.

Mr. McCroskey: Respondents except to the foregoing questions and answers in which the witness seeks to explain the topography of the country, because the topography and location of the different ridges was in issue in the original suit, and the same is not in any sense explanatory of the newly discovered map.

Q. In referring to the broken ridge that leads up to the Hangover, do you mean the ridge over which it is claimed the State line was run?

A. Yes, sir; I do.

Q. As you approach from the north side of the river, is there any ridge on the south side of the river that appears to be a continuous ridge, well-defined and more prominent than another; I mean looking from the north side of the river across through Slick Rock Basin to the ridges on the south side of the river?

A. I would rather you would give me some definite point.

Q. Well, you have previously stated that the ridge leading up

from the river below the mouth of Slick Rock Creek, was broken up, and that what is called the Hangover Ridge was also broken up as it would appear to a stranger and you have also stated that the Big Fodder stack on the south side of the river seems to be the most prominent continuous ridge on that side as it would strike a man from the view-point on the north side of the river. Now, I will get you to state whether or not the Big Fodder Stack is the most prominent and continuous ridge on that side of the river?

128 A. Yes, sir, as you approach the river from the north side looking in the general direction that those people ran that line, the Big Fodder Stack mountain stands out very prominently in front of you, and you can see a ridge that leads from the top of this Big Fodder Stack, a very prominent ridge, and leads back to the left about three and one-fourth miles, which is an unbroken ridge and a very prominent ridge, and leads up to the top of the main mountain.

Q. When you say "top," do you mean to the junction of the Hangover and Fodder Stack?

A. The divides.

Q. Now, Mr. Denton, you have stated that in approaching the river from the north side, that the Big Fodder Stack seemed to be the most prominent ridge looming up before them?

A. In the same general course.

Q. Now, could they also see that in order to reach that ridge you would have to go through the Slick Rock basin?

A. Yes, sir.

Q. Mr. Denton, you have stated that you have made a survey of the State line along the territory in dispute?

A. Yes, sir.

Q. And that that survey is represented by the red line on Map Exhibit "B." Now, I will get you to state whether or not the Map Exhibit "B" conforms to the map of 1821 substantially and practically?

A. No, sir. Practically it does. Well, I will make my explanation. This red line—this is Exhibit "B"?

Q. This is Exhibit "B"?

A. On Exhibit "B" beginning down along the top of the Smoky Mountain on the north side of the Little Tennessee River to a point about one mile from the mouth of Slick Rock Creek; it practically conforms with the map of 1821. Then the red line on Exhibit "B" from the mouth of Slick Rock Creek to a point on Exhibit "B," marked "Big Fodder Stack," practically conforms with the map of 1821. And the red line on Exhibit "B" from a point near the Big Fodder Stack—I said to the Big Fodder Stack awhile ago, but I meant near to a point near Stratton's Bald practically conforms to the general course as the State line as shown on the map of 1821. The red line on Exhibit "B" from the mouth of Slick Rock Creek to a point on said creek near the mouth of Big Stack Branch does not quite conform with my survey, as my survey was with the meanders of that creek up to that point; but the red line on Exhibit "B" from that point on to a point near Stratton's Bald practically con-

forms with my survey of the State line through this disputed
129 territory in the month of April, 1908. I will ask the stenographer to read my last answer. (Answer read by stenographer.) I am sure you never got my answer right or I didn't understand the question aright. Beginning at a point on the top of the Smoky Mountain, where I began my survey, near where the old state road crosses the top of said mountain, from that point southwestward down along the top of said mountain to a point about one mile from the mouth of Slick Rock Creek and on the north side of said river, the red line on Exhibit "B" practically conforms with the general course indicated on the map of 1821. That is all I have to say, there (to the stenographer). Read what I said about on the other side of the river. (Answer read as requested.)

Q. Mr. Denton, the latter part of your answer was intended to correct your answer touching the same points of the map on the north side of the river which was afterwards read to you and corrected in the proper place by the stenographer, is it not?

A. Yes, sir; as I understand it now.

Q. Now then, the said latter part of your answer is wholly unnecessary in view of the correction made by the stenographer at the proper place?

A. Yes, sir; as I understand it.

Q. Now, Mr. Denton, as I understand your answer, you have stated that your line substantially corresponds with the red line on Exhibit "B" outside of the fact that you followed the meanders of the creek?

A. Yes, sir; it practically conforms with it.

Q. Now, will you please state whether or not the line, as you located it, substantially corresponds with the State line as located and run by the Commissioners of 1821, as shown by their map Exhibit "A"?

A. Yes, sir; it does, so far as courses and distances are concerned, except at this one point here on the north side of the Little Tennessee River, but it don't coincide with their map, the way they sketch in the topography of that country.

Q. Taking the line as a whole, is there any serious difference between the line as run and shown by Exhibit "A" and the line as run and shown by Exhibit "B"; what I mean by "serious" is: Could the line have been run somewhere else?

A. No, sir; it could not. I want to correct that: They could have run many other places, but I am absolutely sure that the line that
we found and traced through there and surveyed, is the line
130 that was run by the surveyors and commissioners in 1821.

Mr. McCroskey: Respondents except to that part of the witness' answer giving his opinions, because his opinion is not competent. Only facts are competent.

Q. Does the variation between the line as you run it and the line shown on map Exhibit "A" admit of the possibility that that line as shown on map Exhibit "A" could possibly have been run over the Hangover Ridge?

A. No, sir; it does not.

Mr. McCroskey: Our cross-examination of this witness is made subject to exception.

Cross-examination by Major McCroskey:

Q. During the month of July, 1907, you went upon the ground with a copy of a newly discovered map and undertook at that time to locate the State line, did you not?

A. Yes, sir; I did a few days' work there, yes, sir.

Q. After you had completed your work at that time, you made an affidavit which was filed in this cause, did you not?

A. Yes, sir.

Q. Is that affidavit correct?

A. My answer to that is, that that affidavit was made in good faith, and some of the trees that are mentioned in that affidavit that I was thoroughly satisfied at that time had State line marks on them, in one of the lines mentioned that leads out from Slick Rock Creek at a point about a mile and a quarter from the mouth of that creek that I was thoroughly satisfied at that time was the line run and marked by the original surveyors in 1821, has been by me since that time thoroughly investigated, and the trees marked have been blocked—some of the trees marked have been blocked—and I find that I was mistaken about that portion of the line mentioned in that affidavit that leads from the creek up towards the Little Fodder Stack and the Big Fodder Stack. The trees that I found along Slick Rock Creek from the mouth of said creek southwestwardly and up said creek and the tree mentioned in that affidavit as having been blocked and containing State line marks, I am yet thoroughly satisfied do contain the State line marks. If you take that up in a detailed way I would be glad to answer any particular question you would like to ask concerning that affidavit, and I want to state further that some of the trees blocked along the line mentioned in that affidavit leading from Slick Rock Creek northwestward have been blocked and we find them thirteen years too young—the marks thirteen years
131 too young for State line marks, and that I am satisfied now there are no State line marks there, and my opinion is that that was one or the—that is an old Tennessee section line. That portion of that affidavit concerning the old State line map on the north side of the Little Tennessee River, I yet say is true, although I find that the original surveyor came down to the bank of the Little Tennessee River on the north side *of* a little different way to what they indicate they did in this map marked "A." That portion of that affidavit that refers to the Hangover divide or Hangover lead I still say is correct.

Q. In said affidavit, on page 2, you used this language: "After tracing said line in this manner about three and one-half miles from said Tennessee River, as indicated on said map, he then by the use of his surveying instruments, surveyed the line for some distance"; "He further states that within said distance he found nineteen trees clearly marked with State line marks;" he found "several other trees marked, but not plain enough to be certain that

they were State line marks." Do you mean by that language that you surveyed the line up Slick Rock Creek from its mouth about three and one-half miles at that time?

A. No, sir; I do not.

Q. What do you mean then?

A. The line surveyed at that time is the line indicated on this map Exhibit "B" leaving Slick Rock Creek at a point near station No. 261-88, on Exhibit "B," leading off northwestward. And the trees that I found along Slick Rock Creek from the mouth of said creek up to said station I am still satisfied contain—have the State line marks on them. And the survey that I made at that time and mentioned in that affidavit was begun at a point near the mouth of Slick Rock Creek and run up Slick Rock Creek to the station mentioned, being station No. — to a point near station 261-88, and thence from station No. 261-88 northwestward back towards the point on Exhibit "B" marked "Stiff Knee," and all the trees found——

Q. I didn't ask about trees in that question at all.

A. Well, this line back here for about three—the line mentioned from the mouth of Slick Rock Creek up to the station mentioned, and then northwestward back to the point marked "Stiff Knee" indicated on this map Exhibit "B" is the line that I surveyed and the line mentioned in that affidavit.

Q. In that affidavit and on the same page you used this further language: "Affiant further states that in tracing this line
132 on said map where certain angles are indicated, he found in going on the ground up Slick Rock Creek and along the mountain that the topography of the country necessitated the exact angles as indicated on the map; and at the points as shown by the map; provided the Commissioners desired to follow the thread of the creek and the crest of the mountain as the map indicated did so." Do you now say that affidavit is correct in that respect?

A. No, sir; that affidavit is not altogether correct. I want to make an explanation there. I went down to the point mentioned and taken up this work rather hurriedly and roughly and I had not and did not at that time take off their general bearings from their north point on Exhibit "A" and I was guided a good deal by the topography that they have indicated on this map Exhibit "A" and the mouth of Slick Rock Creek, and that portion of the Little Tennessee River along there near the mouth of Slick Rock Creek is a gorge and what I meant by the angles there observed, was just right and left angles observed without having taken their courses from their north point on their map Exhibit "A," and I made some protest when this affidavit was made about having that angle business put into that affidavit at all. And the right and left angles on this map Exhibit "A" without having taken their courses on map Exhibit "A" from their north point and the topography that they have indicated on that part of the country there is somewhat misleading to me, and that is the way the trouble comes up about concerning the angles mentioned in that affidavit.

The further taking of depositions was here adjourned until 1:30 P. M.; at which time the same was resumed pursuant to adjournment.

Continuation of cross-examination of C. Z. DENTON, by Major McCROSKEY:

Q. On page 3 of the same affidavit, you used this other language: "He further states that according to said map and survey made by him said line ran up Slick Rock Creek for about one and one-fourth miles, and then left the creek bearing west up a ridge or more exactly speaking north 65½ degrees west, 245 poles to the top of the ridge leading to the main Fodder Stack mountain; thence to said junction of the Fodder Stack and Hangover leads"; is this statement correct?

A. Well sir, in going over that hurriedly at that time, I never noticed that it was the creek that they had pulled off from the line, but going down there and taking up this very small section on the State line as is indicated on Exhibit "A" this Map Exhibit
133 "A" having been certified to by the surveyor representing the State of Tennessee and the surveyor representing the State of North Carolina and three Commissioners, representing each state, at that time it was hard for me to believe that they would have surveyed a line for a distance of five miles or more up a creek and then have made a plat or a map indicating that they had surveyed a line for a distance of a mile and a quarter or a mile and a half up a creek and then have indicated that they had left the creek at that point and all six of said Commissioners and the two surveyors representing said States have certified to said map or plat as to its being a true and correct plat or map of their survey; at that time in taking this work up hurriedly, I did not notice that the plat or map Exhibit "A" went on practically straight ahead and the creek as sketched in on map Exhibit "A" left the line at or near this point on map Exhibit "A"; on the other hand I taken the creek as the best defined point on map Exhibit "A" and was under the impression at that time that the line pulled off from the creek at a point about a mile and a quarter or a mile and a half from the mouth of said creek on map Exhibit "A." After having surveyed said creek, I find that the lines as indicated or run on map Exhibit "A" from the mouth of said creek southwestward was run about as indicated and the creek on said map is sketched in wrong. I find it a fact that this creek does not leave the State line as indicated on map Exhibit "A" at a mile and a quarter or a mile and a half from the mouth of said creek, but this line as indicated on map Exhibit "A" leaves the creek at about five or five and one-half miles from the mouth of said creek.

Q. (To the stenographer:) Read the question again. (Question read.) I want an answer to that question. Is this statement correct? Read that question again please sir.

(Question second above read by the stenographer.)

A. What have you there as the answer? (Answer read by the stenographer.) Now I will give you the answer.

Q. Let me ask a question and I will get to that.

A. I guess I ought to have answered your question and made a long explanation afterwards.

Q. Do you want to take back now what you stated in your affidavit?

A. Are you satisfied with what I said a few minutes ago in answer to the first question?

Q. I am satisfied.

A. If you are not satisfied I will make an answer yes or no or any way you ask it.

134 Q. Do you want to take back the language used in your affidavit as quoted above?

A. (To the stenographer:) Read me that question again. (Question read.) I do not want to take that language back. That is the way I made the survey that portion of it that I made at that time.

Q. Is that language or what you said in the affidavit as quoted above then correct?

A. That is correct so far as it refers to the survey that I made at that time.

Q. Do you still claim that it is correct or incorrect?

A. Sir I claim that my survey at that time was correct up to that point, but that I left Slick Rock Creek—my survey of the State line up to that point was correct, and that portion of my survey after I left Slick Rock Creek going out toward Little Fodder Stack or Stiff Knee, that portion of the survey I made at that time was not right. I made a thorough investigation along that line since that time. In fact I made this investigation in the month of April, 1908, and those trees that I blocked along there I thought, in August, July or August, 1907, I thought at that time they had State line marks on them. I find now that the marks on those trees are only about seventy-three years old, and after I made this discovery I was ready then to abandon that line.

Q. Exhibit "A" to the deposition of D. B. Burns, being a newly discovered map, shows that within a half a mile or less, after crossing the river to the south side shows that they were following a ridge, does it not?

A. No, sir. That map don't show that.

Q. Does it not show by the sketching along near the river that it is a ridge instead of a stream?

A. No, sir; it don't show that.

Q. What does it show then?

A. It shows after they cross Little Tennessee River to about one-half a mile or about three-quarters of a mile, that there was a little mountain right there. It also shows at that point that there was a very pronounced ridge on their left.

Q. Does not the sketch after it leaves the creek show there on a ridge or following a ridge?

A. I do not think so sir; until they get up to a point at about a mile and a half from the mouth of the creek.

Q. At that point then it does show that they are on top of a ridge or following the ridge, does it not?

A. Well, I can't say that they attempted to indicate that they were on top a ridge.

135 Q. It does show that if they are not on top of a ridge that the ridge is on the left-hand side as they are going southwest, does it not?

A. Yes, sir; it seems to show at a point about a mile and a half from the mouth of this creek that they were on a ridge there as they sketch in this topography, but I doubt very seriously that topography having been sketched in by any man who was in the party at the time that survey was made.

Q. The map would indicate that they left the creek a mile or a mile and a half above its mouth, does it not?

A. No, sir; the map don't indicate that at all; the map indicates that the creek pulls up from their line, and that is untrue; that is the misleading thing about the whole thing; that is what got me into trouble over there.

Q. You think, then, the map is incorrect do you?

A. No, sir; I do not. This topography as they sketch it in is the only incorrect thing that I saw about it.

Q. Then the topography of the map is not all right, but you think the map is all right?

A. Well sir, I mean this State line, and their general course.

Q. (To the stenographer:) Read the question. (Question read.)

A. They certify on this map Exhibit "A" to this being a true and correct plat of a line run and marked by the surveyors and Commissioners in 1821, and the course that they indicate they have run here is all right. But the way they sketch in this topography, the creeks, etc., is not right; and that is all the trouble I can see about it.

Q. You had a copy of the map with you in July, 1907, didn't you?

A. Yes, sir.

Q. The same as this you have before you now?

A I can't say that it was exactly the same, but it was correct and certified to by the Secretary of State at Nashville, Tennessee, etc.

Q. You cannot point out any discrepancy between that map and the present one?

A. I cannot say that I can.

Q. That map showed the creek left the line within a mile of the edge of the river, didn't it?

A. Well, the way they sketch that creek in there, it shows that in a way, but really there is no creek where they sketch in a creek there at all. I mean, after you get up here to a point about a mile and a quarter or a mile and a half from the mouth of this

136 creek where they indicate a creek up here off to the left, there is no creek there at all.

Q. If I understood your examination-in-chief, you said that you

run and followed the meanders of Slick Rock Creek up to the mouth of Big Stack Branch about five and one-half miles; is that correct?

A. Yes, sir; I run with the meanders of this creek as nearly so as possible, up to that point, or to a point near the mouth of Big Stack Branch.

Q. Are the meanders as shown on Exhibit "B" to the deposition of D. B. Burns, the same meanders, and shows the same meanders that you made and followed; and if not, tell where the discrepancy is?

A. Well sir, I think this creek in here is just about the way it is. If he made any errors in laying off this creek from its mouth up to that point, I have not been able to find where the error was, or is.

Q. In your first survey, as shown by your affidavit, you then thought the line followed up the creek for a mile and a half or a mile and a quarter, and then left the creek and went northwest up the ridge, did you?

A. Yes, sir.

Q. Now, you think that the Commissioners adopted Slick Rock Creek as the line, do you?

A. Yes, sir; I am absolutely sure that the line I found at the point about a mile and a half or a mile and a quarter from the mouth of this creek is not a line 86 years old, but it is a line about 73 years old, and I am satisfied now from the general course that they have indicated on their map, they followed on up this creek to a point near the mouth of this Big Stack Branch, and then left the creek and went up to a point near the Big Fodder Stack.

Q. You think the red line north of the river shows correctly where the Commissioners struck the river, do you; that is, about half a mile above the mouth of Slick Rock Creek?

A. Well sir, we find their marks all along this red line on Exhibit "B" down to a point marked "Tree No 19," which is a hemlock marked fore and aft near the bank of the Little Tennessee River, and at a point a little over half a mile above the mouth of Slick Rock Creek on the north side of said river.

Q. You think that is where they located the line, do you?

A. I am thoroughly satisfied, sir, that is where they marked the line.

Q. And also where they approached the river?

137 A. Yes, sir; I am satisfied they went to the river at the point or near the point marked "Tree No. 19."

Q. And about half a mile above the mouth of Slick Rock Creek?

A. About half a mile above the mouth of Slick Rock Creek on the north side of the Little Tennessee River.

Q. If the map of 1821 Exhibit "A" to the deposition of D. B. Burns correctly sets forth the line as the Commissioners ran it, and also correctly shows the stream called "creek" on the map, running into the Tennessee River from the south, then you cannot swear, can you, that this stream called "creek" on the map is Slick Rock Creek, or would it have to be some other stream?

A. Well, Slick Rock Creek is the only creek there is down in

that neighborhood anywhere near where they struck the Little Tennessee River on the north side.

Q. The map, then, does not show the location of the creek correctly, does it?

A. It shows a portion of it correctly.

Q. It does not show where it enters into the river correctly, does it?

A. Yes, sir; I think it does.

Q. How do you reconcile that with Exhibit "B"—the red line on Exhibit "B"?

A. All the trouble I see about Exhibit B-2 is over here on the north side where they show they run in a straight mile on the north side of Little Tennessee River to the mouth of this creek. On the north side of the Little Tennessee River on map, the red line on Exhibit "B" for one mile north of said river, don't quite agree with the line they indicate going into the mouth of that creek.

Q. If the newly discovered map, Exhibit "A," to the deposition of Burns, is correct, then the stream marked "creek" sketched in on the south side of the river cannot possibly be Slick Rock Creek, can it?

A. Why yes, sir; that can be Slick Rock Creek, but the way they sketch that creek in it from a point a mile and a quarter or a mile and a half from the mouth of said creek up said creek, the way they sketch that creek in there from the head of the creek—they have got it sketched in wrong.

Q. Mr. Denton, you don't understand my question. If the map as certified by the Commissioners is in all respects correct, then the stream marked "creek" on the south side of the river cannot possibly be Slick Rock Creek, can it? Understand, if this is in all respects correct, is it possible?

A. It was not possible—I will answer that by saying it was not possible for that map to be in all respects correct. A surveyor
138 or two surveyors or half a dozen surveyors going on down there surveying the line between the two States, the little mountains on the right and left and the trees on the right and left, it is not possible to get them in correctly without having made an accurate survey of all these mountains and all of these streams.

Q. Can you not give me a direct answer to my direct question?

A. Well sir, that direct question covers a good deal of territory, and it seems to me that it ought to be in two or three questions before I can answer it.

Q. I will ask you again if the newly discovered map, as certified by the Commissioners, is in all respects correct, then the stream marked "creek" on the south side of the river cannot possibly be Slick Rock Creek, can it?

A. Yes; that is bound to be Slick Rock Creek; on the other hand it is absolutely impossible for this map marked Exhibit "A" here to be absolutely correct.

Q. If that is bound to be Slick Rock Creek and the map as certified by the Commissioners is in all respects correct, then they left the

creek within a mile of its mouth, did they not, and followed the ridges? I understand it is in all respects correct; I understand that?

A. In the first place it is absolutely impossible for this map to be in all respects correct, and if this is Slick Rock Creek, which it is bound to be—there is no question about it in my mind—it is sketched in wrong, and the creek don't leave the line as indicated here; and the general course of the line as indicated here is correct, but the creek is sketched in wrong, and the creek ought to be pulled off down along the line where for a distance of about five or five and one-half miles from the mouth——

Q. But the map shows that within a mile of the mouth of the creek they leave it and follow the ridge, does it not?

A. No, sir; the line don't show that they leave it, but it shows that the creek leaves the line that they ran.

Q. Does it not show that they followed the ridge after going up the creek a mile or so?

A. Well, they have indicated by arrows here what might be the conventional signs of a ridge or a mountain, but they don't show that they leave the creek, but they do show that the creek leaves their line.

Q. You couldn't torture that shading on that map to mean a stream, could you?

A. Sir?

Q. You couldn't torture that shading on that map to mean a stream, could you?

139 A. What do you mean by shading? These arrows that are pulled off from this line here (indicating) that is supposed to be there indicates the State line as run.

Q. You could not torture the shading or arrows as you call it along the line to indicate that it was following the creek, could you?

A. I don't think, by these arrows along this line here, south of the Little Tennessee River, from a point a mile and a half from the south of Slick Rock Creek on up here, I don't think they intended by these arrows to indicate that they were running up a stream. I don't think they intended to indicate that by these arrows they have pulled off from that line.

Q. Don't you think they intended to indicate that they were following a ridge along there?

A. It looks very much like the fellow who sketched in this topography here intended to indicate that.

Q. That they were following a ridge?

A. It looks very much like he intended to indicate that the State line followed a ridge.

Q. Going back to the north side of the river, there is no question but what the state line follows the top of the ridge called the Smoky Mountain until it reaches the Tennessee River, is there?

A. Well, it follows down the top of one ridge to a point.

Q. And it is always on top of a ridge, isn't it?

A. No, sir; it is not always on top of a ridge.

Q. What do you mean then?

A. The last mark we found down there near the bank of that river on the north side was a large spruce pine, marked fore and aft, and in fact we found marks on one side of it, I believe that was kinder on the east side and that was near the bank of the Little Tennessee River, and the west side had been blocked. That line did not follow the top of a ridge all the way down the river at all, sir, as we traced it by the marks.

Q. Following the line for a number of miles north of the river, does it not run along on the top of the mountain?

A. Yes, sir; the lines at the beginning of our survey on top of the Smoky Mountain near where the old state road crosses the top of said mountain, on down to a point near Little Tennessee River, follows the top of a ridge. That is where we find the old marks.

Q. The same shading on the north side of the river is found that you find on the south side of the river after leaving the creek, isn't it?

140 A. The same shading on the south side of the river that there is on the north side. After they get up this creek here for about a mile and a half they drawed in those little arrows about the same way from there on the north side of the river.

Q. And the shading, or arrows, as you call them, are on the left hand side as they were going in a southwesterly course, are they not?

A. Yes, sir; well, there is a point here, near the mouth of Slick Rock Creek, that they show a few arrows on the right side of their line.

Q. If the shading or arrows are on the left hand side and following the ridge on the north side of the river, why wouldn't the shading or arrows on the left hand side on the south side at the same time show they were following the top of a ridge?

A. Well sir, I doubt very seriously these arrows having ever been drawn here by any one of the party that made that survey. That is the only way I have got to account for that. They intended here, as I understand it, by the conventional signs of ridges and mountains, that they are running on a ridge or a mountain, while I am absolutely sure they did not run on any ridge or the top of any mountain.

Q. Please file as Exhibit "A" to your deposition the affidavit made by you and above referred to, on the 27th day of July, 1907, as Exhibit "A" to your deposition.

A. I do so, as requested.

(Said exhibit is marked, as stated, but returned into the general files in this cause, in custody of the clerk of this Court.)

Redirect examination by Mr. McQUEEN:

Q. Mr. Denton, I will get you to state whether or not you examined the Hangover lead or State line marked "Trees" and the result of your examination or investigation on that matter?

Mr. McCROSKEY: Respondent excepts to the question because it seeks information on matters that were testified to in the original suit, and would be cumulative only as to the evidence in the original case.

A. Yes, sir; I made a thorough investigation of that ridge from the point of that spur or the ridge that leads off to a point near the mouth of Slick Rock Creek from there all the way from that point to the junction of that mountain with the Big Fodder Stack divide. I never have been able to find any State line marks or anything that indicated State line marks on that ridge old enough for the
141 State line marks; and I blocked two trees along that ridge, one at a point about three-quarters of a mile from the mouth of Slick Rock Creek and another tree at a point a little south of the top of the Cold Spring Knob, on which were the oldest marks I could find along that ridge, aside from some land marks and some land corners; I knew what they were and all about them, and the blocks I taken out of these trees the first ones I have here and they only show twenty-four growths over the hacks, and the other I counted for twenty-three growths over the hacks. There are some older marks than that along that ridge. At one point on that ridge, the line of entry No. 405, crosses the top of that ridge, and the marks on that line are about fifty-three years old, and then the line of the same entry crosses the ridge again at a point near Slick Rock Gap, and there were witnesses to a corner of Cherokee County entry No. 920, near Slick Rock Gap, and those witnesses to that corner marks are about fifty-two years old; then at a point along that mountain a little Southwest of the Haoe there is a small mountain oak, corner of Cherokee County entry No. 1035, a corner of Cherokee County entry No. 4456, which is about fifty years old, and then at a point about a mile southwest of that there is another mountain oak, a North Carolina land corner, which is a corner of entry No. 4456, and a corner of entry No. 4455, and a corner of entry No. 1035, and a corner of Cherokee County entry No. 5051. These corners I did not block, but I have never been able to see anything on them except the marks put on them by J. S. C. Pearcy County Surveyor of Cherokee County, and possibly some of them have been re-marked by H. S. Hayes and H. P. Hyde and others. Sometimes our surveyors re-mark a corner tree. Those are all the old marks I have ever been able to find along that line. There ain't no State marks along that line that are old enough. One thing I have missed that I want to correct: There is a double sourwood down along that mountain at a point near Board Camp Gap, and about one mile from the mouth of Slick Rock Creek, that is marked with one hack on the northeast side and marked with five hacks on the south side, or on the side pointing towards Hangover rock, and the other sourwood—this is a double sourwood tree—and the other sourwood shows one hack on the east side and has been blocked on the north side. These marks, in my opinion are not old enough for State line marks.

Mr. McCroskey: Respondent except- to the answer of the witness for the same reasons given to the questions heretofore,
142 and also because it in no wise explains or bears upon newly discovered matter.

And further deponent saith not.

C. Z. DENTON.

Sworn to before me this May 8th, 1909.
[SEAL.] R. S. C. HUTCHINSON,
Notary Public.

STIPULATION: It was agreed by and between counsel for both sides to this cause, that the Notary Public might sign the name of the witness to this deposition without the same having been read over by the witness before such signing.

Next witness M. E. COZAD, of lawful age, being first duly sworn, deposed as follows:

Examined by Mr. MCQUEEN:

Q. Please state your age, occupation and residence?

A. I am 61 years of age; my residence is Cleveland, Ohio, but for the last nine years I have been in North Carolina, and my present address is Andrews, North Carolina. Since I have been in North Carolina, I have represented W. R. Hopkins and others who are the parties to this suit and have had general management and oversight and care of their holdings in North Carolina.

Q. If you have had any connection with the management of this suit in any way, please state what that is?

A. The latter part of February, 1906, whom, I do not remember now, said that they had heard that the original map made by the Joint Commission in 1821, fixing the State line, had been found in the basement of the State House at Nashville. At once I wrote to a friend of mine to see if there was any foundation for the rumor, and if so, if he could procure a copy of the map. Not getting a direct answer for some weeks, I then asked John Theodore Davidson, of Asheville, who was the attorney for W. R. Hopkins and others, I wrote to friends of his in Nashville to secure me a certified copy of the map. He did so and in the latter part of March of that year, 1906, I received and paid for a map certified by the Secretary of State similar to the one marked in this case as Exhibit "A."

Q. Did you, after hearing that rumor, use due diligence in trying to ascertain the correctness of same and in trying to secure a copy of said map?

A. I did; and wrote letters from time to time to see in the field notes accompanying the map had also been found. Between that time and May of the same year I made two trips to Raleigh,
143 North Carolina, employed assistance, and spent at each time fully a week in going through all the State papers and papers in the State House and in the Executive Department to see if there was any such thing as a duplicate of said map filed in the State Department of North Carolina. I offered a large sum indeed, I might say, to anyone that would find the map on file in the archives of North Carolina, State Department, I failed to find a map, a duplicate of this, filed in the State Department of North Carolina, and I failed to find in either Nashville or Raleigh a copy of the field notes accompanying the maps.

Q. Did you diligently inquire and take all necessary steps to ascertain this information?

A. Just as soon as I heard this rumor—I hadn't very much faith in it, because I had understood that diligent search had been made for the map by other people; indeed I asked people connected with the former owners of this property if they had instituted inquiries and investigations and I was informed they had, but when I heard this rumor I immediately set about to find the truthfulness of it, and procured the map, and just as soon as I could I got it; I do not think it was more than four or five weeks after I first heard of the rumor before I had the map in my possession; and immediately I laid the matter before my attorneys; and this suit was instituted.

Q. Mr. Cozad, if there is anything else that you desire to state in connection with this matter, you may do so?

A. There was only one thing I might say in regard to the employment of Mr. Denton to make this survey last July; I understood from my attorneys that the affidavit touching the matter of this survey would have to be in court in a very short time, and I gave him a very limited time to do the work, and I simply say that in justification to him in regard to the haste and short time that he had to make that cursory examination. I called him in long before he was satisfied to come in. There is nothing beyond that that I think I care to state.

Q. Were you present when the affidavit of Mr. Denton referred to on cross-examination in this case, was prepared?

A. Yes, sir.

Q. State whether or not that was hastily done or done in a painstaking way?

A. It was done in a very hasty manner, and when it was finally ready for signature with others, Mr. Denton objected a little to signing his affidavit, and used some such expression as this (of course I wouldn't pretend to give his exact words. He says: "I believe that is right; But," he says, "the only thing I hesitate about is,
144 I am a little afraid that I am making statements there that from so hasty an examination I ain't fully warranted in making but to the best of my knowledge and belief they are correct;" but he hesitated a little about it. He was not urged especially and did not sign it without any importunity, but he made that sort of an objection: He felt hardly warranted in making some statements there from so hurried and cursory an examination that he had made.

Q. Was this after it had been reduced to type?

A. Yes, sir; it was read over to him and as he read over it I remember he asked to have portions of it read a second and possibly a third time, and made some such expression as this: "I believe that is right to the best of my knowledge and belief, it is correct, but I feel a little hesitancy about making so positive a statement on so hasty an examination. I might be wrong. Now, I won't say that is just the language but that is substantially what he said, but he finally signed the affidavit.

Cross-examination by Mr. McCroskey:

Q. Is Mr. E. P. McQueen, of Loudon, one of your attorneys in this suit?

A. Yes, sir.

Q. How long has he been connected with this case, and with your matters as attorney?

A. His service for us has been limited to this State line suit, and began almost as soon as we instituted the suit. We felt we must have local counsel, and I employed him at the suggestion of my superiors. I think that was in April or May of 1906.

Q. He was also attorney for the Beldings in the original suit in this matter, was he not?

A. I so understand, and that is one reason why he was employed at my suggestion in this case because of his familiarity with the old suit.

Q. I hand you a certified copy of a deed from R. N. Archer and Thomas F. McGarry, Trustees to W. R. Hopkins, Edward I. Leighton, Frederick W. Bruch, George Reeves and John Matthews, and I ask you if that is the same title paper under which W. R. Hopkins and others in this case claim title, and file the same as Exhibit "A" to your deposition?

A. I believe it to be the same. Of course without comparison I could not say it was. I file it as Exhibit "A" to this, my deposition.

(Said paper marked as suggested, but if not attached to this deposition, being returned to the files of the Court in the custody of the Clerk.)

145 And further deponent saith not.

M. E. COZAD.

Sworn to before me this May 8, 1908.

[SEAL.] R. S. C. HUTCHINSON,
Notary Public.

(Stipulation.—It was agreed by and between counsel for both sides that the Notary Public might sign the name of the witness to this deposition, after being written out, and without being previously read over by the witness.)

Certificate.

I certify that, being a stenographer and typewriter, and a Notary public that I took the foregoing depositions in the exact language of the witnesses and reduced them to typewriting; that they were read over by the witnesses (except as otherwise stated at the foot of each deposition) and were approved and signed by them; and I also certify that I am not, in any capacity, in the regular employ of the party in whose behalf these depositions are taken, nor in the regular employ of his attorney; and I certify that I am not interested in the case, nor of kin or counsel to either of the parties, and that I delivered said depositions to the Clerk of this Court at Knox-

ville, Tennessee, without their being out of my possession, or altered after they were taken.

[SEAL.] R. S. C. HUTCHINSON,
Notary Public, Knox County, Tennessee.

This May 8, 1908.

My commission expires January 17th, 1911.

Endorsed: No. 1056. In the U. S. Circuit Court at Knoxville. D. W. Belding, et al. against Chas. Hebard, et al. Depositions of D. B. Burns, C. H. Burns, H. E. Libby, C. Z. Denton, W. E. Cozad. Filed May 18, 1908. W. L. Edington, Dep. Clerk.

Circuit Court of the United States in and for the Eastern District of Tennessee, Northern Division.

W. R. HOPKINS et al.
vs.
CHARLES HEBARD,
and
D. W. BELDING et al.
vs.
CHARLES HEBARD et al.

The Depositions of W. D. Hale, and O. W. Muller, Taken Before R. S. C. Hutchinson, a Notary Public in and for Knox County, Tennessee, on This 8th Day of May, 1908, *at the Hotel Imperial, Knoxville, Tennessee, in the Presence of Attorneys for Complainants and Respondents by Consent.*

146 It is agreed that the evidence shall be taken in shorthand transcribed by the stenographer, who shall sign the names of the witness thereto, and file the same with the Clerk of said Court; said depositions are taken on behalf of the respondents, Smoky Mountain Land, Lumber and Improvement Company.

Said witness, D. W. HALE, being sworn, deposed as follows:

Examined by Mr. MCCROSKEY:

Q. What is your age?
A. Forty-nine.
Q. Where do you reside and what is your occupation?
A. I reside at Maryville, Tennessee; my occupation is a land surveyor.
Q. How long have you been a surveyor and what actual experience and work have you done?
A. I have been a surveyor for thirty years. I have surveyed about all the mountain lands in Monroe County, a good portion of the mountain lands in Polk County and Blount County and a great deal of mountain land in the Cumberland mountains both in Tennessee and Kentucky.

Q. Are you the same W. D. Hale whose deposition was taken in the original cause of Hebard vs. Belding?

A. Yes.

Q. Since the newly discovered map has been found, I will ask you if you have been on the ground for the purpose of locating the line, taking said map as your guide?

A. Yes.

Q. How much experience and how much time have you devoted in the original suit and since the Nashville map was found have you spent in undertaking to locate the State line at the place in dispute?

A. Something like three months in all.

Q. How much time did you spend during the original suit, and how much time have you spent since this map has been discovered?

A. Approximately two and one-half months in the original suit; one-half a month since the discovery of the map.

Q. Have you had any other experience in locating the State line other than in the Slick Rock section, and if so, state where and how much work you have done in doing so?

A. I have had some experience in locating the State line between Blount County, Tennessee and Swain County, North Carolina, near the Sevier County line, and at different points along the line
147 adjoining Blount County, Tennessee, and more especially from the 59th mile tree to the Tennessee River; and I have surveyed the State line from the Tennessee River to the Hiwassee River.

Q. Are you then familiar with the line marks and mile trees as indicated along the line of the Sevier County line, from Sevier County to the Hiwassee River?

A. I am familiar with the line marks. I don't know of but two mile trees standing. Well, I might correct that; I know two undisputed two mile trees and one that is called the 86th mile tree. As to whether it is correct or not, I am not in a position to say.

Q. Please state what mile trees you know that are undisputed?

A. The 50th mile tree and the 59th mile tree.

Q. You have seen both of those trees then?

A. Yes, sir.

Q. State whether or not you have taken the newly discovered map and gone upon the ground at the places now in dispute and undertaken to locate the State line, taking said newly discovered map as your guide?

A. I have.

Q. Please state what you did as a preliminary before going upon the ground and who, if any, were with you assisting?

A. O. W. Muller was with me assisting with scale and protractor to get as nearly as possible the courses and distances from the newly discovered map. Then I went on the ground at the 59th mile tree and attempted to run the State line by those courses and distances.

Q. State whether or not you found anything on the newly discovered map that indicated mile points; and if so, what?

A. I found circles on the map at certain intervals that I judged

by counting them, were intended to indicate the ends of the miles, and by scaling, too.

Q. The scale of said map I believe is 800 poles to the inch?

A. Yes, that is the scale given on it.

Q. Did you find those circles about corresponding as indicating a mile upon said map?

A. Approximately; some are longer and some are shorter.

Q. But before going into the thing on the ground to do the work, state whether or not you undertook to get the degrees and angles as indicated upon said map in the neighborhood of the disputed territory?

148 A. I did; that was the work that O. W. Muller assisted me in.

Q. State whether or not it was possible to get an accurate and correct degree and angle of that line as indicated upon that map?

A. No, because of the scale of the map being so small I could only get an approximate course and distance of it.

Q. If I understand then, you did the best you could to get the degrees and angles before going upon the ground?

A. Yes.

Q. When you went upon the ground where did you begin your work?

A. At what we counted to be the 59th mile tree.

Q. Did you then undertake to run the line in accordance with the degrees and angles as indicated upon this newly discovered map?

A. Yes.

Q. From the 59th mile tree going southwest to the river, state whether or not there is any dispute as to the location of the State line?

A. I never heard of any. I have been with a good many of the natives of that country and talked with them about it, and I never heard of any dispute.

Q. Where is the 59th mile tree with reference to the State road run, from Tennessee to North Carolina?

A. It is two and one-half miles northeast of the State road.

Q. Then you tried to run a line in accordance with the degrees and angles as shown upon the newly discovered map from there to the Tennessee River, did you?

A. Yes.

Q. Were you able to follow the marked trees on top of the ridge from that point?

A. No.

Q. Please explain whether you were on one side or both sides of the top of the ridge, and if so, how far did you get from the top of the ridge where the State line marks are at any point?

A. In the first mile run southwest from the 59th mile tree, I got something like 300 yards on to the North Carolina side; in the second mile, I crossed on to the Tennesee side and got more than half a mile down off the mountain across streams and spurs and ran down a stream a good ways. When I crossed the pike road I was, by the distance on the pike road, judging by walking it, at least a

mile from the State line, following the State road. Then in the next mile I crossed into North Carolina a quarter of a mile
149 from the State line; then I crossed back into Tennessee and got from one-half to three-quarters of a mile from the State line.

Q. From your efforts and the work you did there, and your knowledge of the State line, is it possible to take said newly discovered map and with it locate the State line as indicated along the territory where it is undisputed?

A. No, it is not. The map instead of being an aid to locating the State line or finding the State line, is rather a hindrance.

Q. Have you heard the testimony of D. B. Burns and C. Z. Denon taken yesterday and today in this suit?

A. I have heard part of it; I didn't hear very much of Mr. Denon's.

Q. Did you hear*d* them tell where the undisputed State line struck the Tennessee River?

A. I did.

Q. Half a mile above the mouth of Slick Rock Creek?

A. Yes.

Q. State whether or not there is where the marked trees—in fact, now that the State line does strike the Tennessee River?

A. It is.

Q. Crossing the river and taking this newly discovered map as your guide, is it possible to locate the line up Slick Rock Creek?

A. No.

Q. Please explain why?

A. Why, crossing the river at right angles as indicated by the map you would be half a mile east of Slick Rock Creek, and taking the bearings as near as can be ascertained from this map and following them, and you will be crossing back and forth across the ridges and foothills and not be on Slick Rock Creek, and except in one or two places you won't approach Slick Rock Creek any less than a quarter of a mile.

Q. This map shows that the Commissioners crossed the river at or near the mouth of some stream. Please state whether it is possible from your previous experience in surveying for that to be Slick Rock Creek?

A. No. Following the track of the Commissioners to the river, and then following the courses of the map, as indicated you would be entirely east of Slick Rock Creek and half a mile east. While the creek on that is shown on the east side of the line instead of the line is on the east side of the creek. In my opinion that is only a sketch map and have sketched Cheah River on that Slick Rock Creek.

Mr. McQUEEN: *Defendants*, by solicitor, excepts to so much of the above answer as contains the opinion of the witness.

Q. You say you have been surveying for 30 years?

A. Yes.

Q. Have you been pretty constantly in the work for that length of time?

A. Yes. During the first fifteen years of that time I served about seven or eight years as County Surveyor in Monroe County, and the last fifteen years I have been constantly at work; I have followed no other occupation except surveying and timber estimating.

Q. Do you consider yourself an expert in locating land lines?

Mr. McQueen: Complainants except to the above question, because it is a matter to determine from the testimony of the witness as to whether or not he is an expert and not for the witness to say.

A. I have been used as an expert for the last fifteen years.

Q. Now, you give it as your opinion that the Commissioners indicated that stream as Cheah River. Please explan your reason for thinking so?

A. The track of the Commissioners of the marked trees show- that they struck the river fully one-half mile east of Slick Rock Creek. Cheah River is the first stream of any size east of the line—it is about one mile east of the line—and is the stream that would naturally show on the east side of the line. And the description in the Cession Act of the State line from Tennessee River to the main ridge would naturally take the Commissioners from the river direct from the point at which they struck it and crossed it, up the ridge, that is east of Slick Rock Creek and west of Cheah River.

Q. Are there any spurs north of the river running down from the main ridge that terminates on the Tennessee River near the mouth of Cheah River?

A. Yes.

Q. State whether or not that is one of the prominent spurs of the mountain?

A. Yes. From the point at which the state line leaves this ridge that leads off towards Cheah River, the one leading towards the mouth of Cheah River is the main ridge for a considerable distance, the marked State line dropping down off of the main ridge or a minor ridge.

151 Q. This which you call the main ridge for some distance I notice, as I understand you, at or near the mouth of the Cheah River?

A. Near the mouth, I don't know whether it is right opposite the mouth or not; the ridge forks; I didn't go to the end of the ridge; I went out at a high point some—between a quarter and half a mile searching for the line.

Q. I will ask you if on the opposite side of the Tennessee River and near the mouth of Cheah River there is another spur or ridge that leads to the main Hangover ridge?

A. There is. Just below the mouth of Cheah River, you might say within a couple of hundred yards from the mouth of Cheah River there is a ridge butts off that leaves the Hangover Ridge near the Sourwood Gap.

Q. How far is the Sourwood Gap from the river?

A. It is about one mile.

Q. So that spur would then be about a mile in length?

A. Yes.

Q. Extending from near the mouth of Cheah River to the main Hangover Ridge?

A. Yes.

Q. State whether or not these two spurs, the one on the north side and the one on the south side, would be as convenient or more convenient than any other spurs, if parties were strangers to the country and were trying to cross the river and reach the ridge on the opposite side, to follow, I mean?

A. In some espects, it would be more convenient. In crossing the river especially. Just below the mouth of Cheah River there is an eddy in the river in which parties can cross over on a raft or a boat—a raft it would be at that eddy, while lower down there is no eddy at which they could cross for two or three miles with any degree of safety.

Q. North of the river is there any spur of the main ridge that terminates at the river near to and opposite the mouth of Slick Rock Creek?

A. Yes.

Q. If so, what spur and how does it run?

A. There is a spur there called Lester Ridge, which runs about southwest and terminates opposite the mouth of Slick Rock.

Q. State whether or not you surveyed up and down that ridge or went up and down that ridge?

A. I first went down the ridge searching for marks from its junction with the State line ridge to the river. Then I surveyed
152 that ridge from the river opposite the mouth of Slick Rock back to its junction with the State line ridge.

Q. Is that ridge accessible?

A. Yes, sir. I have been up and down it, at two or three different places; I have surveyed up and down it.

Q. The State line both on the north and south side of the river on this newly discovered map, shows a shading on the left hand side as they are going southwest. Please state what that shading indicates to you as a surveyor?

A. It would indicate that the slope of the ridge was on the side where the shading is.

Q. State whether or not it indicates that they were on a ridge?

A. They were on the ridge, or the slope would not be on that side.

Q. Do I understand that they were on top of the ridge by the indications of this map here?

A. That is the way it indicates to me.

Q. As a surveyor?

A. Yes; had they been on the side of the ridge the etching would have crossed the line.

Q. On the south side of the river, state whether or not it indicates to you there that they are following the top of the ridge as it does on the north side of the river?

A. It does after a distance from the river.

Q. Examine the map carefully near the mouth of the stream or the creek marked "creek" on the map, and state whether it shows that it follows directly up the stream or whether it angles off from it, giving your answer from your knowledge and experience as a surveyor?

A. It appears that for a little more than half a mile the line follows close to the stream. It then turns at an angle of about sixty degrees to the right or westward and runs something like one-eighth of a mile; then turns at an angle of about somewhere from seventy-five to ninety degrees to the left or eastward and runs about one-eighth of a mile, possibly a little more. It then turns at an angle to the right of about sixty degrees and runs about one-eighth of a mile, leaving the creek. It then turns at a very slight angle, possibly ten degrees more to the right or westward, and runs another one-eighth of a mile, getting still further from the creek; it then turns at an angle of about sixty degrees to the left or eastward and runs something like one-eighth of a mile——

Q. That is as far as my question would carry you——

A. About parallel to the creek. This brings it to what appears to be the crest of the ridge, there being etching on both sides and sloping both ways.

153 Q. Is there any ridge in the neighborhood of the mouth of Slick Rock Creek that could possibly conform to this map?

A. Why, I don't know of any ridge in Tennessee or North Carolina that would fit to that map.

Q. Is there any in the neighborhood of the mouth of Slick Rock Creek that could possibly conform to that line as indicated on that map?

A. No.

Q. I lay before you a map filed as Exhibit to your deposition in the original suit. I will ask you if you recognize it?

A. I do.

Q. Near and below the mouth of Slick Rock Creek a ridge runs northwest; please explain how that ridge runs and what it connects with?

A. The spur that ends at the mouth of Slick Rock Creek runs up and joins to a mountain that runs into the bend of the Tennessee River, a continuance of that mountain to Stiff Knee Gap and Stiff Knee Knob, and there makes an acute angle to the left and runs up to the Little Fodder Stack and continues on and runs nearly south to the Big Fodder Stack, then southeast to its junction with the Hangover lead.

Mr. McQueen: Complainants except to the foregoing question and answer, because it is testimony bearing upon the line as located by the witness in the original proceedings in this cause and because it is a repetition of the testimony of the witness in the original proceedings in this cause, and not pertinent or germane to the question involved in the bill of review as to newly discovered testimony.

Q. State whether or not that ridge extending from near the mouth of Slick Rock Creek westwardly to Stiff Knee can possibly conform to the line as indicated on the newly discovered map?

A. No.

Q. Why?

A. Because the angles and distances of that newly discovered map won't follow the ridge or anywhere near the crest of the ridge.

Q. State whether or not there are any other ridges or spurs between this ridge mentioned on the original map and Little Slick Rock Creek, and if so, tell in a general way how they run?

A. There are quite a number of spurs that run off from that ridge marked "Slick Rock Ridge" on this map running south-
154 eastward and terminating at Big Slick Rock some nearly south and terminating at Little Slick Rock.

Q. Is it possible for said newly discovered map to conform to either one of those spurs?

A. No, sir.

Q. I see on your original map a spur or ridge extending westward and terminating at the junction of Big and Little Slick Rock; state whether or not it is possible for the newly discovered map to conform to that ridge?

A. No.

Q. Why?

A. It don't run in the right direction, either for the general course or for any of the angles that would extend the distance shown by that ridge.

Q. I now refer you to the map, Exhibit "B" to the deposition of D. B. Burns, and ask you if the red line north of the river approximately shows how the State line runs and reaches Tennessee River from the north?

A. Yes.

Q. Does it approximately show where the line strikes the river?

A. It does.

Q. About half a mile above the mouth of Slick Rock Creek; is that correct?

A. Yes.

Q. On the south side of the river, Mr. Burns' map indicates that the line runs up Slick Rock Creek and with its meanders to or near the junction of Big Stack Gap Branch with the main creek, and thence up a spur at or near Big Fodder Stack. Is there anything on the newly discovered map to show that by any possible means the line as projected upon said newly discovered map followed Slick Rock Creek as indicated upon that map?

A. I don't see anything on it that would show that that is called Slick Rock Creek or any other creek—that distance. This map very clearly shows to me that within a mile and a half from the river they were on the crest of a ridge and followed the crest of the ridge somewhere, I don't know where.

Q. Is it possible for you or any other surveyor to take that map and indicate what ridge they were following?

A. Well, I do not see how it is.

Q. Could you do it?

A. No, the map is so inaccurate, the scale so small, no names given to the mountains or streams, that I wouldn't know how to follow

the line by that map. And beyond what I know of the
155 line the map is confusing even where the line is undisputed and misleading.

Q. State whether or not the general course of the contour of the map showing the southwesterly course, is approximately correct?

A. Approximately it is. As a sketch map to show that they followed the crest of a ridge and across streams, it would be a correct map for that purpose. But as for showing what ridge they followed or where they crossed streams, the map is not worth the paper it is on.

Q. Further on southwest the map indicates that they run around the head waters of Tellico River. I will ask you if you with any other surveyors actually surveyed the ridge or what you understand to be the State line ridge run around the head waters of the Tellico River, and if so, what surveyor was with you?

A. O. W. Muller and J. K. Wilson were with me, and we surveyed the water shed around the Tellico River.

Q. Is J. K. Wilson living or dead?

A. He is dead.

Q. How long has he been dead?

A. About ten years, I think; maybe longer.

Q. State whether or not this newly discovered map shows the correct contour of the ridge running around the head waters of Tellico River, and if not, please explain from your actual knowledge from actual survey where the discrepancy is?

A. It don't by any means show the correct contour of the ridges. It merely shows that they went around the ridge around the head of Tellico River, but it don't properly locate that ridge. At points on that map the ridge is one mile or more wrong. At the point called Rocky Knob I think if properly plotted on that, would fall at least one and one-half miles from the line as shown there.

Q. You are speaking now from your actual survey and actual knowledge of the topography of the country?

A. Yes.

Q. State if you continued the line to the Hiwassee River as indicated on this map and as shown by the marked trees and also crossing the river?

A. I continued it to the river; I did not cross the river, that is, I did not run the line across the river.

Q. If there is any inaccurancy of the line at the crossing of the Hiwassee River, please explain that?

A. It shows a line crossing Hiwassee River diagonally one time.
The line actually crosses Hiwassee River three times, leaving
156 in the bend on the side between the crossings ten or twelve acres of bottom land, that is not shown on this map.

Q. As a surveyor of experience, would you have located a line up Slick Rock Creek for a distance of five miles following the creek and had afterwards platted the same, would you have shown the creek as you followed it?

A. I certainly would.

Q. State from your knowledge of other and experienced surveyors whether they always in surveying and platting, indicate on their

plat the streams and especially if they follow a stream for that distance?

A. They nearly always indicate on their maps streams that are of any prominence whatever, and especially where they run with a stream it is indicated on the map and in the notes; first in the field notes and then on the map as platted from the notes, especially streams of the volume of Slick Rock.

The deposition of this witness is here closed subject to cross-examination by the complainant at a future date. This is done at the instance of counsel for W. R. Hopkins et al., but not by the consent of counsel for the other side.

And further deponent saith not.

W. D. HALE.

Sworn to before me this May 8th, 1908.

[SEAL.] R. S. C. HUTCHINSON,
Notary Public.

W. D. Hale, sixteen miles, two days.

Stipulation.—It was agreed by and between counsel that the notary public might sign the name of the witness to this deposition without his having read the same before being signed.

The next witness, O. W. MULLER, being duly sworn, deposed as follows:

Examined by Mr. MCCROSKEY:

Q. What is your age, residence and occupation?

A. I am seventy-three years old; I am a land surveyor, and my residence is Sweetwater, Tennessee, Route 1.

Q. What experience have you had, if any, as a land surveyor?

A. I have been doing that kind of work for over forty years.

Q. What experience have you had in surveying land lines in the mountains of East Tennessee?

A. I have surveyed pretty much all the mountain lands in Polk County and various other places, some in the State of Georgia and some in upper East Tennessee, and some in Monroe County.

157 Q. What experience, if any, have you had in locating the State line between Tennessee and North Carolina?

A. I was on that survey twelve years ago running the State line from close to the turnpike road to Hiwassee River.

Q. Are you the same W. O. Muller whose deposition was taken in the original suit?

A. Yes, sir.

Q. How much time in all have you devoted to locating the State line between North Carolina and Tennessee?

A. About seven weeks.

Q. How much of that time was given particularly to the line in dispute in this cause?

A. Well, about four or five weeks.

Q. Have you seen the original map filed at Nashville, a certified copy of which is filed as Exhibit "A" to the deposition of D. B. Burns?

A. Yes, sir.

Q. How did it happen that you saw the map?

A. I was sent there by Mr. Seymour to get a certified copy—to hunt it up and get a certified copy and to look for other papers.

Q. What first called your attention to that map, if anything?

A. I received a message from Mr. Seymour that a report of that kind of a map had been found, and requesting me to go and see about it.

Q. I will ask you if you saw a notice or publication in any newspaper stating that such a map was found, and if so state what paper it was, the date received, and whether or not you preserved a copy or portion of said paper showing said publication?

Mr. McQueen: We object to that question, on the ground that it is immaterial and irrelevant.

A. I did. It was published in the Tribune of this City, about the 6th of March, 1906, I think, is the date—the 6th or 7th of March. I preserved a copy of said paper.

Q. I will ask you if your affidavit has been heretofore taken in this cause, and with said affidavit you filed a copy of said paper showing said publication?

A. Yes, sir.

Q. I hand you the affidavit and the accompanying publication. Please examine them and state whether that is the same paper and file of the affidavit and copy of publication as Exhibit A to this your deposition?

A. Yes, sir; and I so filed the same as requested.

158 (Said affidavit, with copy of publication attached, are marked Exhibit "A" to this deposition, but is returned to the general files in this cause, in the custody of the Clerk of this Court, for the reason that it is a part of the files before being offered as an exhibit in this deposition.)

Q. You found the map at Nashville, did you?

A. Yes, sir.

Q. State whether or not you got a copy?

A. Yes, sir.

Q. State whether or not the copy that you obtained is practically the same as the copy filed as Exhibit "A" to the deposition of D. B. Burns in this cause?

A. It is practically the same, I think, it looks just like it.

Q. State whether or not you have undertaken to locate the State line in the locality where this line is in dispute?

A. Yes, sir.

Q. And if so, state the first preliminary steps that were taken by you, and with whom?

A. Well, the first I tried to get the bearings and distances from the map, making proper allowance for the variation of the magnetic

needle, and I was not able to go to the mountains at that time, and I did not go; Mr. Hale went by himself, so I understood.

Q. State whether or not you undertook to get the degrees and angles as indicated upon said map so that you could undertake to run the line in accordance with said degrees and angles?

A. I did.

Q. State whether or not it was possible to take those calls and locate the State line by the map as shown to you today?

A. We couldn't fit it to the territory.

Q. Please state what actual surveying you did yourself in connection with Mr. Hale?

A. Do you want the surveying that was done ten years ago?

Q. No, sir, just this last time.

A. We went up the Tennessee River and started at the Cooper Camp Branch, and ran up a spur until we struck the State line ridge, where the State line is undisputed, on the north side of the Tennessee River.

Q. How far was this point from the river?

A. I haven't got my notes.

Q. Approximately?

A. Approximately it is about a couple of miles.

Q. Proceed and state what you did?

159 A. And then we followed the line and looked at the marked trees that we had seen twelve years before. Some of them had been mutilated by being blocked; others we found, and then we came down to the river, following that line, at the river we found the same old spruce pine, or hemlock; whichever you call it; it had been blocked on one side. When we first saw it, it was a well-defined State-line mark but one side had been blocked; the other side was still intact. This tree stands between two little branches, on a little ridge, which is a continuance of the spur that comes down from the main ledge of the river. Understand, it stands on top of the ridge, between the two branches.

Q. Mr. Muller, please state what you did with a view of locating the line, taking this newly discovered map as your guide?

A. We then tried as a base at the crossing of the river, and tried to fit it back towards the north, and we did not succeed, and we tried to fit it by crossing the river; tried to fit those bearings on the south side of the river, and it wouldn't work. Then we went to the mouth of Slick Rock Creek and meandered that creek—run up that creek about two miles, and it was not satisfactory there; then we went up the Tennessee River to the mouth of Cheah and run up it, to get the location of it. That is about all the surveying we did.

Q. Is it possible for you, as a surveyor, or for any other competent surveyor, to take that line or tracing and locate the State line as indicated on that map?

A. The map indicates that the State line runs on top of the ridge from the shading, and it indicates that it crosses the river at right angles, and I could not locate that line on top of a ridge in that country the way it is sketched here on this map.

Q. North of the river the line shows the shading on the left hand

side, or southeast side. From your experience and knowledge as a surveyor, what did that shading indicate?

A. It indicates that the line is on top of the ridge.

Q. South of the river you find the same shading. What does that indicate also?

A. It indicates the same thing.

Q. If I understand you, then, if it was following the ridge on the north side of the river the same shading would necessarily indicate that it was following a ridge on the south side; is that correct.

A. Yes, sir.

160 Q. Near the mouth of the stream marked "creek" on the south side of the river, how does the marked line indicate the running, with reference to said stream or creek?

A. It indicates that it runs on the east side—the line runs on the east side of it—the line runs on the southwest side of the water course. And I see some shading on both sides of the line here, right close to the river.

Q. What does that shading indicate?

A. It indicates that between the shading is the top of a ridge.

Q. State whether or not it indicates that the ridge is followed where the shading is shown?

A. That is my opinion of it.

Q. State whether or not there are any angles in that part of the line which shows running along the stream or creek, and tell what those angles are?

A. It runs for half a mile with no angle; it is a kind of a bend here, and then it turns to the right and runs perhaps forty rods, and then turns again to the left, running about the same distance, and then again to the right running about eighty rods, or perhaps 160, perhaps half a mile.

Q. Are you thoroughly familiar with the topography of the coutry at and near the mouth of Slick Rock Creek, and on both sides of the creek?

A. I cannot say that I am thoroughly familiar with it.

Q. State whether or not you have been there with a view of examining the topography, and particularly as to the ridges?

A. I have.

Q. Is there any ridge at or near the mouth of Slick Rock Creek that would indicate this line, as shown on this newly discovered map, running the same course as indicated by that map?

A. We tried to fit the courses and the map to the ridges there, but could not succeed. We could not find anything to fit it.

Q. Are there any ridges or spurs running out from near the mouth of Slick Rock Creek on the lower south side, and if so, in what direction does the ridge run?

A. From the north side to 3-ridges it runs over the river from the main State line ridge. The ridge from the mouth of Slick Rock Creek runs in a southwesterly direction. It is a little south of west.

Q. What ridge does that connect with?

A. I think they connect finally with the Big Stack of that lead.

161 Q. What does it reach before it gets to the Big Stack, if anything?

A. It reaches what they call Stiff Knee Gap.

Q. Where is that with reference to the head of Little Slick Rock?

A. It is right above the head of it.

Q. State whether or not, following continuously the spur of the mouth of Slick Rock to Stiff Knee and around that way, whether it would pass Stiff Knee and thence Little Fodder Stack and Big Fodder Stack?

A. Yes, sir. You can follow the ridge around that way; there are some deep gaps, one deep gap that I know.

Q. Between that ridge and the mouth of Little Slick Rock Creek are there any other spurs and ridges?

A. Yes, sir.

Q. And if so, what do they connect with?

A. They all run from the Big Stack lead down to Slick Rock on that side.

Q. No, I am speaking of on the other side, Mr. Muller?

A. On the east side?

Q. No, on the west side or northwest side; I am speaking of on this side over here (indicating on map); here is the Big Stack over here; are there any spurs along in here?

A. Those spurs, they run to the river.

Q. Are there any spurs running from Slick Rock Ridge towards Slick Rock Creek?

A. Yes, sir.

Q. State whether or not you followed up any of those spurs?

A. Yes, sir, I followed up some of them.

Q. Please state whether it is possible to make the newly-discovered map and the line indicated thereon correspond with and follow any ridge on the west, or northwest, side of Slick Rock Creek?

A. It is not possible to lay those bearings and distances down on any of those ridges.

Q. Have you recently examined the topography of the country on the south side of the river and above the mouth of Slick Rock Creek with reference to this newly-discovered map?

A. Yes, sir.

Q. Is it possible to locate that map with reference to any particular ridge in that locality?

A. No, sir; I think not.

Q. State whether or not you examined the ridges and the section of country in that neighborhood of that particular view to see whether any of them would fit that map?

162 A. Yes, sir, and we failed to fit them.

Q. From the map it would indicate that the Commissioners in crossing the Tennessee River from the northeast to the southwest, crossed at or near the mouth of a stream, which stream is shown on said map. Is it possible to fit the stream and the ridges in the locality of Slick Rock Creek from said map?

A. No, sir.

Q. Is there any other stream in that locality which would come

as near, or nearer answering the stream as shown on the map, and if so, what stream is it?

A. Cheah River.

Q. Where is Cheah River located, with reference to where the line strikes the river on the north side?

A. About a mile and a quarter above.

Q. Above what?

A. Above where the line strikes the river; above that spruce pine that is marked on the bank of the river.

Q. Are there any spurs from the main ridge on the north side of the river leading down towards Cheah River?

A. Yes, sir.

Q. Are there any spurs on the south side leading from or near the mouth of Cheah River to the main Hangover lead?

A. Yes, sir.

Q. Have you examined those ridges?

A. I have examined several of them.

Q. Are any of those ridges accessible to persons passing through the country?

A We surveyed two of them.

Q. State whether or not persons going through that country, who are not familiar with it, would be as apt to follow the spur leading down to and away from the mouth of the Cheah River as any other spurs in that section, and if so, explain why?

A. Why, I was in that condition when I first went there and traced the State line; on the State ridge, I came to a place where it forked, and we took the left hand as the most prominent spur running down to the river. This was about 1900 feet above where we found the spruce pine. There was another spur that runs to the right, and runs lower down on the river; runs down about the mouth of Slick Rock Creek. It winds a good deal; it is not a straight spur; I believe they call it Lester Ridge. And then there was a middle spur, upon which we found the marked State line that runs down to the spruce pine where we crossed the river.

163 Q. Getting back to my question, tell us why a person would be inclined to follow those ridges to the mouth of Cheah River, and then follow a ridge to the main ridge on the south side. Is that more accessible in there, or not? Please explain?

A. They are equally accessible. Those spurs are all tolerably rough, but they are about equally accessible, and what determines one that is unacquainted and is hunting the line would be the height of the ridges as showing the main ridge.

Q. Are those ridges in that particular locality the highest?

A. Well, the most prominent ridge you see from the north side of the river is the Hangover lead.

Q. I am speaking of the spur that leads down to the mouth of the Cheah River.

A. Certainly. I say, standing on the north side of the river looking across, you see the most prominent ridge over there, which is the Hangover lead; it is the highest. That answers the question, doesn't it.

Q. The question I want you to answer is, Mr. Muller, is: Taking strangers, who are in that neighborhood and desiring to cross the river, where would be the most convenient, accessible place, following the ridges and taking the river itself, the topography of the country, to get from one side of the river to the other and then reach the main ridge?

A. You would have to cross the river just below the mouth of the Cheah. It is the only place you can cross there with safety. There is an eddy there, and the rest of the river is very rough down below there.

Q. Is there a ridge running down to that point from the north side?

A. Yes, sir.

Q. State whether there is a ridge running from near that point on the south side to the Hangover lead?

A. Yes, sir.

Q. Taking Exhibit "B" to the deposition of D. B. Burns on the north side of the river, that red line indicates the State line to the Tennessee River on the north side. State whether or not that line approximately shows the State line on the north side?

A. I think it does.

Q. On the south side, the red line indicates the State line as located by Mr. Burns up Slick Rock Creek. Is it possible to take the newly discovered map and locate the line up Slick Rock Creek, as they have it on the map, and if not, please state why?

164 A. It is not possible, because it makes a gap here of half a mile that is not accounted for.

Q. State whether or not it is possible to locate it off Slick Rock Creek, taking that map as your guide?

A. We did not do it.

Q. Well, can you do it?

A. No, sir, we could not—couldn't do it.

Q. Is it possible to do so, Mr. Muller, taking that map as your guide?

A. No, sir, it is not possible.

Q. Is there any indication on this newly discovered map that shows that a line would follow up any stream for a distance of five miles?

A. No, sir.

Q. Is it possible to construe the map in any way, showing that it had followed Slick Rock Creek, taking the shading and all together?

A. There is no indication that it followed up a valley. The indications are that it had taken the crest of the mountain just as quick as it could leave the river.

At the request of complainants' counsel, this deposition is closed, with the request to cross-examine at a future date, if so desired. Which is not consented to by counsel for the Smoky Mountain Land, Lumber and Improvement Company.

And further deponent saith not.

O. W. MULLER.

Sworn to before me this May 8th, 1908.
[SEAL.] R. S. C. HUTCHINSON,
Notary Public.

Stipulation.—It was agreed by and between the parties that the Notary Public might sign the name of the witness to this deposition, the same not having been read over to the witness before signing, nor after nor before being written up.

O. W. Muller, forty-five miles, two days.

Certificate.

I certify that being a stenographer and a Notary Public that I took the foregoing depositions in the exact language of the witnesses and reduced them to typewriting; that the same were not read over by the witnesses after they were given nor after the same were written up; that the signatures to the same were waived by counsel for both parties.

I also certify that I am not in any capacity in the regular employ of the party in whose behalf these depositions are taken, nor in the regular employ of his attorneys; and I certify that I am not interested in the case, nor of kin or counsel to either of the
165 parties, and that I delivered said depositions to the Clerk of this Court, at Knoxville, Tennessee, without their being out of my possession, or altered after they were taken.

[SEAL.] R. S. C. HUTCHINSON,
Notary Public.

In the United States Circuit Court, Knoxville, Tennessee.

No. —.

W. R. HOPKINS et al., J. W. BELDING et al.,
vs.
CHARLES HEBARD et al.

The deposition of T. E. H. McCROSKEY, taken upon notice at the office of the Clerk of the United States Circuit Court, Knoxville, Tennessee, on the 30th day of October, 1908, to be used as evidence on behalf of respondents in the above styled cause. Said deposition being taken in the presence of E. P. McQueen, attorney for complainants, and T. W. Peace for respondents.

Said witness of lawful age, being duly sworn, deposed as follows:

Q. What is your profession?

A. I am a lawyer.

Q. What connection had you with the original suit of Charles Hebard against J. W. Blaisdell and others in this court, litigation over the State line between North Carolina and Tennessee, at what is known as Slick Rock Creek?

A. I was one of the attorneys representing complainant, Charles Hebard, in said cause, and actively participated in the litigation

from its inception until its final termination in the United States Circuit Court of Appeals at Cincinnati.

Q. When was the case finally heard in the United States Circuit Court of Appeals at Cincinnati?

A. About the last days of February, 1900.

Q. When did you first get notice of the decision by said Circuit Court of Appeals?

A. A few days after the case had been argued before said court, and after my return home from Cincinnati, received communication from the clerk stating the case had been affirmed. My recollection now is that the case was argued before said court, composed of Judges Taft, Lurton and Day, and that it was the last case heard by the court before the resignation of Judge Taft took effect, preparatory to his going to the Philippines, his resignation to take effect the next day, or rather at midnight on the day the case was
166 argued, and as I understood the court in consultation that night, after adjournment, affirmed this case, but the opinion afterward prepared by Judge Lurton was not filed until about the 13th day of July, 1900, and final decree pronounced confirming the case on that day.

Q. When did you first communicate with your client, Charles Hebard, of the final termination or decision of the case by the United States Circuit Court of Appeals?

A. Immediately after getting information from the Clerk of said Court I wired Mr. Hebard, who then lived at Chestnut Hill, near Philadelphia, Pa., that he had gained the suit, and I saw him two or three months after that, and the decision was discussed between us.

Q. What do you know about the sale of the land by Charles Hebard to P. C. Blaisdell, W. F. Blaisdell, L. B. Seibert, F. L. Andrews and others, and what, if anything, do you know about the knowledge of the purchasers, Blaisdell and others, as to the litigation of the State line and final termination of said suit before the sale to Blaisdell and others was consummated?

A. I know that Blaisdell and others bought the land; that the negotiations were pending for several months—at least two or three months; the proposed purchasers came with experts to examine the timber on the tract of land, and they also came to Madisonville to investigate titles, and conferred with me in regard to the title to the land. It was explained to them by me that there had been litigation over the State line which involved several thousand acres of the land which they proposed to buy, and I explained to them that the litigation had been finally terminated in the United States Circuit Court of Appeals at Cincinnati, and that there was no appeal therefrom. Otherwise the title to the land being satisfactory, and they apparently being satisfied that the State line litigation was settled, bought the land; the deal was closed and deed executed. I herewith file as Exhibit "A" to my deposition a certified copy of the deed from Charles Hebard to P. C. Blaisdell and others. After this sale was made, some of the original purchasers from Charles Hebard not being able to meet their part of the purchase price, or for some

other reason decided to drop out of the deal, and thereupon a corporation was formed in the name of the Smoky Mountain Land, Lumber and Improvement Company, and the lands were then conveyed to said company. I herewith file, as Exhibit "B" to my deposition, certified copy of the deed, of F. L. Andrews and others to said company. Before this last deed was executed some of the principal stockholders in said company came to examine the
167 land and timber thereon, and also had attorneys to come to Madisonville and investigate titles to the land, and the whole situation was again explained to them by me, and also litigation in regard to the State line in Slick Rock section, and also that said litigation had been finally determined, and thereupon the deed was executed and accepted by the company. In regard to the purchase price of the land, I know that the sum agreed upon to be paid to Charles Hebard for the lands, as shown by the deed, Exhibit "A" to my deposition, was $233,500, which included interest. My recollection now is that the purchase price was $210,000, but the purchasers were granted time on a large part of the purchase price upon their paying interest, and the interest was added to the face of the deed, making said sum of $233,500. This deed was not delivered to the parties at the time, but was placed in escrow in the Drexel Bank in Philadelphia, and held in escrow until the purchase price was paid, which was a year or two, perhaps, after the date of the deed. I do not just remember when the purchase price was paid and the deed finally delivered, but it was sometime afterwards, one or perhaps two years.

Q. After Charles Hebard sold to Blaisdell and others, did you still represent the purchasers as attorney, and if so, for how long?

A. After P. C. Blaidsdell and others bought the land they retained me as their attorney and I acted as such while they owned the land; and when they sold to the Smoky Mountain Company I was again retained by said Company and acted as such during the time that they owned it, and am still representing the owners of the land at the present time. I have been attorney for the successive owners of the land from and prior to the time Charles Hebard owned the land.

Q. To your knowledge, or from information obtained by you, have any of the successive owners since Charles Hebard had any knowledge that there had been newly-discovered evidence in this cause, or any information coming to your knowledge or to that of your clients that a bill of review would be filed or the case in any way reopened?

A. So far as I know, no information or knowledge of any kind ever came to any of the successive owners as to any question about the title growing out of the State line litigation, or that any newly-discovered evidence had been found, or that any effort would be made to re-open the litigation until the petition for leave to file a bill of review was filed in the United States Circuit Court of Appeals at Cincinnati. This came as a surprise to me, and being in con-
168 stant communication with the owners, I am quite sure that they had no knowledge of any prospective litigation or re-opening of the case in any way because of newly-discovered evidence or

otherwise. Knowledge of the filing of the petition for bill of review was first communicated to me by attorneys on the other side, and I communicated without delay to my clients, and I am quite confident that they had no knowledge or suspicion of anything of the kind until so informed by me.

This deposition is here closed, and the complainant reserves the right to cross-examine and make all legal exceptions.

T. E. H. McCROSKEY.

Subscribed and sworn to before me this 30th day of October, 1908.

[SEAL.] W. L. EDINGTON,
Dep. Clerk.

Copy.

CHARLES HEBARD
to
P. C. BLAISDELL et als.

This indenture made and entered into on this the 16th day of July, 1900, by and between Charles Hebard of Pequaming, Basaga County, Michigan, party of the first part, and Mary C. his wife, and P. C. Blaisdell, W. F. Blaisdell, L. B. Seibert, H. H. Cobb, F. L. Andrews, F. A. Raymond and S. A. Holbrook parties of the second part:

Witnesseth:

That the party of the first part, for and in consideration of the sum of Two Hundred and Thirty-three Thousand Five Hundred Dollars, hereby bargains, sells, transfers and conveys to the parties of the second part all his right, title, claim and interest in and to the following described real estate to-wit: Containing Forty-one Thousand (41,000) acres, more or less, situated in the seventeenth (17) and twentieth (20) Civil Districts of Monroe County, Tennessee, in the Ocoee Land District, being same tracts of land purchased by the party of the first part from J. H. Simonson, John Rhinesmith, Wm. Fleming's heirs, Mrs. Amelia Burgess and husband, Callaway heirs, Mrs. Mary E. Hopkins and husband, T. E. H. McCroskey and H. M. McCroskey, Geo. P. Wetmore and perhaps from others, the same covered by original grants from said state and by mesne conveyance, and set out by sections and quarter sections and other boundaries as follows:

169 Ocoee Land District, 6th Range, East of Basis Line, Second (2) fractional township North, southeast and southwest quarters of section 34, containing 320 acres under grant No. 4607; southeast and northwest quarters of section 33, containing three hundred and twenty (320) acres, under grant No. 4608; southwest and southeast quarters of section 35, containing 320 acres under grant No. 4618; sections 2 and 11 containing 1280 acres, under grant No. 6398; all of fractional sections 1 and 12, under grant No. 6399; all of sections 9 and 10 under grant No. 6400; all of sections

20 and 21, under grant No. 6401; all of sections 30 and 31 and northwest and southwest and southeast quarters of section 32, containing 1760 acres under grant No. 6402; all of sections 17 and 19 and the northeast, southwest and northwest quarters of section 18, containing 1760 acres, under grant No. 6403; all of sections 27, 28 and 29, under grant No. 6404; all of sections 15 and 22, under grant No. 6405; all of sections 7 and 8, under grant No. 6406; all of fractional sections 14 and 23 under grant No. 6407; northwest and southwest quarters of fractional section 26, northeast and southwest quarters of section 33; northwest and northwest quarters of section 34; northwest fractional quarter of section 35, under grant No. 6419.

Ocoee Land District, 6th Range, East of Basis Line, First (1) fractional township south, and southeast and southwest quarters of section 11, under grant No. 4609; northeast and northwest quarters of section 11, under grant No. 4610; northwest and northeast quarters of section 10, under grant No. 4611; southeast and southwest quarters of section 10 under grant No. 4612; northeast and southeast quarters of section 4, under grant No. 4613; southeast and southwest quarters of section 3, under grant No. 4614; northwest and northeast quarters of section 3 under grant No. 4615; northwest and northeast quarters of section 2, under grant No. 4616; southeast and southwest quarters of section 2, under grant No. 4617; northwest and southwest quarters and a fraction of the northeast and southeast quarters of section 1; northwest and southwest quarters and fractions of southeast and northeast quarters of section 12, and northwest and southwest fractional quarters of section 13, under grant No. 6408; all of sections 5 and 6, and northwest and southwest quarters of section 4, under grant No. 6409; all of sections 14 and 15, under grant No. 6410; and all of sections 8 and 9, under grant No. 6411;

Ocoee Land District, 5th Range, East of Basis Line, First (1) fractional township north, and southeast quarter of section
170 14 under grant No. 5096; northeast, southeast and southwest fractional quarters of section 12; all of section 13; and northeast fractional and southwest quarter of section 14, under grant No. 6412; northeast, southeast and southwest quarters of section 35; and all of section 36, under grant No. 6413; sections 24 and 25, and the northwest fractional and southeast fractional and the northeast quarter of section 26, under grant No. 6414; northwest fractional quarter of section 14, southeast fractional quarter of section 15, northeast, southeast and northwest fractional and southwest fractional quarter of section 22; all of section 23, and northeast fractional quarter of section 27, under grant No. 6416.

Ocoee Land District, 5th Range, East of Basis Line, Second (2) fractional township north, being all of section 1, and the southeast fractional, southwest fractional, and northeast and northwest quarters of section 2, under grant No. 6415.

Ocoee Land District, Ranges 5 and 6, East of Basis Line, southeast quarter of section 18, fractional township 2, north, Range 6, and northwest quarter of section 35, fractional township 1, north, and Range 5, under grant No. 8977.

Ocoee Land District, Range 6, East of Basis Line, First (1) fractoinal township south sections 19, 20, 21, 22, and 23, and northwest and southwest quarters of section 25, under grants numbered 6130, 6129, 6128, 6127, 6126, 5475, and 6125, containing thirty-five hundred and twenty (3520) acres more or less and known as the Callaway tract.

Ocoee Land District, Range 6, East of the Basis Line, First (1) fractional township south, and sections 26, 27 and 28 and southeast, southwest and northwest quarters of section 36, containing 2400 acres more or less, and known as the Cooke or Hopkins lands.

Fractional township 2, Range 6, Northeast of Basis Line and being northeast fractional quarter of section 23, northeast fractional quarter of section 35, and south half of fractional section 36, and northwest forty (40) acres of southwest quarter of section 6. Being lands purchased from Geo. P. Wetmore.

Also, Five thousand (5,000) acres, more or less, lying in 17th Civil District of Monroe County, Tennessee, beginning in the center of Little Tennessee River, opposite the mouth of Slick Rock Creek; thence up the center of said river with its meanders; when reduced to a straight line, south 68 degrees east 162 poles to a point in said river, bearing south 2 degrees East from a spruce pine and a rock corner on the north bank of Tennessee River, the southeast
171 corner of what is known as the Sanford tract in Blount County, Tennessee; thence south with the state line to stake and pointers and sweetgum tree on south bank of said river at foot of ridge, forming the eastern divide and boundary of the waters of Slickrock Creek thence up the leading ridge, giving approximately the bearings, the line running with the main crest of the ridge leading up to Hangover mountain, being state line between Tennessee and North Carolina, and as follows: South 31 west 11 poles; south 51 west 2 1-2 poles; south 65 west 18 poles; south 72 west 14 poles to a stake on point of ridge; south 86 west 7 poles to a point on ridge; south 19 west 5 poles to blazed pine; south 53 1-4 west 12 poles to a point on ridge; south 63 west 11 poles to a point on ridge; south 85 3-4 west 11 1-2 poles to a chestnut; north 81 3-4 west 8 poles; south 69 1-2 west 21 3-4 poles to a chestnut; south 9 1-2 west 21 poles to a black oak; south 40 1-4 west 14 poles; south 62 west 4 1-2 poles to a hickory; south 3 1-2 East 5 9-25 poles; south 58 west 15 1-5 poles; south 10 west 15 17-25 poles to a dead tree; south 82 2-3 west 10 poles; south 12 west 15 1-4 poles to a pine; south 2 west 12 poles, passing a depression at 2 poles, to a point; south 29 west 3 4-5 poles; south 45 east 8 poles; south 30 east 22 poles, passing a depression at 10 poles to a point at turn; south 7 1-2 west 8 poles; south 45 1-2 west 7 poles; south 68 west 10 9-25 poles at a small black oak; north 86 3-4 west 3 7-25 poles to a point near a stone corner; south 28 3-4 west 16 1-5 poles, passing Sourwood Gap at 14 poles, to small sourwood; south 15 1-4 west 17 3-5 poles to a black oak; south 35 east 6 6-25 poles to a point at turn; south 47 west 12 18-25 poles to a black oak; south 76 1-2 west 20 1-10 poles, passing an oak at 2 poles, to a chestnut oak; south 2 3-4 west 20 poles; south 15 east 8 poles; south 28 west 12 2-25 poles; south 46 west 4 22-25 poles;

south 15 west 12 poles to a stake in Slick Rock Creek Gap; thence on southwestwardly, continuing with the state line on the leading ridge forming the eastern watershed of Slickrock Creek, and dividing the waters of Slickrock Creek from those of Cheowah; including all lands on the waters of Slickrock Creek to the point in the state line between North Carolina and Tennessee, where the lands conveyed to Charles Hebard by deeds of Fleming, Simonson and Rhinesmith join to said State line; thence with the said Hebard land to the beginning. Being same land conveyed by T. E. H. McCroskey and H. M. McCroskey to the said Charles Hebard.

It is not intended herein to convey section 16 of the school land, which is located in the second (2) fractional township north, Range 6th Ocoee District, East of Basis Line, nor forty-five (45) acres heretofore conveyed by the said Charles Hebard to W. P. Stratton, which is situated on Sassafras Mountain, and beginning at common corner of sections 20, 21, 28 and 29, first (1) fractional township South, Range 6, Ocoee District, East of the Basis Line, and the same are hereby expressly excluded from the foregoing boundaries. All the above described lands lie contiguous and in one body, and are bounded on the north by lands of Wetmore and Stevenson heirs; on the east by the state line between Tennessee and North Carolina; on the south by Wetmore and Stevenson heirs; W. R. Reynolds and others; and on the west by Wetmore and Stevenson heirs; the White Oak Flats Lands, and the boundary line between the Ocoee and Hiwassee Land Districts.

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The title to all the above described lands being in the party of the first part, he doth hereby warrant the title to the same to the parties of the second part, their heirs or assigns, against all the legal claim of all persons, claiming by, through or under him, but no further or otherwise.

CHARLES HEBARD. [SEAL.]
MARY C. HEBARD. [SEAL.]

Witnesses to the execution of foregoing deed:

JULIA HEBARD.
H. C. TUXBURY.

STATE OF NEW YORK,
County of New York:

Personally appeared before me, H. C. Tuxbury, a Notary Public, the above named Charles Hebard and Mary C. his wife, with whom I am personally acquainted, who in due form acknowledged the above Indenture to be their act and deed and desired that the same be recorded as such. And the said Mary C. Hebard, being of full age, and by me examined separate and apart from her said husband, and the contents of the foregoing Indenture first made fully known to her, declared that she did voluntarily and of her own free will and accord, seal and as her act and deed deliver the same without any coercion or compulsion of her said husband.

In testimony whereof, I have hereunto set my hand and seal, this 18th day of July, One Thousand Nine Hundred (1900).

HENRY CHASE TUXBURY, 76, [SEAL.]
Notary Public.

STATE OF TENNESSEE,
Monroe County:

I, J. F. Allison, Register of said County, do hereby certify that the foregoing deed, together with the certificate of Probate, was received in my office for registration at 2 o'clock P. M. the 18th day of December, 1903, and was duly noted in Note Book No. C,
173 page 94, and recorded in Deed Book No. 8, page 394 et seq.
Witness my hand at office in Madisonville, this the 19th day of December, 1903.

J. F. ALLISON, *Register.*

STATE OF TENNESSEE,
Monroe County:

I, J. F. Allison, Register of Deeds for said County and state do hereby certify that the foregoing transcript *of* a full, true and complete copy of a deed as the same appears of record in my office.
Witness my hand and seal of office on this the 13th day of May, 1908.

[SEAL.] J. F. ALLISON, *Register.*

(Endorsed:) Certified copy of deed. W. R. Hopkins et al. vs. Charles Hebard et al. Filed Oct. 30, 1908. D. L. Snodgrass, Clerk. Register's fee $3.25. Paid by McCroskey & Peace. J. F. Allison, Register.

F. L. Andrews et als.
to
The Smoky Mountain Land, Lumber and Improvement Company.

This indenture, made the twenty-eight day of January, in the year of our Lord, One thousand nine hundred and one; between F. L. Andrews and Mary W. Andrews, his wife, L. B. Seibert and Sue A. Seibert, his wife, H. H. Cobb, and Emma Louise Cobb, his wife, F. A. Raymond and Maryette Raymond his wife, S. A. Holbrook and Phœbe E. Holbrook his wife, P. C. Blaisdell and Sarah G. Blaisdell, his wife, and Walter Blaisdell and Cordelia Blaisdell, his wife, parties of the first part,

To The Smoky Mountain Land, Lumber and Improvement Company, a corporation incorporated under the laws of the State of Delaware with its principal office in the City of Wilmington, County of New Castle in said State, of the second part;

Witnesseth:

That the said parties of the first part, for and in consideration of the sum of One Dollar, lawful money of the United States of America, unto them well and truly paid by the said party of the second part, at and before the sealing and delivery of these presents, the receipt

whereof is hereby acknowledged, have remised, released and quit-claimed, and by these presents do remise, release and forever quit-claim unto the said party of the second part, its successors and assigns, all their right, title, claim and interest in and to the following described real estate, to-wit:

Containing Forty-one Thousand (41,000) acres, more or
174 less, situated in the Seventeenth (17) and twentieth (20) Civil Districts of Monroe County, Tennessee, in the Ocoee Land District, being same tracts of land purchased by Charles Hebard from J. H. Simonson, John Rhinesmith, Wm. Fleming's heirs, Mrs. Amelia Burges and husband, Callaway heirs, Mrs. Mary E. Hopkins and husband, T. E. H. McCroskey and H. M. McCroskey, Geo. P. Wetmore and perhaps from others, the same covered by original grants from said state and by mesne conveyances and set out by sections and quarter sections and other boundaries as follows:

Ocoee Land District, 6th Range, East of Basis Line, Second (2) fractional township north, southeast and southwest quarters of section 34, containing 320 acres under grant No. 4607; southeast and northwest quarters of section 33, containing three hundred and twenty (320) acres, under grant No. 4608; southwest and southeast quarters of section 35 containing 320 acres, under grant No. 4618; sections 2 and 11, containing 1280 acres, under grant No. 6398; all of the fractional sections 1 and 12, under grant No. 6399; all of sections 9 and 10, under grant No. 6400; all of sections 20 and 21 under grant No. 6401; all of sections 30 and 31, and northwest and southwest and southeast quarters of section 32, containing 1,760 acres, under grant No. 6402; all of sections 17 and 19 and the northeast, southwest and northwest quarters of section 18, containing 1,760 acres under grant No. 6403; all of section- 27, 28 and 29 under grant No. 6404; all of sections 15 and 22 under grant No. 6405; all of sections 7 and 8 under grant No. 6406; all of fractional sections 14 and 23 under grant No. 6407; northwest and southwest quarters of fractional section 26; northeast and southwest quarters of section 33; northeast and northwest quarters of section 34; northwest fractional quarter of section 35, under grant No. 6419.

Ocoee Land District, 6th Range, East of Basis Line, First (1) fractional township south and southeast and southwest quarters of section 11, under grant No. 4609; northeast and northwest quarters of section 11, under grant No. 4610; Northwest and northeast quarters of section 10 under grant No. 4611; southeast and southwest quarters of section 10 under grant No. 4612; northeast and southeast quarters of section 4, under grant No. 4613; southeast and southwest quarters of section 3, under grant No. 4614; northwest and northeast quarters of section 3, under grant No. 4615; northwest and northeast quarters of section 2, under grant No. 4616; southeast and southwest quarters of section 2, under grant No. 4617; northwest
and southwest quarters and a fraction of the northeast and
175 southeast quarters of section 1; northwest and southwest quarters, and fractions of southwest and northwest quarters of section 12; and northwest and southwest fractional quarters of section 13, under grant No. 6408; all of section 5 and 6 and northwest and southwest quarters of section 4, under grant No. 6409; all

of sections 14 and 15 under grant No. 6410; and all of sections 8 and 9 under grant No. 6411.

Ocoee Land District, 5th Range, East of Basis Line, First (1) fractional township north, and southeast quarter of section 14, under grant No. 5096; northeast and southeast and southwest fractional quarters of section 12; all of section 13; and northeast fractional and southwest quarters of section 14 under grant No. 6412; northeast, southeast and southwest quarters of section 35; and all of section 36, under grant No. 6413; sections 24 and 25, and the northwest fractional and southeast fractional and the northeast quarter of section 26, under grant No. 6414; northwest fractional quarter of section 14; southeast fractional quarter of section 15; northeast, southeast, northwest fractional and southwest fractional quarter of section 22; all of section 23 and northeast fractional quarter of section 27, under grant No. 6416.

Ocoee Land District, 5th Range, East of Basis Line, Second (2) fractional township north, being all of section 1 and the southeast fractional, southwest fractional, and northeast and northwest quarters of section 2, under grant No. 6415;

Ocoee Land District, Ranges 5 and 6, East of Basis Line, southeast quarter of section 18, fractional township 2 North, Range 6, and northwest quarter of section 35 fractional township 1, north and Range 5, under grant No. 8977.

Ocoee Land District, Range 6, East of the Basis Line, First (1) fractional township south, sections 19, 20, 21, 22 and 23 and northwest and southwest quarters of section 25, under grants numbered 6130, 6129, 6128, 6127, 6126, 5475, and 6125, containing thirty-five hundred and twenty (3520) acres more or less, and known as the Callaway tract.

Ocoee Land District, Range 6, East of the Basis Line, First (1) fractional township south, and sections 26, 27 and 28, and southeast, southwest and northwest quarters of section 36, containing 2,400 acres more or less, and known as the Cooke or Hopkins lands.

Fractional township 2, Range 6 North, east of the Basis line, and being northeast fractional quarter of section 23, northeast fractional quarter of section 35, and south half of fractional section 36,
176 and northwest forty (40) acres of southwest quarter of section 6, being lands purchased from Geo. P. Wetmore. Also Five Thousand (5,000) acres, more or less, lying in the 17th Civil District of Monroe County, Tennessee, beginning in the center of Little Tennessee River opposite the mouth of Slickrock Creek; thence up the center of said river with its meanders when reduced to a straight line, south 68 degrees, east 162 poles to a point in said river bearing south 2 degrees east from a spruce pine and a rock corner on the north bank of Tennessee river, the southeast corner of what is known as the Sanford tract in Blount County, Tennessee; thence south with the State line to stake and pointers, and sweetgum tree on south bank of said river at foot of ridge, forming the eastern divide and boundary of the waters of Slickrock Creek; thence up the leading ridge, giving approximately the bearings, the line running with the main crest of the ridge leading up to Hangover mountain, being state line between Tennessee and North Carolina, and as follows:

South 31 west 11 poles; south 51 west 2 1-2 poles; south 65 west 18 poles; south 72 west 14 poles; to a stake on point of ridge; south 86 west 7 poles to a point on ridge; south 19 west 5 poles to a blazed pine; south 53 1-4 west 12 poles to a point on ridge; south 63 west 11 poles to a point on ridge; south 85 3-4 west 11 1-2 poles to a chestnut; north 81 3-4 west 8 poles; south 69 1-2 west 21 3-4 poles to a chestnut; south 9 1-2 west 21 poles to a black-oak; south 40 1-4 west 14 poles; south 62 west 4 1-2 poles to a hickory; south 3 1-2 east 5 9-25 poles; south 58 west 15 1-5 poles; south 10 west 15 17-25 poles to a dead tree; south 82 2-3 west 10 poles; south 12 west 15 1-4 poles to a pine; south 2 west 12 poles, passing a depression *as* 2 poles, to a point; south 29 west 3 4-5 poles; south 45 east 8 poles; south 30 east 22 poles, passing a depression at 10 poles to a point at turn; south 7 1-2 west 8 poles; south 45 1-2 west 7 poles; south 68 west 10 9-25 poles to a small black oak; north 86 3-4 west 3 7-25 poles to a point near a stone corner; south 28 3-4 west 16 1-5 poles, passing Sourwood Gap at 14 poles, to a small sourwood; south 15 1-4 west 17 3-5 poles to a black oak; south 35 east 6 6-25 poles to a point at turn; south 47 west 12 18-25 poles to a black oak; south 76 1-2 west 20 1-10 poles, passing an oak at 2 poles to a chestnut oak; south 2 3-4 west 20 poles; south 15 east 8 poles; south 28 west 12 2-25 poles; south 46 west 5 22-25 poles; south 15 west 12 poles to a stake in Slick rock Creek Gap; thence on southwestwardly, continuing with the State line on the leading ridge forming the eastern watershed of Slickrock Creek, and dividing the waters of Slick Rock Creek from those
177 of Cheowah, including all lands on the waters of Slickrock Creek to the point in the state line between North Carolina and Tennessee, where the lands conveyed to Charles Hebard by deed of Fleming, Simonson and Rhinesmith to said state line; thence with the said Hebard land to the beginning, being same land conveyed by T. E. H. McCroskey and H. M. McCroskey to said Charles Hebard.

It is not intended to convey section 16 of the school land, which is located in second (2) fractional township North, Range 6th, Ocoee District, East of Basis line, nor forty-five (45) acres heretofore conveyed by said Charles Hebard to W. P. Stratton, which is situated on Sassafras Mountain and beginning at common corner of sections 20, 21, 28 and 29, first (1) fractional township south, Range 6, Ocoee District, East of Basis Line, and the same are hereby expressly excluded from the foregoing boundaries.

All the above described lands lie contiguous and in one body and are bounded on north by lands of Wetmore and Stephenson heirs; on the east by the state line between Tennessee and North Carolina; on the south by Wetmore and Stephenson heirs; W. R. Reynolds and others; and on the west by Wetmore and Stephenson heirs, the White Oak Flat Lands, and the boundary line between the Ocoee and Hiwassee Land Districts.

The equitable title to all of the above described lands being in the parties of the first part by contract of purchase between themselves and Charles Hebard of the City of Philadelphia in the form of an option, which said contract bears date July 16th, 1900, and in

POOR COPY

which it is set forth that the said Charles Hebard and wife have upon the date of said agreement executed to the said first parties a deed with clause of special warranty, giving a description of the property contracted to be conveyed, and which deed was upon the same day deposited with Drexel & Company, Bankers of Philadelphia, to be by them held in escrow until final payment should be made.

Together with all and singular the tenements, hereditaments and appurtenances to the same belonging or in any wise appertaining, and *in* reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also, all the estate, right, title, interest, property, claim and demand whatsoever, both in law and equity, of the said parties of the first part, of, in, to or out of the said premises, and every part and parcel thereof.

To have and to hold the said premises, with all and singular the appurtenances unto the said party of the second part, its
178 successors and assigns to and for the only proper use and behoof of the said party of the second part, its successors and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year above written.

Sealed and delivered in the presence of

P. C. BLAISDELL.	[SEAL.]
SARAH G. BLAISDELL.	[SEAL.]
L. B. SEIBERT.	[SEAL.]
SUE A. SEIBERT.	[SEAL.]
H. H. COBB.	[SEAL.]
EMMA LOUISE COBB.	[SEAL.]
F. L. ANDREWS.	[SEAL.]
MARY W. ANDREWS.	[SEAL.]
F. A. RAYMOND.	[SEAL.]
MARYETTE RAYMOND.	[SEAL.]
S. A. HOLBROOK.	[SEAL.]
PHŒBE E. HOLBROOK.	[SEAL.]
WALTER BLAISDELL.	[SEAL.]
CORDELIA BLAISDELL.	[SEAL.]

STATE OF PENNSYLVANIA,
County of Potter, ss:

On the 7th day of February in the year of our Lord, One Thousand Nine Hundred and One, before me, the subscriber, a Notary Public, came the above named L. B. Seibert, and Sue A. Seibert, his wife, with whom I am personally acquainted, and they acknowledged the above indenture to be their act and deed, and *and* desired that the same might be recorded as such; and the said Sue A. Seibert being of full age, and separate and apart from her husband, by me examined, and the full contents of said indenture being first by me made known to her declared, upon such separate examination, that she did voluntarily, and by her own free will and accord

sign seal and as her act and deed, deliver the said Indenture without any coercion or compulsion of her said husband.

Witness my hand and Notarial Seal.

[SEAL.] MILTON J. POTTER,
Notary Public.

STATE OF PENNSYLVANIA,
County of Potter, ss:

On the 7th day of February in the year of our Lord, One Thousand Nine Hundred and One, before me, the subscriber, a Notary Public, came the above named H. H. Cobb and Emma Louise Cobb, his wife, with whom I am personally acquainted, and they acknowledged the above Indenture to be their act and deed and desired the same might be recorded as such; and the said Emma Louise Cobb, being of full age, and separate and apart from her husband, by me examined, and the full contents of said Indenture being first by me made known to her, declared, upon such separate examination, that she did voluntarily and of her own free will and accord, sign, seal and as her act and deed, deliver the said Indenture without any coercion or compulsion of her said husband.

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Witness my hand and Notarial Seal.

[SEAL.] MILTON J. POTTER,
Notary Public.

STATE OF PENNSYLVANIA,
County of Potter, ss:

On the 7th day of February in the year of our Lord, One Thousand Nine Hundred and One, before me, the subscriber, a Notary Public, came the above named, F. A. Raymond, and Maryette Raymond, his wife, with whom I am personally acquainted, and they acknowledged the above Indenture to be their act and deed and desired the same might be recorded as such; and said Maryette Raymond, being of full age, and separate and apart from her husband, by me examined, and the full contents of said Indenture being first by me made known to her, declared, upon such separate examination that she did voluntarily, and of her own free will and accord, sign, seal and as her act and deed, deliver the said indenture without any coercion or compulsion of her said husband.

Witness my hand and Notarial Seal.

[SEAL.] MILTON J. POTTER,
Notary Public.

STATE OF PENNSYLVANIA,
County of McKean, ss:

On the 9th day of February in the year of our Lord, One Thousand Nine Hundred and One, before me the subscriber, a Notary Public, in and for said County, came the above named S. A. Holbrook and Phœbe E. Holbrook, his wife, with whom I am personally acquainted, and they acknowledged the above Indenture to be their

act and deed, and desired the same might be recorded as such, and the said Phœbe E. Holbrook, being of full age, and separate and apart from her husband, by me examined, and the full contents of said Indenture being first by me made known to her, declared upon such separate examination, that she did voluntarily and of her own free will and accord, sign, seal and as her act and deed, deliver the said Indenture without any coercion or compulsion of her said husband.

Witness my hand and Notarial Seal.

[SEAL.]

MOSES SULLIVAN,
Notary Public.

STATE OF PENNSYLVANIA,
County of Pennsylvania:

On the 11th day of February, in the year of our Lord One Thousand Nine Hundred and One, before me, the subscriber, D. H. Jark, a Notary Public, came the above named P. C. Blaisdell and Sarah G. Blaisdell, his wife, with whom I am personally acquainted, and they acknowledged the above Indenture to be their act and deed, and desired the same might be recorded as such; and the said Sarah G. Blaisdell, being of full age, and separate and apart from her husband, by me examined, and the full contents of said Indenture being first by me made known to her, declared upon such separate examination, that she did voluntarily and of her own free will and accord, sign, seal and as her act and deed, deliver the said Indenture without any coercion or compulsion of her said husband.

180

Witness my hand and Notarial Seal.

[SEAL.]

D. H. JARK,
Notary Public.

STATE OF NEW YORK,
County of Kings, City of New York:

On the 1st day of April in the year of our Lord, One Thousand Nine Hundred and One, before me, the subscriber, George Eckstein, came the above named Walter Blaisdell and Cordelia Blaisdell, his wife, with whom I am personally acquainted, and they acknowledged the above Indenture to be their act and deed, and desired the same might be recorded as such; and the said Cordelia Blaisdell, being of full age, and separate from her husband, by me examined and the full contents of said Indenture being first by me made known to her, declared upon such examination that she did voluntarily and of her own free will and accord, sign seal and as her own act and deed deliver the said Indenture without any coercion or compulsion of her said husband.

Witness my hand and seal.

GEORGE ECKSTEIN,
Commissioner of Deeds, City of New York.

STATE OF NEW YORK,
County of Kings:

I, Peter P. Huberty, Clerk of the County of Kings, and also Clerk of the Supreme Court for said County (said Court being a Court of Record) do hereby certify that Mr. George Eckstein whose name is subscribed to the certificate of proof *of* acknowledgement of the annexed instrument and thereon written was at the time of taking such proof or acknowledgement a commissioner of Deeds in and for the City of New York, residing in the Borough of Brooklyn in said County, Commissioned and sworn and duly authorized to take the same; and further that I am well acquainted with the handwriting of such commissioner and verily believe the signature to the said certificate of proof or acknowledgement is genuine,
181 and that the same is executed and acknowledged according to the laws of the state of New York.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court, this 2nd day of April, 1901.

PETER P. HUBERTY, *Clerk.*

STATE OF PENNSYLVANIA,
County of Potter, ss:

On the 7th day of February, in the year of our Lord, One Thousand Nine Hundred and One, before me, the subscriber, a Notary Public, came the above named F. L. Andrews and Mary W. Andrews, his wife, with whom I am personally acquainted, and they acknowledged the above Indenture to be their act and deed, and desired the same might be recorded as such; and the said Mary W. Andrews, being of full age, and separate and apart from her husband, by me examined, and the full contents of said Indenture being first by me made known to her, declared, upon such separate examination that she did voluntarily and of her own free will and accord, sign, seal and as her act and deed, deliver the said Indenture without any coercion or compulsion of her said husband.

Witness my hand and Notarial Seal.

[SEAL.] MILTON J. POTTER,
Notary Public.

STATE OF TENNESSEE,
Monroe County:

I, J. F. Allison, Register of said County, do hereby certify that the foregoing deed, together with the certificate of Probate, was received in my office for registration at 2 o'clock P. M. the 18th day of December, 1903, and was duly noted in Note Book C, page 94, and recorded in Deed Book No. 8, page 399 et seq.

Witness my hand at office in Madisonville, this the 22nd day of December, 1903.

J. F. ALLISON, *Register.*

POOR COPY

STATE OF TENNESSEE,
Monroe County:

I, J. F. Allison, Register of Deeds for said County and state do hereby certify that the foregoing transcript is a full, true and complete copy of a deed as the same appears of record in my office.

Witness my hand and seal of office on this the 13th day of May, 1908.

[SEAL.] J. F. ALLISON, *Register.*

(Endorsed:) Certified copy of deed. W. R. Hopkins et al. vs. Charles Hebard et al. Filed Oct. 30, 1908. D. L. Snodgrass, Clerk. Register's fee $4.50. Paid by McCroskey & Peace. J. F. Allison, Register.

182 Be it remembered that at a Circuit Court of the United States began and held for the Northern Division of the Eastern District of Tennessee, at the Federal Court Rooms in the City of Knoxville, within said District and the Sixth Circuit, on the 2nd Monday, it being the 14th day of September, A. D. 1908, the following proceedings were had, to-wit:

MONDAY, *January 25th,* 1909.

Court met pursuant to adjournment, present and presiding the Hon. John E. McCall, Judge, etc.:

No. 1056.

CHARLES HEBARD
vs.
D. W. BELDING et al.

On application of petitioners W. R. Hopkins et al., this cause is continued until the next regular term of Court, at which time the cause will be tried without further delay.

The parties are ordered to prepare the case for trial on or before the next regular term.

Enter this.

McCALL, *J.*

O. K.

E. P. McQUEEN,
T. E. H. McCROSKEY,
Sol-.

(Endorsed:) No. 1056. In the U. S. Circuit Court at Knoxville. Charles Hebard against D. W. Belding et al. Order continuing cause. Ent'd Journal S, p. 509-10. Filed 25 day of Jan. 1909. C. A. Hill, Deputy Clerk.

Circuit Court of the United States in and for the Northern Division of the Eastern District of Tennessee.

W. R. HOPKINS et al.
vs.
CHAS. HEBARD et al.,
and
D. W. BELDING et al.,
vs.
CHARLES HEBARD et al.

The Cross-examination of O. W. Muller, W. D. Hale and W. P. Chambers, Ed Mayfield for Petitioners; D. B. Burns, T. E. H. McCroskey, and Robert T. Quarles for Respondent, Taken by Consent in the Presence of Counsel Representing all Parties, Beginning on January 8, 1909, at the Imperial Hotel, Knoxville, Tennessee.

O. W. MULLER, the first witness called for cross-examination, deposed as follows:

183 Cross-examination by Mr. MATTHEWS:

Q. Mr. Muller, you are the same W. O. Muller who has heretofore testified in this case on this branch of the case?
A. Yes, sir.
Q. And you also testified in the original case, did you not, that was tried some years ago?
A. Yes, sir.
Q. You are a land surveyor?
A. Yes, sir.
Q. And live at Sweetwater?
A. I live in Monroe County on a Rural Route; Sweetwater is my postoffice.
Q. How long have you lived there?
A. About five or six years.
Q. Where did you live before that?
A. Polk County.
Q. That is further south, down towards Chattanooga?
A. Yes, sir; south of Monroe.
Q. And you say you have been a land surveyor about forty years?
A. Yes, sir.
Q. What were you before that?
A. Well, I was a school teacher a part of the time.
Q. Where did you learn land surveying, and how?
A. Well, I learned it at school.
Q. You mean while you were a scholar, or while you were a teacher?
A. As a scholar.
Q. And how far did you carry along your schooling in that profession?

POOR COPY

A. I am entitled to the degree of A. M.
Q. What institution?
A. Hiwassee College.
Q. How high in the mathematical curriculum did you go?
A. I went through navigation—surveying navigation.
Q. You have studied geometry and trigonometry and geometrical geometry?
A. Yes, sir.
Q. Where has your surveying been principally confined?
A. Well, I have surveyed in East Tennessee and in Georgia.
Q. Surveyed any in North Carolina in Graham County?
A. No, sir.
Q. Acquainted with any of the streams over there?
A. I am acquainted with some of the streams.
184 Q. You say you are acquainted with some of the streams?
A. Yes, sir.
Q. Do you know Cheoah River?
A. Yes, sir.
Q. Where does the Cheoah River rise?
A. I don't know just where it rises; up there in the mountains somewhere.
Q. How much are you acquainted with it; how far along its banks have you been?
A. About a mile—something like a mile.
Q. From its mouth?
A. Yes, sir.
Q. Do you know how long it has been known under that name?
A. No, sir.
Q. How long have you heard of it under that name?
A. I have known it for fourteen years by that name.
Q. Where were you born?
A. In Prussia.
Q. When did you come to this country?
A. In 1846.
Q. Settle down in this country?
A. Yes, sir.
Q. Cheoah is a pretty crooked stream isn't it?
A. It runs from the mouth to where it made a sharp turn to the left.
Q. And then doesn't it run quite a length almost parallel with the Tennessee River?
A. It looks like it did.
Q. And then winds up to a sorter north or to northwest a little bit, and then goes off to the left?
A. I can't tell how it runs, only from the map. That is as far as I went.
Q. Are there any streams entering into the Tennessee River between the Cheoah and Slick Rock Creek?
A. Some little streams. One I remember, a small branch.
Q. A small branch of what?
A. A small water course.

Q. Little runs?

A. Small runs. That is what you would call it, I suppose.

Q. Nothing compared with the Slick Rock Creek or the Cheoah River, I suppose?

A. No, sir.

185 Q. Nothing that you put down on any map that you ever made of that section when you made your surveys?

A. I don't remember whether we made that little branch or not.

Q. Weren't you with Mr. Hale when he made the old survey in the old case?

A. Yes, sir.

Q. Did you take any part in preparing the map, or go over it after he prepared it?

A. Yes, sir.

Q. Look if there is laid down there any stream between the Slick Rock and where the Cheoah ought to be.

A. No, sir; there is no stream laid down.

Q. Cheoah River isn't laid down on this map is it?

A. No, sir.

Q. About how far is Cheoah River from the Slick Rock Creek—about?

A. I haven't got my notes. I think it is about a mile and a half.

Q. Isn't it further than that?

A. Not much further than that.

Q. Well, isn't it fully a mile and a half to where you found these trees marked down to the bank of the Tennessee River?

A. I don't think it is quite a mile and a half.

Q. You never measured it?

A. Yes, we measured it, but I don't remember.

Q. How does it compare in size with the Slick Rock Creek?

A. It is a good deal larger—about three times as much water in it.

Q. Is it visible from a point, say, a half a mile back up the river from the north or northwestern side of the Tennessee River? Can you look down that side and see it?

A. If you knew it was there you could see it.

Q. If you didn't know it was there you couldn't see it?

A. No, sir.

Q. Comes out in a sort of a gorge, doesn't it?

A. Yes, sir.

Q. Now, you recently went with Mr. Hale and had this map with you, didn't you—this map of 1821?

A. Yes, sir.

Q. How far back did you go to start from the Tennessee River north?

A. I think it was six thousand feet and something.

Q. Didn't go back as far as the turnpike?

186 A. No, sir. We started a little above the mouth of Cooper Camp Branch, and we run up a spur until we struck the State line on the north side of the river. It seems to me that it is about six thousand feet up there—a little over a mile.

Q. There the State line came down, and you thought it was undisputed so far as that point was concerned?

A. We struck the State line there that we had run thirteen years before, and which was marked by a good many trees. We had traced it and run it down the river. We struck the State line there and then we came down the State line to the river.

Q. Now, standing at that point, about six thousand feet back there, could you see the Cheoah River from there?

A. I don't remember whether we could see the Cheoah River or not.

Q. Could you see the gorge out of which it came?

A. Yes, sir.

Q. Could you see the Slick Rock Creek from there?

A. Well, you could see the gorge, I think, but that is the Slickrock Creek Branch.

Q. That is where the Slick Rock Creek comes out?

A. Yes, sir.

Q. How far down the Tennessee River and down the different ridges can you see from there?

A. That is pretty hard to tell.

Q. Well, can you see as far down as the Hangover and the Big Fodder Stack come together?

A. Yes, sir.

Q. How far beyond that can you see—about, I mean?

A. You can see the whole range of mountains—have a pretty good view from there.

Q. Now, what is it that is called the Unicoi Range?

A. I think the highest range there is called Unicoi.

Q. Well, is it called the Unicoi Range after the junction of Hangover and the Big Fodder Stack?

A. It is called the Unicoi Range before the junction and after the junction, too.

Q. All of them is called the Unicoi, or just one range of them?

A. The main range, and then the spurs run down, and I consider them all belonging to the same range.

Q. Can you give us any idea how far beyond the junction of the Hangover and Big Fodder Stack you can see along the tops of the mountains?

A. On a clear day you can see the mountains a good piece.

187 Q. As much as thirty miles?

A. You might see them that far.

Q. And a continuous range?

A. Yes, sir.

Q. Now, when it comes to that junction, and coming from the south side of the range, and coming towards the river, how there does it divide off?

A. Which?

Q. The range of mountains. There is a range of mountains that come along to that junction that I speak of—the junction of Hangover and the Big Fodder Stack—and there it divides, does it not?

A. I call it dividing.

Q. And into how many spurs does it divide, and where do they go to reach the river?

A. A good many spurs hang down over the river on each side, and the Big Fodder Stack is one of the main spurs that runs over the river.

Q. Does that run off to the left a little coming to the south?

A. Yes, sir.

Q. And that starting point is the junction of Big Fodder Stack and Little Fodder Stack, is it?

A. Yes, sir.

Q. And about how far from that does the Little Fodder Stack branch off?

A. I couldn't tell you just the distance.

Q. Nor give us any idea of it?

A. Probably a couple of miles from there.

Q. Now, is the Big Fodder Stack then merged into the Little Fodder Stack, or does it go on further and the Little Fodder Stack branch off from it?

A. The Little Fodder Stack branches off from the Big Fodder Stack.

Q. And where does the range of the Big Fodder Stack go?

A. It runs down towards Slick Rock.

Q. Down about Rabbit Creek?

A. No, sir.

Q. Where does it strike the Tennessee River—about Rabbit Creek, doesn't it?

A. I am not sure whether it is Rabbit Creek or not.

Q. It strikes it about a mile and a half lower down than Slick Rock Creek, doesn't it?

A. There is one spur from the Big Fodder Stack that runs down between Big Slick Rock and Little Slick Rock.

Q. Which range is that? I mean which branch is that?

188 A. Little Slick Rock is more to the south.

Q. Does Little Slick Rock run into Big Slick Rock?

A. Yes, sir.

Q. Is that what you are talking about—the Big Fodder Stack?

A. The Little Fodder Stack.

Q. You say you don't know where it strikes the Tennessee River?

A. No, sir.

Q. You do think it strikes the river near the Big Slick Rock?

A. I think the main spur from Big Fodder Stack does.

Q. You can't tell how far?

A. No, sir.

Q. Where does the little spur go off?

A. You might consider it a spur.

Q. Where does it strike the Tennessee River?

A. Down below Slick Rock.

Q. About how far?

A. I don't just know; a good piece It runs past what they call Stiff Knee Gap; and it runs into the river.

Q. It strikes the river first down about the Big Slick Rock?

A. Yes, sir.

Q. Then the Hangover there, from the junction of the Big Fodder Stack and the Hangover, describe as near as you can the course of that towards the river.

A. It runs, I think, in a northeasterly direction.

Q. That would be off to the right from that junction point?

A. Going north towards the river.

Q. And how near to the river does it go?

A. Well, it goes, you might say, the way I look at it, it comes down to the river.

Q. About three-quarters of a mile isn't it the spur that goes off of it and isn't it the spur that reaches the river?

A. The spurs run off of it.

Q. Describe that Hangover in its approach to the river.

A. The Hangover is a pretty rough peak, and what gives it the name of Hangover there is a place on top that gives it the name.

Q. But you don't quite understand my question, I think, Mr. Muller. When you leave the junction there of Big Fodder Stack and Hangover Stack, south of the river. That is about how far from the river—nine or ten miles, isn't it?

A. I don't remember how far it is.

189 Q. You know the point I mean. I am asking you now, if the Hangover ridge, if you so call it, when it leaves that point doesn't circle a little bit off to the right?

A. I don't think it does much. It looks—the top of the ridge looks like there is some pretty bad gaps between it and the river.

Q. In other words, it is up and down?

A. Yes, sir.

Q. It is not a continuous ridge?

A. It is a continuous ridge, but it has got gaps in it; it makes a water shed.

Q. It makes a water shed in different directions?

A. It is a continuous ridge, but it has got gaps in it.

Q. And your recollection is not very vivid, Mr. Muller, whether it runs a little around in going towards the river?

A. No, sir.

Q. Well, there is a basin there called the Slickrock Basin, between those ridges, of about three and a half or four miles?

A. Yes, sir.

Q. Isn't there a spur that comes down between the Hangover and the Fodder Stack towards the river?

A. Well, there is that spur that comes down in the forks of the Slick Rock.

Q. Well, I am not talking about a point above the mouth of Slick Rock and beyond it, where the spur of the Hangover reaches the river; between those points isn't there a spur that comes off one or the other of those ridges that runs down towards the river between those two points?

A. There are a good many spurs that break off. You can start at the river and go up several spurs and reach the Hangover.

Q. Are there any spurs there that you can go up there between Slick Rock Creek and this bluff and come to the State line, where it comes down to a ridge on Fodder Stack Range?

A. Yes, sir.

Q. Pretty high spur?

A. Yes, sir, pretty high.

Q. And pretty continuous over to the Fodder Stack?

A. Yes, sir, after you get on top.

Q. And that is between the Slick Rock Creek now that I am talking about; the mouth of Slick Rock Creek and the Hangover?

A. Yes, sir.

190 Q. On this map of yours, that you helped to prepare for this original case, you don't show any of those, do you?

A. I didn't show it.

Q. Why didn't you show any of those?

A. We didn't survey them.

Q. Why didn't you survey them?

A. Couldn't be expected to survey every spur that run off the mountain.

Q. You couldn't be expected to show what, did you say, Mr. Muller?

A. You couldn't be expected to make every spur that run off the mountains.

Q. It isn't customary to do that, you think, in making surveys or plats?

A. No, sir.

Q. Will you read that down on the bottom there? (Counsel referring to map of witness.)

A. (Witness reading from map). "Map of leading ridges, Slick Rock Basin, Little Tennessee River and North Carolina Line, Monroe and Blount Counties, Tennessee."

Q. What leading ridges—I mean, it shows the leading ridges, then?

A. Yes, sir.

Q. I want to call your attention to a spur just south of the Little Slick Rock Creek. Is that of any importance on this map?

A. Yes, sir.

Q. For what reason?

A. It was a large spur, and I wanted to get the topography of it.

Q. But you didn't want to get the topography of those that I have been calling your attention to?

A. It was a larger spur.

Q. You didn't carry the State line as you surveyed it thirteen years ago, did you?

A. No, sir.

Q. It had no pertinency then to the State line as you surveyed it?

A. We were hunting for the State line.

Q. This spur over here to the East of the Slick Rock, how have you got that marked on the map? If not marked, describe what that is?

A. This is the line that we ran at the—this is the line that we ran out on top of the spur.

Q. And that is the Hangover ridge?

A. Yes, sir.

191 Q. Now, I understand you to say, Mr. Muller, and agree with Mr. Hale, that this map of 1821 is fairly accurate as to distances between the main points and courses; that is, general courses. Is that correct?

A. Hardly.

Q. Explain, then, in what respect it is not correct.

A. The courses are not such as you can lay down on the mountains.

Q. Well, take it from a point, say that mile above the Tennessee River, and look down to the junction of the Hangover and Big Fodder Stack ranges. Doesn't that line show the general course between those points, now, without regard to the small angles and without regard to the mountain ranges as a line upon the map. Isn't it approximately correct?

A. No, sir, it is not approximately correct. This map shows nothing but a few things. It shows, from the shading, that they run the line on the top of the mountains on the course that they crossed the Tennessee River when they came to it, and that they run above the headwaters of Tellico River.

Q. You recognize that as a point, didn't you that junction of the Big Fodder Stack and the Hangover as a point to be reached, no matter where you run the line in detail. You recognize that, don't you, as a point to be reached?

A. Yes, sir.

Q. And you recognized it as a point to be reached, as a point a mile north of the river?

A. Yes, sir. That is the leading ridge.

Q. Where do you get the idea of a "leading ridge"?

A. We got the idea from the map of the Commissioners that made the report to the State of Tennessee and the State of North Carolina.

Q. This map shows that it crossed the river at some point, the Tennessee River, does it not, where there was a water course on the other side?

A. The map shows that it crossed close to a water course.

Q. Could that be anything other than the Slick Rock Creek or the Cheoah River?

A. No, sir.

Q. Must be either one or the other of those streams?

A. Yes, sir. But they have pictures — the Cheoah River further down than where it actually is.

Q. It couldn't be, then, if this map is correct and you have to go by the Commissioners—assuming that you have got to go by the Commissioners' map, and take objects that it points out

192 plainly and that you don't have to guess at it—it couldn't be that the map lays down a line that crosses the river at a bluff, as stated by you in your former testimony?

A. I don't consider that map as a guide for the State line. It is

not correct, and when it is not, it is of no use. It only showed these three things; that it followed the course of the mountain, and that it crossed the river when it struck it, and that it run above the headwaters of Tellico River, and it included them in the State of Tennessee. That is all the use that it is. It is not a guide for a surveyor.

Q. If this is a map of the report of the Commissioners who had in charge the survey, and accompanied their report, and was one of the documents that the Legislature had before it when it confirmed that report, and that map shows the State line crosses the Tennessee River in the immediate neighborhood of the mouth of a stream, which you say couldn't be other than Slick Rock Creek or the Cheoah River, I want to ask you if, taking this map to be correct, it could be possible that that State line passed the river at that bluff that you speak of which connects with the Hangover Range?

A. You are calling for a bluff. You probably don't understand me there. The whole bank of the river is very steep and bluffy.

Q. Didn't you say in your former testimony, Mr. Muller, that when you went down to the river at about a half mile above the mouth of Slick Rock, where you found trees blazed, that just across the river from there there was a bluff?

A. You might call it a bluff.

Q. Didn't you call it a bluff?

A. Possibly did.

Q. And this is the bluff that is connected with the Hangover by a range from the river over to Hangover, as a part of Hangover?

A. Yes, sir.

Q. I say, if this map is an efficient map and it shows that that line crossed the river, the Tennessee River, at the point or immediate vicinity of a stream on the other side, is it possible that you could derive from this map a line crossing the river at that bluff that I speak of?

A. Well, the bluff extends from the mouth of Cheoah all the way down to the mouth of Slick Rock. It is all steep and bluffy.

193 Q. Didn't you have a point in that bluff where you said that the Commissioners must have crossed the river and continued their survey on the south side in your other testimony?

A. I don't remember what language I used. I can just tell you we continued on the course on top of the bluff and then took the leading ridge from there.

Q. And then continued the line along the top of the bluff, just opposite the point where you reached the river, down to these trees along the river?

A. Yes, sir, that is the idea.

Q. Now, I want to know by this map, which shows that that line crosses the river, or in the immediate vicinity of the mouth of some stream, whether you could show by this map that it crossed the river and continued over the bluff that you speak of?

A. Couldn't show anything from that map, because we found it was incorrect.

Q. And then you can't show that it crossed by that bluff?

A. No, sir.

Q. Then it is a matter of fact that these Commissioners made a report to the State Legislature, which was confirmed by the Legislature, that nobody can locate it?

A. Yes, sir.

Q. That nobody can locate it by that map? That is right, is it?

A. Yes, sir.

Q. If that bluff extends all the way down the river, from Slick Rock Creek and Cheoah River, why didn't you plat that bluff in that map of yours?

A. We surveyed the Cheoah River afterwards.

Q. How long afterwards?

A. Fourteen years.

Q. That is about now how long?

A. Thirteen years, probably, it was.

Q. That is about now?

A. A year last spring.

Q. After the commencement of this subsequent part of this case?

A. Yes, sir.

Q. And why did you survey the Cheoah River at that time, when you had never attached to it any importance in reference to that State line before?

A. We had never had this map in this part of the country.

194 Q. Until when?

A. Until I went to Nashville and had a copy made.

Q. When was that?

A. That was several years ago. I don't remember just what time it was.

Q. Well, at that time, when you surveyed by the old map, I am not talking now with reference to the production of this map, you didn't consider the Cheoah River as having had any importance in connection with the State line?

A. No, sir.

Q. Do you remember when you testified here a few weeks ago, stating that a stranger coming there would find it more convenient to cross that river near the mouth of Cheoah?

A. Yes, sir.

Q. That there was an eddy there?

A. Yes, sir.

Q. Did it strike you then when you were testifying that the Cheoah was easier to cross from a point 200 feet below there by following those blazed trees, a more convenient way of going on to that ridge than any other?

A. No, sir.

Q. What did you say *that* then—what difference would there be between a stranger coming there and a surveyor going there?

A. There wouldn't be any difference. When we find a river we try to find a place to get across.

Q. As a surveyor you do that?

A. Yes, sir.

Q. What do you do with your line?

A. We leave our line and get opposite to it and then go ahead.

Q. The point about what I want to know is: If that is true, what difference is there as to the place you get across the river the easiest if you carry your line opposite on—from a place opposite where you stopped. Why don't you say you go across and carry it on?

A. I thought I was asked the question where I crossed.

Q. You were asked the question if a stranger came there what would strike him as the most convenient way in getting across and reaching the Hangover?

A. Have you ever seen the river? You wouldn't cross it anywhere except where that eddy is.

Q. You don't understand what I am asking you about. The point is—you were asked—let me ask the question. Do strangers get across the river any more easier than surveyors?

195 A. A stranger don't perhaps cross the river more easier than the surveyor.

Q. You say that the point easiest to cross it was two hundred feet below there. What difference does it make to strangers?

A. I don't know what you are asking about.

Q. I am asking this: You said awhile ago that within these last few months you surveyed the Cheoah River, and you testified here a few weeks ago that a surveyor trying to reach the main ridge would find it more convenient to cross down the Cheoah River and below up the ridge from there to the main ridge of the Hangover. Now in view of what you say from the Cession Act the stranger had followed the main ridge. It struck me there was some pertinency there in reference to the State line. If there wasn't it had no reference to this case; if it did I want you to explain.

A. A surveyor wouldn't go away from his line. He would go back to it. A stranger would cross the line there; he wouldn't go down the river and go back, but he would take one of those spurs and climb the mountain.

Q. Well, you can explain to me then if a stranger would do that, wouldn't anybody do that?

A. A surveyor wouldn't. A surveyor would stick to his line.

Q. Would he cross the river right on his line.

A. You wouldn't cross the river when it was impossible to cross it.

Q. Was it possible to cross it there at that bluff?

A. It is so rapid there you couldn't cross it in your boat, and I don't think you could wade it.

Q. And you say in your examination that it wasn't safe to cross that point except about two hundred feet from that point?

A. Yes, sir.

A. It wasn't any safer to a surveyor than any stranger.

A. A surveyor would go up there and cross and go back to his line.

Q. And is it not a fact that you don't remember those questions and you don't know what Mr. McCroskey was after?

A. I am not a good expert—I couldn't read in Mr. McCroskey's face and say what he was thinking about.

Q. And now when you came down on the river there you had nothing to go by except to pick out a main ridge, did you?

A. That was all.

196 Q. And you picked out the Hangover Ridge as the main ridge and your idea was, and you was positive that they went right across there with their line?

A. Yes, sir.

Q. And then along the Hangover?

A. Yes, sir.

Q. Now, you say a person not able to cross the river there would go down the river where it was safe to cross and then go back to his line?

A. Do it in this case.

Q. And you can carry a line very well where it isn't safe to go?

A. Yes, sir.

Q. You can carry your line right straight across but in going over the ground you might have to go around to get across?

A. Yes, sir.

Q. There isn't anything inconsistent then having reference to this line, this State line, that is run on this map of 1821 from that point a mile north of the river, notwithstanding they couldn't get there on a straight line as run on this map to the mouth of the Slick Rock and had to go down the river to get across, there isn't anything inconsistent then in running their line straight to the mouth of Slick Rock?

A. I think it is very inconsistent. I think to take the line off the river running down the creek is very inconsistent.

Q. I am talking about taking the line a mile down the river and the line is inaccessible to that going down the creek?

A. The ground is not inaccessible to a surveyor.

Q. What do you mean by that?

A. The surveyor can walk over it and run a line over it and sight over it.

Q. Run over what?

A. Solid earth below it.

Q. What range—what ridge I mean would be run over there—that Lester ridge you mean?

A. If it was a straight line.

Q. How do you get that point a mile north of the river there to that line of Slick Rock, would you go over Lester ridge or not?

A. If I wanted to go from the top of the hill to Slick Rock Creek I would go straight if that was the objective point.

Q. You would run a straight line on the map?

197 A. Yes, sir.

Q. Now, taking this map of 1821, Mr. Muller, from a point there, the mile circle, the mile back at the south bank of the river, the Tennessee River, at the mouth of Slick Rock Creek as shown here. What is the general bearing for about seven miles as shown by the mile circles? What is the direction and angle?

A. It would be northeast.

Q. And going in the other direction?

A. Southwest.
Q. And how many degrees?
A. I couldn't tell unless I had my instruments.
Q. For this purpose you could make that parallel there with th north point there, the line?
A. I could make it approximately.
Q. Did you ever see Mr. Burns' map that was used in this ca when he was testifying?
A. Well, I believe I have seen it, I am not sure.
Q. Well, he makes that general direction south forty-four degre west. Do you know whether that is correct? Or about correct?
A. I don't — whether it is or not.
Q. Could you measure it on your map—starting at that point, mean?
A. Starting at that point going south down the river?
Q. South of that seven mile point, shown by the mile circles o that map. Could you pick out the same spot on your own map?
A. I don't know whether I could or not.
Q. Well, after you leave that seven miles for the next three mile do you know?
A. I wouldn't undertake to say unless I had some instruments.
Q. What instruments would you require to give us that data?
A. I would require a ruler.
Q. Anything else?
A. Yes, a parallel ruler and a protractor.
Q. Just a parallel ruler and a protractor would enable you to ge it from the map, would it?
A. Yes, sir. Might have to have a little daylight to be exac about it.
Q. Can you do that, Mr. Muller, can you give us the informatio from your own map? Take the point at which we say that tha State line crosses the Tennessee River at the Slick Rock. Take th point at which you say it crosses and give the bearings fo
198 seven miles distant from that. Can you do that?
A. The general direction would be about south twenty degrees west to just approximate it.
Q. Can you make it any closer?
A. I can't see these marks well at night. (Witness referring t marks on protractor.)
Q. Did you ever submit the map of 1821 to the tests of you instruments to ascertain the bearings there?
A. Yes, sir.
Q. For those seven miles?
A. We tested the bearing on both sides of the river.
Q. I am asking you now for seven miles to a point crossing the Tennessee River at Slick Rock, assuming it to be Slick Rock, fo seven miles. Did you test the map by your instruments for the general bearing of that map?
A. No, sir.
Q. What distance did you test it?

A. We tested it back on the line. Right here we tested it. (Referring to map.)

Q. State the point where you mean, Mr. Muller, "right here" doesn't mean anything when you get it in the record?

A. From the river to where the Lester Ridge takes off to the north of the river.

Q. Will you test it on the south side of the river? I mean did you test it on the south side of the river?

A. Yes, sir.

Q. How far.

A. I think it was three miles.

Q. And that is the only test you made of that, the only distance that you tested south of the river, was it?

A. I think so.

Q. On that map of 1821, Mr. Muller, you notice that that line south of the river runs about seven miles from there to there (indicating on map) in one pretty straight line and general direction, and then it takes a very decided turn, almost at right angles. Did you test that for the general course from the river as far as that seven miles at all?

A. We tested the course on the map you might say of 1821 running up Slick Rock Creek, and it wouldn't fit the bearings nor the distances.

Q. What I am asking you, Mr. Muller, is from that point on the Tennessee River where this map shows that it crosses, assuming that to be Slick Rock up to where it takes a very decided abrupt turn to the left as you look away from the river. Did you test that
199 line for general direction and course there for that seven miles as it is laid out on this map?

A. No, sir.

Q. Did you start here at all at the end of those seven miles, where it takes that abrupt turn that I speak of, and over to the left where it takes another abrupt turn, and it straightens out again, did you make any test of that for general direction?

A. No, sir.

Q. In coming here now to this second point where I said it turns and straightens out and runs a considerable distance down here, did you make any test of that for general direction?

A. I surveyed that country.

Q. Please answer my question. I am asking you a definite question. Do you know whether you tested this here (pointing to map) at that time, this portion? I mean when you took this map out here from this second point where it makes an abrupt turn from the south to the southwest, did you make any test of that distance to see where the general course of that line was on this map?

A. Tested that last spring.

Q. After you got this map?

A. No, sir. I found out that the map was incorrect, in all its particulars, in all its bearings and distances, and I paid no further attention to it.

Q. And that you did without a test of your instruments on those general lines?

A. I noticed that several years ago.

Q. You mean you could tell by your own eye that it was incorrect?

A. I could tell by my field notes.

Q. And that was run prior to the time before you knew of the making of this map and then when you had this map you could see by your own eye without having this map that it was totally incorrect.

A. Yes, sir.

Q. It never struck you, did it, that that creek which we have designated as the Slick Rock Creek, may have been incorrectly drawn instead of the state line, did it?

A. Yes, sir, it struck me that it was incorrectly drawn.

Q. In what respect?

A. It seems that this creek which you call the Slick Rock is intended for Cheoah River. It makes exactly just such a turn right here (pointing to map) as Cheoah River makes, and it is laid down as a much larger stream than Slick Rock Creek is.

200 Q. And in about the same position, is it?

A. It makes the same turn.

Q. And it is in about the same position—starts at the same place?

A. As I said before, I think it is sketched in too low down for Cheoah River.

Q. And it is your impression that the state line should cross at the Cheoah River?

A. You want me to say something which is untrue, and I am not going to do it. I don't recognize this map as showing Cheoah River, and I am not going to do it. It is not a good guide for a surveyor.

Q. But if that map fixes the line and that stream there is the Cheoah River, all I am asking you, Mr. Muller, if according to this map the state line don't cross at the Cheoah River?

A. According to this map it would, but I don't recognize this map. It was found to be incorrect.

Q. From what you have said you couldn't tell us, then, at all the bearings, if any are shown by this map for say three miles and seven miles from the river over to the left as you look south, could you?

A. I could by taking a great deal of pains, I could tell the bearings on the map.

Q. You haven't took any pains heretofore to find out the bearings?

A. Yes, sir.

Q. I understood you to say you hadn't tested that before to see what the bearings were?

A. I didn't go on the ground to test the bearings on this map, but I took the bearings before I went to the mountains to make the survey or test it on the ground. I took the bearings with the instruments of all those distances and bearings as near as I could get them and tabulated them and I had them when we made the survey and made the investigation.

Q. Didn't you say a while ago that you didn't test the bearings except three miles from the river?

A. No, sir.

Q. I am talking about this map—I am not talking about the ground?

A. You are not making yourself clear. I told you I found when I applied the instruments to it it would bear out these bearings, and I made the bearings all along from the Sixty-ninth mile post. I took all these bearings and tabulated them and gave them
201 to Mr. Hale, and he made some tests from those bearings that he took from this map.

Q. And he made the test on the ground?

A. Yes, sir.

Q. Now, leaving the ground off, taking simply this map, did you endeavor with your instruments to test the bearings of this line as shown on this map south of the river?

A. Yes, sir; but I only tested it with the compass three miles up Slick Rock Creek.

Q. Now, what is the bearings of seven miles on the map?

A. I couldn't tell you without I had my notes.

Q. But you have the bearings up the river seven miles from that point?

A. Yes, sir; I have the bearings clear past the Slick Rock Creek.

Q. Then you could, from papers that you have at home, give us the bearings as shown by this map from that seven miles to that elbow, and the next three miles?

A. I don't know just how far I took them up this way.

Q. You don't remember?

A. I don't remember how far I took them.

Q. That was only last spring, wasn't it?

A. Yes, sir.

Q. Will you produce those notes that you have got off of those bearings?

A. I think Mr. Hale has them.

Q. Well, if you have got them will you produce them?

A. Yes, sir; if I have got them I will produce them.

Q. If you haven't got them and if he has them with him, you will get them from him?

A. Yes, sir.

Q. How soon could you have those, Mr. Muller, if you have got them?

A. I haven't got them. I could get them again off the map.

Q. If you haven't those notes so that you can produce them, you can get them off the map?

A. I can do it.

Q. Will you do it, just to accommodate us?

A. I suppose so.

Mr. McCroskey: We object to anything of that kind as representing the opposite parties. My exception is that, postponing this matter, it might delay the trial of this cause. I think now you understand what I mean.

Mr. MATTHEWS: Will you make that if you can't find those notes—will you make that calculation for us tomorrow morning or by tomorrow morning?

202 The WITNESS: Yes, sir.

Q. Could you tell us where you would land if you started at the mouth of Cheoah River and went south forty-four degrees, west for seven miles, and then south nineteen degrees, east for three miles—could you tell us where you would land?

A. No, sir.

Q. Don't you know you would land on the Santeekle Creek?

A. No, sir.

Q. Now, in the morning will you give us the courses as laid down on the map of 1821 for the seven miles? I want the course for that and the course for three miles over there, and then take your own map and take your own starting point on the south bank of the river, and give us the courses for the corresponding distances on your own map. Will you do that for us?

A. Yes, sir; I will.

Mr. MCCROSKEY: Will you furnish the instruments to the witness so that he can make the plat?

Mr. MATTHEWS: I don't want a plat—just the results.

Mr. MCCROSKEY: Will you furnish the instruments to get the result?

Mr. MATTHEWS: Oh, yes, sir.

Mr. MATTHEWS: We are through with this witness until we get that information.

O. W. MULLER.

Mr. W. D. HALE, the next witness called for cross-examination, deposed and said as follows:

Cross-examination by Mr. MATTHEWS:

Q. When you went out this last spring that you made this last survey with this map of 1821, had you, either by yourself or in connection with Mr. Muller, taken the bearings off of this map, leaving out the ground—just the bearings as shown on this map of this state line?

A. Yes, sir, took each course separately.

Q. From a point how far did you start north? I mean from a point how far north did you start?

A. From the fifty-ninth mile post there, beginning on the map, and from the twenty-fifth.

Q. And how far did you go across here? (Referring to map.)

A. We went about twelve miles, I think, south of the river. That is, we took the bearings and distances from the map about twelve miles south of the river.

203 Q. And in taking the bearings did you take the bearings as shown on this map?

A. No, sir; we didn't take any general bearing. We took each particular course as shown on the map separate and by itself.

Q. Did you make any notes?

A. I think Mr. McCroskey has those notes. I had a copy of them, and I think I turned those notes over to Mr. McCroskey with the map.

Q. Could you, if those are accessible to you, produce those notes in the morning?

A. They are not accessible to me for that early production.

Q. Could you not, then, prepare those from this map, if you are furnished with such instruments as are necessary, and give us the same information as Mr. Muller was asked to give?

A. Yes, sir.

Q. Could you do that so as we could have it by tomorrow morning?

A. By noon tomorrow I could, but not only by tomorrow morning.

Q. The first seven miles and the next three miles—the general bearing for that seven miles and the next three miles—and then if it — possible for you to produce those notes before, I would like to have them.

A. I don't think I have them now, and don't think I can produce them.

Q. You will give us this as early as you can in the morning—those general bearings for those distances—you will give us that?

A. If I have the instruments I will.

Mr. MATTHEWS: I am through then. We will have to ask for an adjournment, then, tonight, Mr. McCroskey.

Mr. MCCROSKEY: Why? Can't you take some of the other witnesses?

Mr. MATTHEWS: If we can get that information I think we can roll it off very rapidly tomorrow.

Mr. STONE: May I ask how long you expect to continue taking testimony here—any longer than tomorrow?

Mr. MATTHEWS: Not on this branch. We expect to get through. Possibly some documentary evidence we will want. If we get that early in the morinng I think we can get through tomorrow.

Mr. STONE: My object in asking that I was going to take *that* train for Cincinnati tomorrow.

204 Mr. MATTHEWS: I think we can possibly get through by noon tomorrow.

Mr. STONE: You don't expect to continue next week?

Mr. MATTHEWS: Oh, no.

Mr. MCCROSKEY: Of course; we will have to do that. Remember, we have been here all day waiting for something to turn up. I wish you would push the matter as rapidly as possible. I would be glad if you could take some of your other witnesses then and go ahead with it.

Mr. MATTHEWS: It will shorten the matter very much.

Mr. STONE: What time will you meet in the morning? Suppose, then, we adjourn until 9:30.

Mr. MATTHEWS: All right.

After some discussion, the further taking of proof in this cause

was adjourned, by consent, to the same place at 8:00 o'clock a. m sharp, January 9, 1909.

The taking of depositions in this case was resumed on th January 9, 1909, at 9:00 o'clock a. m., pursuant to adjournmen

O. W. Muller.

Continuation of cross-examination by Mr. MATTHEWS:

Q. What did you do with the map of 1821, in answer to th question that I put to you last night, and which had reference to a certaining the courses of the first seven miles of the state line, a shown on the map of 1821, up to the elbow, where it strikes off t the east, and for the next three miles after leaving the last mentione point?

A. I have not done anything; only I assisted Mr. Hale in gettin those bearings. I could not see well enough by this light.

Q. What did you do with reference to the plat that you an Mr. Hale jointly prepared, and which was used in the original cas (known as the Hale map, and called: "Map of Leading Ridges" in ascertaining the course starting from where you crossed the rive and up to the Hangover, and thence to the junction of the Hangove and Big Fodder Stack?

A. I did nothing with it, except to assist Mr. Hale in gettin those things, on account of the same reasons that I gave before— I could not see well enough.

Q. Then the work that was done in answer to these question was done by you jointly with Mr. Hale, and his figures would b your figures?

A. Yes, sir.

And further deponent saith not.

O. W. MULLER.

205 Sworn to before me this January 9, 1909.

[SEAL.] R. S. C. HUTCHINSON,
Notary Public, Knox County, Tenn.

Forty-five miles; three days.

W. D. HALE, a witness on behalf of the complainants.

Continuation of cross-examination by Mr. MATTHEWS:

Q. Mr. Hale, did you do any work last night, or this morning, to obtain an answer to two questions that were put last night and reiterated this morning, just now to the witness, Muller?

A. Yes.

Q. What did you find to be the general course of the line indicated on the map of 1821, from the point where it leaves the river on the south side, for a distance of seven miles to where it bends to the east,

or to the left, as you look down in that direction, what is that course? Give the general bearing of it?

A. South 44¼ west.

Q. Now did you obtain also the general bearing of the next three miles on that same map, after leaving the elbow made by that turn to the east or left that I have just mentioned?

A. Yes.

Q. What is the general bearing of that?

A. South 20 degrees east.

Q. I notice a couple of lines put onto this map of 1821, exhibited in this case and labeled north 44¼ east, and then running off to the left, north 20 west, did you put those there?

A. Yes, sir, that is the reverse of the courses I have just given.

Q. Now, what did you ascertain to be the courses from your map called "the Hale map" in this case from the point that I have mentioned first, the Hangover and then to the junction?

A. From the river to the Hangover is south 8 west; from the Hangover to the junction south 60 west.

Q. Will you take this map of 1821 and plat on it the line south 8 degrees west, and then south 60 degrees west that you have just mentioned, commencing at the point on this map of 1821, where the State line is shown to cross the Tennessee River and commencing on the south side of that river?

A. Yes, I have so platted it.

Q. Mr. Hale, will you take this map of 1821 and put all of those lines on it in red ink?

206 A. The lines I have platted?

Q. Yes, both sets of lines.

A. Let me understand what lines it is you want.

Q. These lines in the first place, that I first asked you about, starting to——

A. The first seven and the second three?

Q. The 44¼ and the north 20 west, and also this last set of lines that you have put on there and marked the bearings also on the last lines?

A. I have done so.

Q. Mr. Hale, in making these last surveys since you had this map of 1821, did you use a transit?

A. Yes, I believe I did; I am not positive now, whether I used a transit or a compass; I think I used a transit.

Q. If you used a transit, what kind of a transit did you use?

A. A Gurley—or a reconnoissance.

Q. But you are not sure that you used one at all?

A. No, sir, I am not sure whether I used a compass or a transit.

Q. Did it have the Vernier attachment?

A. Yes, sir.

Q. Describe what is a Vernier?

A. A Vernier is a contrivance on the compass for reading the angles less than a degree.

Q. On the compass or on the transit?

A. On either.

Q. When you spoke of a Vernier being on the compass or the transit, either one, were you speaking of the same kind of a Vernier?

A. Yes, the same system.

Q. I am not speaking of the same system; but I am speaking of the same description of make, or the description of the Vernier.

A. There is a slight difference in a Vernier on a transit and on a compass. The transit has variations—Verniers and angle Verniers—Verniers to the limb and Verniers to the graduated circle. While the compass only has Verniers to the graduated circle or variation for it.

Q. Is the Vernier on a compass for the purpose that you stated——

A. Of turning off the variations and graduated angles smaller than a degree.

Redirect examination by Major McCroskey:

Q. Taking up the map of 1821 and looking at it as an experienced surveyor, beginning north of the river, how does the map
207 indicate that the survoyers ran, on a mountain or following the streams?

A. On the crest of the mountain.

Q. Please explain definitely, from your standpoint as a surveyor, why you say they followed the crest of a mountain?

A. Because the mountains and ridges are indicated on the map by etching; the streams are indicated by solid, irregular crooked lines, and the State line as marked here follows the etching north of the river.

Q. Then, from your standpoint and knowledge as an experienced surveyor, the etching and markings on the map north of the river shows that the surveyors unquestionably followed the crest of a mountain?

A. They certainly did.

Q. State whether or not that indicates that they followed a continuous ridge, or was that ridge broken by streams?

A. It seems to be a continuous ridge from the Big Pigeon River to the Tennessee River.

Q. Is there anything on either side of the line north of the river to indicate streams, and if so, definitely point them out, so that the Court may understand?

A. On the northeast of the line there is Little Pigeon River, the west fork of Little Pigeon, Little River and Abrams Creek, all heading near the line; on the southeast side of the line there is Big Creek, Deep Creek, and a creek and a number of streams not named, heading near the line and flowing southeastward; while those northwest of the little slope northwestward, as indicated by the map.

Q. Looking at the map itself, and from your own experience, state whether or not the line indicated as the State line shows that they are following a leading ridge or mountain dividing the water courses?

A. The line on the crest of a ridge, that is the water shed between the streams on the northwest on those on the southeast all the way from the Big Pigeon River to the Tennessee River.

Q. Speaking again from your knowledge as a practical and experienced surveyor, when they reached the Tennessee River, what does the map indicate they did?

A. They went directly across it.

Q. From the map, is there any question in your mind that they did go directly across?

A. None.

Q. After crossing the river to the south side, looking to the map and speaking from your own knowledge and experience,
208 what does it indicate from the face of the map itself? Does it show that it followed the leading ridge, or that it follows streams? Please explain fully what it does show, from your knowledge and experience, looking to the map alone?

A. It appears that at a distance of about two miles from the river they reached the crest of a ridge which is a water shed, and a continuous ridge from the Tennessee River to within two miles of Hiwassee River. Immediately after crossing the river, from the map it appears that they followed close to the stream for something like two-thirds of a mile, and then left the stream for probably one-sixth of a mile; then returned to near the stream in the next one-sixth of a mile; then left the stream for good and climbed on top of the mountain. From this map it would be hard to tell whether they were immediately on the stream or in the vicinity of the stream.

Q. Are you familiar with the topography of the country immediately at the mouth of the Cheoah River, and also at the mouth of Slick Rock Creek?

A. Yes.

Q. State whether or not it is very mountainous at the mouth of either of those streams; is it not mountainous; or is it mountainous?

A. It is very rough and mountainous in the whole neighborhood around there, at the mouth of each of the streams, and above and below the streams.

Q. Is it or not a fact that immediately upon leaving either of the streams, as above indicated, you at once began ascending hills or spurs of the mountains?

A. Yes. The mountains butt down to the river and streams throughout the whole section, and you cannot get away from any of these streams without climbing the mountain.

Q. The question I want to get at, Mr. Hale, bearing directly upon the line as it leaves the river on the south side, is whether the line, as indicated on this map of 1821, shows that it follows a stream directly, or whether it is ascending the slope of the mountain or ridge next to the stream, speaking from your personal knowledge of the localities?

Mr. MATTHEWS: I object to this question and all questions that have gone before it, on the ground that it is not proper re-examination or rebuttal, because these matters have all been gone into on examination-in-chief.

A. The first two-thirds of a mile from the circle on the south

bank or at the south bank of the river is hard to determine
209 whether or not they were following the stream or were ascending the mountain. After that, speaking from my knowledge of the country and experience as a surveyor, I would say they were ascending the mountain.

Q. South of the river, what leading ridge do you find to fit or compared with this map of 1821?

Mr. MATTHEWS: Objected to as having been gone into fully on examination-in-chief and as not being proper rebuttal.

A. I find the watershed dividing Slick Rock Creek and Citico Creek from the waters of Cheoah River and Snowbird.

Q. From your knowledge and experience as a surveyor, and your familiarity as a surveyor with the topography of that country, and actually having run lines in that section, is there any other possible way of locating the lines by following a ridge or leading ridge except over the Hangover Ridge. I mean this line here (indicating on map of 1821.)

Mr. MATTHEWS: I object to that question for the same reason given to the previous questions.

A. No.

Q. To be more explicit, I am speaking now of that part of the map south of the river. Do you still adhere to the same answer?

A. I do.

Q. Looking at the map of 1821 still, and as explanatory to the topography of that country, I will ask you to again refer to the original map filed by you in the original case, called the Hale map. How many leading ridges are indicated upon that map?

A. Two.

Q. What are they?

A. The Fodder Stack lead and the Hangover lead.

Q. How are they shown or sketched upon that map?

A. They are shown by etching a number of lines of etching through each ridge.

Q. What do the numbers of lines of etching indicate?

A. The relative height of the ridges.

Q. From one line to another, how high is its altitude?

A. I do not remember the altitude.

Q. I mean from one line to the other.

A. I do not know the altitude from one line to the other. They are supposed to represent about one hundred feet between lines of etching.

Q. Those two ridges, the Hangover and Fodder Stack—what section of country do they inclose?

A. The Slick Rock Basin.

210 Q. The Fodder Stack, as I understand it, is on one side and the Hangover on the other of Slick Rock Basin?

A. Yes; The Fodder Stack to the west and the Hangover Ridge to the east.

Q. Are there any other leading ridges in that section of the

country but the two from the Tennessee River going south or southwest?

A. No, not from Tennessee River in the vicinity where the State line touches the river.

Q. Looking again to the map of 1821 and south of the river, are there any other leading ridges indicated upon that map except the leading ridge indicating the State line as shown upon the map?

A. I see none.

Q. Down the river from the mouth of Slick Rock Creek, perhaps two miles, you observe something sketched there as indicating a ridge or something else. Please state what that sketching from your knowledge as a surveyor, indicates?

A. It indicates a sketch to me.

Q. Of what?

A. Of an imaginary ridge.

Q. Is there any ridge in that section of the country, Mr. Hale, that could fit that sketching?

A. There is a ridge that might be tortured into fitting it. The Salt Springs Ridge or Salt Springs Mountain.

Q. Does it run that near to the Tennessee river?

A. Well, at places it is as close as that. No, I will take that back. I do not believe it approaches that near the Tennessee River. It is only about three miles, while the Salt Springs Ridge is seven or eight miles.

Q. State whether or not it is a fact that the Salt Springs Ridge ever reaches the Tennessee River or as a matter of fact does it reach the Tennessee River?

A. No.

Q. Further along on this map of 1821, there is several etchings and sketchings at the end. Does that fit the topography of any mountain in that section of the country, or does it mis-fit them?

A. I see one ridge there that might fit the Sassafras mountain. No, it don't. I will take that back. Just strike that out.

Mr. MATTHEWS: No, don't strike it out; just take it back.

A. I will take it back. I did not see any ridge on that map that would fit any branch or minor ridge of that country. This is referring to any part between the Hiwassee and the Tennessee River.

211 Q. The map of 1821, shows the line crossing the Tennessee River at or near some stream. The map says "Creek." From your knowledge of the line and location, is there any stream in the vicinity of where the line actually crossed the river that would fit this map as located, and if so what stream?

A. There is no stream of any size in less than half a mile where the line crossed the river. The shape of that stream as indicated on the map would come nearer to fitting the Cheoah River a mile or something more above where the line crosses than any other stream that I know of.

Q. Why do you say it comes nearer fitting Cheoah River?

A. The Cheoah River approaches the Tennessee River in approximately the same course that this stream approaches the river.

From the river, a distance unknown to me, but something like the distance shown on this map, it makes about the same bend eastward that this stream makes.

Q. Can it be construed to fit the Slick Rock Creek?

A. No.

Q. Why?

A. Because Slick Rock Creek has nearly the same general bearing for several miles from the river.

Q. You mean running back up the stream from the river?

A. Going up the stream from the river.

Q. You mean by that that Slick Rock Creek has as a matter of fact a bearing or the same bearing or a uniform bearing to the Tennessee River?

Mr. MATTHEWS: I object to that question as leading.

A. I mean to say as a matter of fact and location of the ground, of Slick Rock Creek, has about the same general bearing from five miles up the stream to the river and not as pictured on this map.

Q. I will ask you if in your former investigation and in giving your deposition you had the calls of the State line as made by the Commissioners' report as a part of the Code of Tennessee read over to you and are you now familiar with those calls?

A. Yes, a portion of them. I carried a copy of them in the woods.

Q. Taking the calls as reported by the Commissioners and this map, and speaking from your knowledge and experience as a surveyor, where did those Commissioners locate that State line?

212 A. On Slick Rock lead; no, on the Hangover lead.

Q. Why did you say first the Slick Rock lead?

A. It was a slip of the tongue.

Q. From your knowledge and experience as a surveyor and from your knowledge of the State line as located, can you explain why a stream has been sketched in so near the State line, and if you can, please explain?

Mr. MATTHEWS: I object on the ground that the question is asking for an opinion for doing a certain thing in 1821, by certain commissioners long since dead who left no record of why they did this in locating the State line.

A. As a surveyor in approaching the Tennessee River, from the northeast, when you reach a point about a mile from the river looking southwest, you can see the gorge where two streams approach the river from the south. The line as marked indicates that the Commissioners reached the river between those two streams at a point where neither could be seen. The stream on the map indicates from its general trend that they sketched the stream that was to the left giving it its general trend, but drawing it closer to the line than it actually approaches.

Q. Mr. Hale, this map of 1821, shows the scale of eight hundred poles to the inch. How many miles to the inch would that be?

A. Nearly three miles; two and one-half miles.

Q. To be exact, how many miles are 800 poles?

A. It is two and one-half miles.

Q. Taking your knowledge and experience as a surveyor and this map as exhibited to you, is it possible to take and follow the exact track of the surveyors or is it more of an outline or picture map of what the Commissioners did?

A. I take it as a sketch map and utterly worthless without the report of the Commissioners.

Q. Why do you say it is utterly worthless without the report of the Commissioners?

A. Because you cannot take that map and scale the courses and distances they have given and follow the actual marked line at any point that I have ever tried it.

Mr. HOPKINS: You mean that you cannot do so?

The WITNESS: Yes, I cannot.

Q. Taking the map as exhibited and the report of the Commissioners with which you say you are familiar, what is the inevitable result in locating the State line south of the river. Taking the map and the report, is the theory that the State line crosses the river, ascends the highest range of the Hangover and follows along
213 the highest point thereof, not more consistent than the theory adopted by the Commissioners in this case?

Mr. MATTHEWS: I object to that question as leading.

A. Yes.

Q. That is the map and the report considered together?

A. That is the way your question read.

Recross-examination by Mr. MATTHEWS:

Q. You said awhile ago, Mr. Hale, that there is no stream where the line crosses the Tennessee, corresponding to the stream marked "Creek," on the map of 1821. When you say where the line crosses the river, do you mean where it crosses on that map, or where you testified it crosses just opposite the bluff of the Hangover Ridge?

A. I mean at the point on the south side of the river, opposite the marks of the State line on the north bank of the river.

Q. As shown on the map of 1821?

A. As shown on the ground.

Q. As you stand on that spot that you have spoken of, about a mile north of the river and looking directly at the river, having reference to the angle at which the line still further north approaches that point (a general course, I mean, of the line) on which hand is Slick Rock and on which hand is the Cheoah River?

A. Slick Rock is on the right hand and Cheoah to the left.

Q. And about how far apart are they, Slick Rock Creek and the Cheoah River?

A. From a mile and a half to a mile and three-quarters.

Q. How long have you known the Cheoah River by name or tradition or otherwise?

A. About 15 years.

Q. Do you know on the ground now, without reference to any

map, what are the comparative courses of those two streams, the general course of those two streams?

A. Slick Rock runs a general course Northeastwardly for several miles, while Cheoah runs, I think, nearly Northwest for several miles, then turns about North to the river, is my recollection, speaking from memory only.

Q. Cheoah River is a much larger stream, isn't it, than Slick Rock Creek?

A. Not a great deal larger. No, sir.

Q. Cheoah River runs over to Robbinsville, does not it? The County seat of Graham County, North Carolina?

A. Oh, no, sir; I am not familiar with it more than a couple of miles from its mouth.

214 Q. Does not it drain nearly the whole of Graham County, North Carolina?

A. I think it does; I am not positive about that.

And further deponent saith not.

W. D. HALE.

Sworn to before me this January 9, 1909.

[SEAL.] R. S. C. HUTCHINSON,
Notary Public for Knox County.

One witness 4 days.
Mileage 130.

W. P. CHAMBERS, next witness called on behalf of the petitioners, having been first duly sworn, testified as follows:

Examined by Mr. MATTHEWS:

Q. Where do you live?
A. Seven miles west of Cleveland, Tennessee.
Q. How long have you lived there?
A. I have been living there off and on all my life.
Q. How old are you?
A. Sixty-eight years old.
Q. What is your business?
A. Farmer and land surveyor I suppose.
Q. How long have you been land surveying?
A. Thirty years this month since I commenced public surveying.
Q. Have you ever occupied any official position?
A. County surveyor of Monroe County.
Q. During what period of time?
A. Beginning on 1879 for eight years continuously.
Q. Have you ever been Entry Taker there?
A. I was Entry Taker of Hiwassee District and of the County.
Q. When was that?
A. That was during the same period, about the same period.
Q. How wide has your experience been in surveying?
A. Well, I cannot say that it has been continuously, but it has been off and on tolerably regular with farming.

Q. What company have you been engaged with as a surveyor in surveying lands for them?

A. Well, in the early eighties, I surveyed principally for the Tellico Manufacturing Company, for the Cow Camp Company, I believe they called it; Seymour owns the land now or did own it—I do not know that he owns it, but it belongs to some of those mountain or lumber companies; it exchanged hands anyway; and
215 the Scott and Loomis Lumber Company. I did some work in the vicinity of Chattanooga for Tomlison Fort.

Q. Have you made any large surveys?

A. Some, yes, sir.

Q. How large ?

A. Well, eight or ten miles, I have surveyed some townships.

Q. Are you familiar with what is called the State line map of 1821? Relating to the State line between North Carolina and Tennessee?

A. Well, I have seen and examined it to some extent.

Q. Did you ever go out upon the State line?

A. Yes, sir.

Q. When?

A. I was out in November last. I had the map, what they called the Nashville map of 1821, I also had Mr. Burns' map that he had made.

Q. Who went with you?

A. Mr. Ed. Mayfield of Cleveland.

Q. Who is Mr. Mayfield.

A. He is a surveyor and engineer.

Q. Of how long standing?

A. I cannot say how many years; I will say fifteen or twenty years.

Q. What is his reputation as a surveyor?

A. Good.

Q. Has he occupied at any time any official position in Monroe County?

A. I think not.

Q. Has he ever been Entry Taker there or in that vicinity?

A. Not in Monroe County.

Q. Well, in Polk County?

A. He is Deputy Entry Taker in Bradley County and has had practical possession of the books, maps, etc., of the Ocoee Land District.

Q. Did you tell what you were going for?

A. Why no, I did not tell him previous to the time we went on the land.

Q. Did you tell him on whose behalf you were going?

A. I do not think I did. It was suggested to me that I get Mr. Mayfield, but I did not employ him; I did not have anything to do with him.

Q. Now, where did you go to first on that line, where did you strike that line first?

A. North of the river.

216 Q. At what point and how far from the river?

A. Right at the river.

Q. How far back north did you go?

A. We went back to the station, 143—well, 132, I believe it was, and we made some observations at 144.

Q. How far about is that from the river?

A. About a mile and a half from the river.

Q. When you got back there were you on a ridge?

A. Yes, sir.

Q. What ridge?

A. I do not know what the name of the ridge is; Lester Ridge I believe they call it; I do not know—I cannot say as to the ridge, but that is the ridge north of the river that they claim the State line runs on.

Q. How familiar, Mr. Chambers, are you with that Slick Rock Basin and the ridges there?

A. Well, I have been over them a few times, I believe three times in a surveying capacity.

Q. Now, from that point about a mile or a mile and a half from the river, looking south or southwest and over that section of Slick Rock Basin and beyond, how far can you see over the different ridges there on a clear day?

A. You can see the Hangover, the Big Fodder Stack, the Little Fodder Stack, towards the river Northward and a portion of the Basin up the Slick Rock Country.

Q. Can you see the junction of the Hangover?

A. I do not think you can.

Q. How far back of that can you see or below that?

A. Below the junction?

Q. Yes.

A. About half way between the junction and what they call the Rock Stack—The junction and the Big Fodder Stack; there is a high point there that they call the Rock Stack.

Q. Is that south or north of the junction?

A. North of the junction.

Q. How far south, if any, could you see the ridge of the mountain?

A. From that point?

Q. Yes, sir.

A. You can see North down the river, away down to some spurs in what we call the bend of the river.

Q. What river?

A. The Tennessee River.

Q. I am asking you, looking across the Tennessee River and down to that junction?

217 A. Southward?

Q. Southward of the Big Fodder Stack and the Hangover, whether you can see the ridge beyond that and if so how far?

A. No, sir, it is my recollection that you cannot see it to any extent.

Q. Did you go there more than once?

A. Yes, sir.

Q. When was the second time you went there?

A. The next Wednesday, I went there on Thursday first and then on the next Wednesday. I went further out on the line.

Q. Further North?

A. Yes, sir, further North.

Q. About how far North did you reach then?

A. Three miles, I believe they call it, or two and one-half; I went to the turnpike road where the State line is said to cross the turnpike road.

Q. Does that turnpike go up over a ridge?

A. Yes, sir.

Q. Were you at a higher point there than the first point that you mentioned or lower?

A. Well, I do not -now whether it was higher or not; it was right there where I was first at. Where the road crosses the line it is in a deep gap of the ridge, of the main leading ridge running down, and Northwestward is a stream and on the Northeastern side there is a stream. That seems to be the watershed for the two streams and the road crosses that in a deep gap of the ridge. Then, in traveling along Westward or Southwestward you climb a ridge, a succession of ridges that going towards the river.

Q. When you first got off on that road that you say you climb after leaving the State road, what kind of a view do you have of the country South of the river?

A. A pretty fair view.

Q. How long did you stay there each time?

A. Well, the first time we stayed there, I will say, two hours, and we put in the most of the day after we got there. I will say we got there between 11 and 12 o'clock, and we stayed on that line then until about three, maybe four o'clock, between three and four o'clock.

Q. And how long did you stay the second time?

A. This is the second time I am speaking of. The first time about two hours.

Q. How near did you get to the river on either of those occasions?

218 A. The first day we went to the river and went across the river.

Q. What point?

A. At the mouth of Slick Rock. Or just below it. You might say at the mouth of it. When I speak of the mouth I mean approximately at the mouth.

Q. Now, from that point about a mile or a mile and a half north of the river, I wish you would explain in your own way and fully, Mr. Chambers, describe fully the look of the country of the river, of that Slick Rock Basin and the various ranges that are there?

A. In looking Southward the first thing you see there in that direction would be the Hangover. It is the most prominent from that point, and immediately it breaks down at the Hangover it seems to fall—I do not know how many feet, but considerably; there is a considerable fall-off in the territory running towards the

river. Running eastward there is a main leading ridge running up towards the Cheoah River towards Robbinsville, there is a main ridge running up there.

Q. You say a main ridge?

A. Yes, sir; a ridge running from the Hangover in an eastwardly, eastwardly toward Cheoah River.

Q. Does it reach the Cheoah River?

A. I do not know, I never traversed it; I cannot say.

Q. How does that compare with this drop-off of the Hangover?

A. When you drop down there you have a succession of broken ridges down to the river, as though there is one main leading ridge it divides that runs down, but it is broken.

Q. Is it more or less broken than the ridge that you say runs off towards the Cheoah?

A. You might say it is not a ridge leading down at all compared with that one. It appears to be nice and smooth to travel over. This other from the experience I have, that is very broken and rough.

Q. Which one do you say is the smooth ridge?

A. The one leading towards Robbinsville.

Q. How does it compare in volume with the other?

A. It appears to be the larger.

Q. Now, between the Hangover and the Big and Little Fodder Stack, what ranges are there, if any?

A. That is what we call the Slick Rock Basin.

Q. Are there any ranges that come down from the Big Fodder Stack?

219 A. There are spurs. You mean now between the Hangover and the stack?

Q. Yes, between the Hangover and the Fodder Stack?

A. That country in there is considered the Slick Rock Basin.

Q. I know, but are there any ridges in there?

A. None, no; there is ridges—no leading ridges. They lead down to a creek.

Q. What creek?

A. Slick Rock Creek.

Q. I know; do they approach the Tennessee River?

A. This main leading ridge that I was speaking of, this broken ridge that drops down from the Hangover, runs in a northward course, it runs down near the mouth of the creek.

Q. Now, do you know how the Big Fodder Stack and the Little Fodder Stack compare with the Hangover ridge?

A. In height?

Q. Yes, the general average height?

A. Well, in elevation I think there is about five hundred feet difference, four hundred or five hundred feet.

Q. In favor of which one?

A. Of the Hangover.

Q. And on the average, how is it?

A. Well, you take the average lead of that Fodder Stack lead, and that would be the highest. That is my opinion of it.

Q. Is it more or less broken?

A. Well, it is considerably broken, but not so much as this Hangover leading down to the river.

Q. Where do these spurs join if they join at all back and south of the river?

A. The Fodder Stack lead runs in a south course a little east, the Hangover runs southwest to some extent, and they join up near the Bob Stratton Bald, a little west. That is their junction with the main leading ridge, leading south to the Hall Knob and to the headwaters of Tellico River.

Q. How would you designate this range from the junction of the Hangover and the Big Fodder Stack going south, as compared with the others?

A. What would I call it?

Q. Yes.

A. I would call it the Fodder Stack lead.

Q. Well, if you were looking down there and attempting to designate which was a main ridge or the principal ridge——

220 A. To get to the river?

Q. No, looking over that whole country down south of the river there, which would you call the principal or main ridge?

A. Well, I would call that the principle ridge.

Q. Which?

A. The Big Fodder Stack lead in connection with the Little Fodder Stack lead?

Q. And from the junction, which is the main ridge, from Stratton south?

A. It would be a continuation of the same lead on to Hall Knob.

Q. Does it have any particular designation from there down?

A. Well, that is the watershed between a portion of Santeelah Creek and Citicio Creek after you arrive at the junction.

Q. After you arrive at that junction, the ridge that goes down, the ridge is a single ridge?

A. Yes, sir.

Q. And how is the ridge designated?

A. I do not know what name it has.

Q. Now, are you familiar with the relative situation of the Slick Rock Creek and the Cheoah River?

A. More with Slick Rock Creek than I am with Cheoah; I am not very well acquainted with the Cheoah.

Q. From that point about a mile north of the river you could see Slick Rock Creek?

A. I could see right where it was, yes sir.

Q. And in what direction was it from you, was it on your left hand?

A. About south 70 west.

Q. And on which hand was it as you looked in the general direction from which the State line was coming, north of where you were standing?

A. Slick Rock Creek would be on the left, it would be southward.

Q. Then suppose you turned and looked directly at the river in front of you, on which hand would it be?

A. It would be on the right.
Q. And where was the Cheoah looking the same way?
A. Cheoah would be on the left.
Q. Could you see the Cheoah River from there?
A. I did not.
Q. About how far apart are they?
A. Well, I do not know; I never measured it; it was said to be about a mile and three-quarters or two miles.

221 Q. Do you know the relative size of the two streams?
A. Cheoah is said to be a good deal the larger—is the larger.

Q. How long, by tradition, or otherwise, have you known it under that name?
A. Well, I have known of it by tradition, for about fifty years.
Q. Do you know its general course?
A. No, sir, only by the maps and by looking at where they said the Cheoah ran.
Q. Well, from those sources of information what would you say as to its general course?
A. Well, it rises up at Robbinsville and runs down in a northwest direction.

Major McCroskey: Respondent excepts to the information of the witness being admitted or used as evidence, because there is other and better evidence as to the location and course of the stream.

Q. What is Robbinsville?
A. It is the County seat of Graham County, I believe.
Q. And do you know on which side of these ridges that you have been talking about and how far away it is?
A. No, sir; it is on the east slope of these ranges, away up.
Q. You don't know how far?
A. No, sir.
Q. A good ways up. How familiar were you with the lay of the land in the Slick Rock Basin and these various ridges from actual surveys that you made for anybody?
A. Well, I surveyed it in 1883.
Q. Please state *from* whom you surveyed it and under what circumstances?
A. For W. L. Albright.
Q. Had you surveyed it at any other time?
A. Yes, sir.
Q. When?
A. In April, 1908.
Q. What was it you surveyed for Mr. Albright and for what purpose was his survey made?
A. Mr. Albright wanted to enter this land at that time, that is the land I suppose in dispute, the land lying east of Slick Rock Creek or east of the White and Bearden Land. He had an idea that this land was vacant land and wanted to enter it; he wanted to enter it by the section.
Q. Did the survey that you were to make—or was it made in

running your lines according to any instructions from him; what did he tell you to do?

222 A. He wanted the land sectionized; he wanted to enter it by sections and quarter sections; he did not want to enter it as a general entry.

Q. Where did he tell you to survey?

A. Well, I don't know what he told me; I think I suggested that we commence at the northeast corner of Fractional township two north range five east in the Ocoee land district.

Q. State where you ran these lines on that occasion?

A. From the beginning corner I ran south 67 or 68, I do not recollect which now, east until I struck the divide leading from the Big Fodder Stack to the Bob Stratton Bald. That would be the township line between Township Two North and One South Range Six. We then ran to the top of the Bob Stratton Bald, then ran down over the Heigh-ho; then to the Hangover; then in a northern direction down to this broken ridge that I was speaking about near the river. We did not go to the river, but went near it.

Q. Did you run any line from that point on your map or survey to the river?

A. Yes; from that I proceeded in sectionizing that scope of country, assuming that this White and Bearden land ran in a southwest direction from the mouth of the creek.

Q. How did you come to go over or along through the Hangover?

A. Well, I believe Mr. McCroskey was the first one that I heard talk about it; either Mr. H. M. McCroskey or Mr. Tom McCroskey, this attorney here.

Q. Did that correspond with your knowledge of where the state line was?

A. I had understood that it ran up Slick Rock Creek and up to the Fodder Stack lead before that, previous to 1882.

Q. How long have you understood that?

A. Well, quite a while.

Mr. McCroskey: Respondent excepts to the general information of the witness being used as evidence and also as to what he did at that time being used as evidence in this suit, because in neither aspect is it competent.

Q. I want to ask you if you went over the Hangover by the instructions of anybody or otherwise?

A. Well, yes; I went down there by the instructions of Mr. Albright.

Q. Have you made more than one survey there?

A. Yes, sir.

Q. When did you make the other?

A. Last April.

223 Q. But I meant in that time, along during that time, 1881, or 1882, or 1883?

A. No, sir; that time I started to make a survey, to survey the White and Bearden lands, but did not make it.

Q. Did Mr. Albright make any entry?

A. Well, I do not know—he made an entry in the country.
Q. What had the McCroskeys to do with it?
A. Well, Mr. McCroskey made an entry also about the same day.
Q. Were you the Entry Taker at that time?
A. Yes, sir, of Monroe County.
Q. Did these entries both cover the same ground?
A. Yes, sir; one was made as the general entry and the other as a kind of—well, by the section and quarter section.
Q. Had you ever heard before that any State line went over there at the Hangover?
A. In 1882, I had heard talk of it.
Q. From whom?
A. From Mr. McCroskey.
Q. Prior to that talk about it being over there, had you ever heard of it?
A. I never had.
Q. Now, I wish you would tell in your own way, Mr. Chambers, what surveying you did in that locality in this White and Bearden, — after that you speak of.
A. I was notified by the firm of McCloskey and Hicks that they wanted me to make a survey of the White and Bearden land. Mr. Hicks was a partner of Mr. McCroskey. Mr. Hicks either went home with me from Madisonville or came there, I do not recollect which. We were going to Boyd McMurray's and meet Mr. King at that place, who was interested in this business at Boyd McMurray's. We were then going to the beginning corner on Slick Rock Creek where the White and Bearden land was said to leave the creek, and make the survey from that point. That was about the beginning point. We started across there through the mountains and it rained some time in the day and Mr. Hicks gave out and and he said he could not go, and we would have to go back home. So we went back home and that ended the survey.
Q. What instructions did you have for running the line after leaving that initial point that you speak of as Slick Rock?

Mr. McCroskey: We object to the instructions, because not competent in this case.

224 A. I was to go up the creek a mile and a half, then bear southwest to the top of Big Fodder Stack.
Q. Was there anything said about that being the State line at that time?
A. Well, it was considered the State line but that land went to the State line.
Q. Was that grant in Tennessee or North Carolina?
A. It was in Tennessee, in the Ocoee District.
Q. Did it call for any state line in the description in the grant or entry?
A. No, sir; not that I know of. I do not know as to that.
Q. Were you instructed to commence at that point as the commencement of the State line?

Mr. McCroskey: We except to that as incompetent in any sense.

The WITNESS: Yes, sir.

Q. Who told you that?

A. Mr. McCroskey.

Q. Now, Mr. Chambers, how much of an examination did you make of this map of 1821?

A. I examined it some time in November, and I examined it some since I came here in a general way as you have all been looking at and criticizing it.

Q. And before you went out there you say as I understand you had Burns' map.

A. Yes, sir.

Q. Did you compare them?

A. Well, I do not know that we got right down to the letter of the business and compared them; we did it in a general way.

Q. What did you find with reference to them; how did they correspond?

A. Well, in the general courses they would correspond.

Q. Is it a possible thing to lay down that line by that map of 1821?

A. Well, I would think that it could be done.

Q. That stream called "Creek" there, and that we say is Slick Rock Creek, could that be, from its position on that map or its position on the ground, Cheoah River?

A. I think not.

Q. Explain why not?

A. From Mr. Muller's evidence and from my own observation of the stream running up the Cheoah River, you would naturally get too far south or southeast. If you follow that stream anything like a mile and a half, its general course up there, you will get a good ways southeast, and you could not, laying down the map in a general way, you would never get back on top of that lead.

Q. Where would you get?

A. You would fall over on the waters of Santeelah. If you would run far enough you might strike on the southwestern slope of the Hangover lead. I mean you would run on the west side of the Hangover lead, if you would run far enough in that direction and in a southwest course. Now, I mean from this point on Santeelah River, if you would run seven miles in a southwest course, you would probably fall on the west slope of the Hangover lead. From the next call as shown on the map you would land over east of Santeelah creek.

Q. On what side is Santeelah and where is it?

A. Santeelah is on the southeast side of this main lead dividing what is called the State line all the way up there; there are no waters of the Santeelah on the west side or the northwest side of any of those divides that we have been talking about.

Q. And in what direction do the waters of the Santeelah run?

A. They run generally in a north direction, northward.

Q. And what do they empty into?

A. I think it empties down there into Cheoah.

Q. Are you speaking of the Big or Little Santeelah?

A. Well, I am speaking generally of the waters of Santeelah.

Q. And that was assuming that you commenced at the mouth of Cheoah River?

A. A mile and a half up the river, you got a mile and a half up the river.

Q. My question related to this: If that was the Cheoah instead of Slick Rock Creek and running the lines as shown and courses by that map, where would you land?

A. We would land on the east side of Santeelah Creek.

Q. And on the east side of these ridges?

A. Yes, sir.

Q. Now, in getting to the Cheoah River from the point that you speak of a mile north of it, is there any ridge from that point off in the direction of the mouth of the Cheoah River on the north side of the Tennessee River?

A. There might be some spurs leading down there; I did not see any.

Q. When you went out recently on this State line, what instrument did you take with you?

A. A common slot compass.

226 Q. Did you take in a general way the bearing of the Burns' survey and of this map of 1821 and compare them?

A. Yes, sir, as I understood it.

Q. Did they correspond generally?

A. Well, to some extent. They did not just come down specifically you might say the same line but in a general way they did.

Q. Was there anything more than the difference in deflection of the needle would bring about at different times?

A. Mr. Burns made a very accurate survey; that is he made a survey that could not be questioned up the creek, up Slick Rock Creek as I understand it, and around this general boundary. This map is only a general outline showing the general outlines of the line from the creek to the top of the Big Stack; they were practically the same.

Q. Now, could you take that map of 1821, and the instructions or report of the Commissioners, and upon the ground and with your knowledge as a surveyor and from your knowledge of where the State line was reported to be, locate that State line and the trees on the ground?

A. I think I could. That is, I mean the territory where I am familiar with. I do not know what I might do if I was going to Pigeon River or some other place that I did not know, where I did not know what I was about, but I think from the Gregory Bald to the head waters of the Tellico River, I could do it.

Q. Now, I wish, Mr. Chambers, you would tell me in your own way the story of the survey and all that was done that you speak about Mr. Albright getting you to make in detail?

A. Do you want me to tell everything about it?

Q. Yes.

A. Everything connected with it from first to last?

Q. Yes.

Major McCroskey: Respondents except to any evidence by the witness as to transactions between the witness and Albright and to any evidence with reference to the survey made at that time, because it is in any sense incompetent.

A. In 1882, H. M. McCroskey mentioned this Slick Rock land to me. He had been having some cattle herded in there, and asked me how it would suit me for him to furnish the money, make an entry of the land, me to do the work and Mr. McCroskey here to do the lawing if there was any to be done. Well, I said, yes, I would do it. We were to be herders; that was his proposition. The matter was talked over several times just incidentally and deferred. Mr. McCroskey sent Mr. Albright in 1883, and he said that
227 McCroskey had talked to him about it—Mr. Tom McCroskey had talked to him about this land—and he asked me to draw in with him and enter the land and I declined, because — considered that I was under obligations to Mr. H. M. McCroskey. He brooded over it a week or two and said that he was going to have it surveyed and employ the hands himself, and he asked me to survey it and said if nothing else would do he would pay me for it.

Q. Who said this?

A. This was Mr. Albright. So we proceeded to make a survey of it. On our return from this survey I felt like I ought to notify Mr. H. M. McCroskey about it, and did so. Now, I may be mistaken about what I am going to say now; my recollection is that the ground was taken out in H. M. McCroskey's name. The same day Mr. Albright proceeded with Mr. Pritchard as his attorney and I made him a plat and submitted it to him—the land—and they entered it by the Section and Fractional Quarter Sections. I gave each of them a statement showing that it was a true copy of the records of the Entry Taker's office of Monroe County. They both went to Cleveland to the General Entry Takers' office of the Ocoee Land Office, and they had some trouble there I understand. The grants went up to Governor Bates and he refused to sign them. The grants were issued as I understand and Governor Bates refused to sign them, claiming there was no land vacant in this section of the country. Some years after that Mr. McCroskey procured a grant in his name and H. M. McCroskey's name. As shown by the record of the Ocoee Land District (I saw it there, I saw it some nine years after that), Mr. Albright makes his entry by the Section and Quarter Section as I stated, and this McCroskey entry is by general boundary up the creek with White and Bearden Land and around over to the Hangover down to the river and so on. Mr. Albright had offered me a one-half interest in the land for the work.

Q. I want you to describe it just as fully as you know?

A. Well, I have given you the general history in brief. This is the same land now in dispute if that is what you mean, between us, what we call the Slick Rock lands, the lands lying east of the White and Bearden land, south and southeast of the White Bearden lands and east of the Slick Rock Creek and west of the Hangover, and that

lead leading up to the junction of the Fodder Stack lead and the Hangover lead.

Q. Was the west line of that survey the State line as we claim it now?

A. Well, that was claimed at that time by a good many
228 people to be the line.

Q. No, what I am speaking of is the west line of your survey that you made at that time, the west line the same as the State line as we claim it now?

A. I did not make a survey of the west line. I only adopted the line of the White and Bearden land in the Albright survey—I only adopted that line, running from the mouth of Slick Rock to the top of the Big Fodder Stack in a south direction forty-five west.

Q. Did you adopt a line over the Hangover as the State line?

A. Yes, sir.

Q. At whose instance and request did you do that?

A. Well, I had understood—I did not want to do the work—I had understood this White and Bearden land ran about south forty-five degrees west; that was my understanding of the line, the general lay of the country.

Q. The general understanding of what line?

A. The State line as it was originally claimed.

Mr. McCroskey: Respondents except again to the testimony of the witness because his understanding is not competent, and further as to the question of the location of the *question of the location of the* line on Slick Rock Creek, was the main issue in the original suit.

Q. The question I asked you, Mr. Chambers, is, that in running the line over the Hangover, whether you adopted that as the State line or whether your information as to where the State line was differed from that?

A. At that time?

Q. Yes.

A. Prospectively expecting to be interested in this business at that time, I wanted it to go over Hangover.

Q. Well, was it your knowledge at that time or was it the knowledge of the people in that vicinity at that time that it did go over Hangover or up Slick Rock?

A. Generally speaking the people considered that it went up Slick Rock Creek.

Mr. McCroskey: Respondent again excepts to the general understanding of the witness, and again as to the fact that it went up Slick Rock Creek, because it has already been in evidence.

Q. Prior to that had you ever heard anything to the contrary of its going up Slick Rock Creek?

A. Prior to 1882, I had never.

Q. And from whom did you first hear it in 1882?

229 A. Well, I got the most of my legal information at that time from Mr. McCroskey and his firm, prior to 1882, even after that.

Q. Is it true then that the survey over Hangover was for the purpose of getting out a grant for this so-called Slick Rock Basin?

A. That was it; that was the object.

Q. On that line that you prior to that time supposed was the State line along Slick Rock Creek?

A. And commencing at or near the mouth of it.

Q. Down to the junction of Big Fodder Stack are there any state line marked trees?

A. Along the creek?

Q. Along that line; the creek, yes, and the line generally as you had understood the line to be prior to this survey that you speak of?

A. Well, I found some trees on the lead, some marks on the lead leading from the Big Fodder Stack by the way of Rock Stack all on the same lead up to the junction of Hangover lead, I found marks there occasionally; and in going down the Hangover lead the first thing of importance that you strike upon that lead is the Bob Stratton Bald, and quite a distance through that, and then the timber is scrubby. Occasionally, you will find an old tree that has some marks on it and hacks, sometimes two there, maybe half a dozen hacked on the several sides. The timber on that lead to the Hangover is very scarce.

Q. During that survey or at any time did you discover on the Hangover any trees marked that in your estimation were old enough to represent a State line?

A. No, sir; there was none on the Hangover for quite a distance south.

Q. How far south would it be?

A. About half a mile before there was any timber that I recollect of.

Q. Was half a mile down to the junction?

A. Or towards the junction, and there is half a mile, immediately at the junction up there that is a bald, the Bald is something like a half mile long.

Q. The question I want you to answer if you can is whether or not on the Hangover ridge at any point to the junctions you saw any trees that were old enough in your opinion to show that the marks were marks of a State line?

A. There is a few trees along about the Heigh-ho between the Heigh-ho and the Bald that are old enough to be marked.

230 Q. Did they have marks on them that were old enough to be State line marks?

A. Yes, sir; Well, I did not examine them, but there was old marks. I did not examine them with reference to the State line business at that time.

Q. You did not block any of them?

A. No, sir; but they were old and mossed over, but some time the trees would have a half dozen marks on them, sometimes two and sometimes three and sometimes more, sometimes they were just hacked and sometimes they were cut deep.

Q. Now, taking all the information you have, at this time including the report of the Commissioners, their map, the survey of Mr.

Burns', and what you saw there on the ground, have you any reason to change the opinion and knowledge you had as to where the State line was prior to 1882, when you were told something different by Mr. McCroskey?

A. No, sir, I do not know that I have.

Mr. McCroskey: Respondent excepts to all this evidence because the same is in every sense incompetent; and further that the witness has not stated that he had any knowledge prior to 1882, whatever of the State line.

Q. The question I put to him is with his personal knowledge and the maps you have seen and the report of the Commissioners and what you have seen recently on the ground, you have no reason to change the opinion and knowledge of the State line that you had prior to 1882?

A. I have not.

Q. You were the entry taker were you at any time in the Ocoee District?

A. I was the Entry Taker of Monroe County. They first made an entry in the County and then took it to the General Land Office at Cleveland, of the Ocoee Land District.

Q. Well, was it a part of your business as the Entry Taker to know where the State line was?

A. I do not know that it was. If a man wanted an entry and paid the fees I generally let him have it.

Q. Were you acquainted with the maps of the Ocoee District?

A. Yes, sir, I have seen them.

Q. How many of them are there there?

A. Well, the White and Bearden map was there, and the
231 Tipton map, a map of the Tipton lands, lying south of the White and Bearden lands, and I had a map of the County.

Q. Do you know about how many plats there are there now? And has been, I mean the plats of the Entry Taker's office of the lands in Monroe County?

A. I do not think there are very many in Monroe County; in the land district at Cleveland, there are principally all there; there are a few there practically they are all there.

Q. When were these surveys made of those lands up to the State line?

A. Well, about 1835 or 1836; somewheres along there.

Q. What was the eastern boundary of your county supposed to be?

A. Monroe County?

Q. Yes.

A. Well, it was considered Slick Rock by the surveys.

Q. I know, but was it the State line?

A. Yes.

Q. Mr. Chambers, are you familiar with what is called the Five Mile Tree?

A. I have seen it.

Q. Where is that located?

A. It is up Slick Rock Creek.

Q. About five miles from the Tennessee?

A. Yes, sir.

Q. What do you know about that Five Mile Tree?

A. It is a large pine tree, marked with "Five Miles"; the Five Mile Tree is what it is called.

Q. Is it marked as a point on the State line?

A. It has got three hacks on it.

Q. I want to ask you to take that map of 1821 and go upon the ground there, trace it by the hacks on the tree, the State line marks; if there are any on the trees, can you find the State line, and if so, does it agree or not agree with that State line map and with your previous information as to where it was?

A. Well, taking this map as it is laid down here, and running up that creek, it seems there is no question but what it struck the mouth of the creek and ran up the creek a piece; but the creek seems to deviate, to bear more southeastwardly to that, the general lay of the creek, as laid down on the map; but the line seems to run in the general direction as I find the creek is laid down by an actual survey and by Mr. Burns' map. If I understand this, if the line strikes the mouth of the creek where it runs up here a piece,
232 and I think that would be practicable; but here the creek diverges southeastward too much, or rather runs a little east of south; it is laid down there more than what it actually runs.

Q. Then, the depiction of that map is not what you have actually ascertained to be the exact course of Slick Rock Creek?

A. No, sir, not all the way through.

Q. Now, the question I asked you was that with this map, and going upon the ground and following that creek, as marked on the trees, could that State line be laid down as far as that Five Mile Tree? And would it correspond with your previous information of what the State line was?

A. I think it would be with the marks and the way it runs there. Now, understand me. This creek, the way it is laid down on this map, is not according to my view of it as I surveyed it and as Mr. Burns laid it down on his map. I do not know how he surveyed it.

Q. Does the way Mr. Burns laid it down on that map correspond with your survey?

A. Yes, sir; I followed in his footsteps mostly.

Q. Did I understand you to say that the State line has a bearing from the mouth of Slick Rock Creek of about forty-five degrees, south by west?

A. Yes, sir.

Q. Now, can you tell whether or not, from your survey, whether Slick Rock Creek has any bearing of that kind, and if so, how near it approaches that, for a distance say of four or five miles from its mouth?

A. Well, from the Fodder Stack—Big Fodder Stack—to the mouth of the creek is about north fifty east.

Q. It would be the same coming from the other direction, which would be south fifty west?

A. Yes, sir.

Mr. McCroskey: I want to except to all that part of the evidence of this witness as a whole that undertakes to detail or testify as to facts testified to or brought out in the original suit, because the same is accumulative; and second, as to any testimony that the witness state as hearsay, or as the general opinion; it is not the best evidence; and third, as to conversations and transactions as to original surveys for W. L. Albright, or any other person or circumstances under which the survey was made and the entry taken out, because the same has no bearing on this suit and is incompetent, and that it does not change the petition and does not meet the issue raised by the petition.

And further deponent saith not.

W. P. CHAMBERS.

233 Sworn to before me this January 9, 1909.
[SEAL.] R. S. C. HUTCHINSON,
Notary Public, Knox County.

One witness three days. Mileage, ninety-four.

Ed. Mayfield, next witness called on behalf of the petitioners, aged 40, having been first duly sworn, deposed as follows:

Examined by Mr. Matthews:

Q. Where do you live?
A. Cleveland, Bradley County, Tennessee.
Q. What is your occupation?
A. Well, I have been engaged in nearly everything I can think of. I have been a land surveyor, I have followed the business a good deal for twenty years; I have put in odd times surveying and engineering work, sometimes.
Q. Have you been educated as an engineer and surveyor?
A. Well, an attempt at it. I started in to make an engineer, but fell down before I finished; I quit; I dropped down home; the bigger part of my education as an engineer has been secured in actual experience.
Q. Are you related to P. B. Mayfield?
A. I am a son of P. B. Mayfield, and a brother of the present P. B. Mayfield, lawyer.
Q. Do they live at Cleveland?
A. They live at Cleveland.
Q. Is your father dead?
A. My father is dead.
Q. How much study did you put in in the engineering line?
A. Well, it is hard to say, sir. I was expelled from practically every school I attempted to attend, but I put in a course—I took a common school course, and started in on an engineering course; I suppose I put in as much as two years in the college course, getting up to a point where we could matriculate in a good college now. The course is now higher than it was in those days.

Q. In mathematics you went up how high?
A. Well, my course of study——
Q. Did you go through geometry and trigonometry?
A. Not in the higher branches of trigonometry; I was fairly well——
Q. Did you ever study co-ordinates?
234 A. Why, that was in the course. But I was only moderately familiar with it, and have had very little to do with it in latter years.
Q. Are you acquainted with the instruments used in surveying?
A. The transit, the level and the common compass are the instruments, I have had the greatest experience with.
Q. Now, did you do any work along with Mr. Chambers, over there on the so-called State line?
A. Yes, sir.
Q. When was that, please?
A. In November; about the 9th, I started from Cleveland.
Q. In what year please?
A. This last year. I was out engaged on this job about ten days all told; we had a copy of the map of 1821 and the map of Mr. Burns. I had some small platting instruments with me. I took the map of 1821, figured out the angles, as best I could in a general way, placing a ruler along *there* line here and where we could trace the line, say to one-sixteenth of an inch; that would be five hundred feet away from the line, according to the scale, or four hundred feet away from it; we would consider that line straight, or even probably more; as much as one-sixteenth of an inch, that would be nearly one thousand feet—two hundred feet—I would consider it straight. We took on the map of 1821, and made several points; one of our courses would run from the State line road to the mouth of Slick Rock about south, about seventy west or seventy-one, or within that neighborhood. The line, as we followed down the trees, then along the line, varied some from that course, but I think I stayed within one-sixteenth of an inch on this map here. We came on down to the river, crossed the river at Slick Rock Creek; from there our next course led to a point at the foot of Big Fodder Stack lead. It is a lead that comes off of the Big Fodder Stack Mountain, that runs down to the forks on Slick Rock Creek, about Five Mile Point; you have heard them speak of that. I never traversed that line right up the creek, but have taken the course from each end of it across that line; and it corresponds close to the line that is on that map of 1821; then the general course was south nineteen, is about the way I took it from my figures. That was from the top of the Big Fodder Stack, or on Mr. Burns' Station 342; that was a station on the Big Fodder Stack. From the station on the top of Big Fodder Stack, the lines extend south nineteen east, was my figures, to a point about
235 where the Fodder Stack and the Hangover lead come together, or near that point—they fork, one lead going to the Hangover and one going to the Fodder Stack. From my platting instruments I got these courses, and, as I say, they do not track the line absolutely, but they stay within one-sixteenth of an inch, or

such *a* of it. Slick Rock Creek, as I take it on this map, or thi creek, is not plotted to go the way Slick Rock Creek does go on th actual ground. I am deputy entry taker of the Ocoee District, en bracing the territory of five counties, or such a matter; the bigges part of the territory. I have in my possession about seventy maps or sheets, each representing a township; and I have studied those ol maps some, and I would take it from my knowledge of those ol maps that this map, the water courses and mountainous points, ar off-hand drawings, and are not made from the survey; and m knowledge of the Ocoee maps *are* that there *is* none of those map made in 1836, or back at that period, that have ever come withi my hands, while I was thoroughly familiar with the land, that ther were not intersections in the location of the streams, ridges and som other points of that kind. The land lines are thoroughly accurat only, but the streams and ridges cannot be relied upon to locat your land by. We took this course followed up on out to close to th junction of those two ridges, the one which leads to the Hangove and the one which leads to the Fodder Stack. The snow was o the ground, about eight inches, and we turned back. We went i sight of them, where we could take our bearings; Mr. Chambers has previously chained it and I did not care to chain it myself.

Q. Did you take part with Mr. Chambers in making any survey of Slick Rock Creek?

A. No, sir; that was my first trip into those mountains, and I might say that I had no idea who Mr. Chambers was working for; whether he wanted to locate the line, or what the survey was made for, until I came off the job. I was employed by Mr. Harrison, over the telephone; he asked me if I would go along, and I told him I would. He did not tell me who I was going for, or what he wanted me to do. He gave me this map, and asked me if I could go there and make the survey by it. I took the map and went there. If you have got to take in the rivers, the streams—what I want to explain by that is: The Tennessee River is not as wide as this scale would show it to be, and those things cannot be traced to an absolute minuteness; but in a general way I can run that line up that Slick Rock Creek. I would not be on top of the mountain all the
236 way; I would be just at that point. If I had been a commissioner appointed to run that line, and was back on that Big Bald north of the river and climb down off of that, I would climb to that state line road where it is admitted they did come, I believe; start on down that point and you have got the Slick Rock Basin in front of you. You have got the Little Fodder Stack Mountain right directly—yes, that course leads you directly to the Little Fodder Stack Mountain. When you come down here north or west, you go as straight to the Little Fodder Stack Mountain as you can walk. That is the course. From these points where that course leads right across the mouth of Slick Rock Creek on to Little Fodder Stack Mountain; but when we get down to the point north of the river, these trees lead us off east of our line, or east of the line that would go to Slick Rock Creek. The surveyors from my experience, I would say, had run down that way; but in making surveys I have often

made off-sets to get around a fence row, where there is nothing in the way except little briers and as for going around a house, or anything of that kind, I always make an off-set and go around; I do not try to climb those inaccessible points. I do not know what they did, but that is the way it looks to me.

Q. That is, in the marking of the trees?

A. That is in the marking of the trees; in the marking of the trees I would leave marks on the trees; the line I would take perfectly straight from given points; that is, from the point that I had picked out in advance; while to make detours in getting down there, the line I would consider perfectly straight.

Q. And from your knowledge of the ground there, and from your marking of those trees and looking at that map, can you state whether or not that has been done in that case?

A. I would say that it looks to me as if the surveyor did just the thing I would have done, as I know I would have done, if I had been running that line—the surveyors who made this map.

Q. What did you undertsand?

A. The surveyor who made the map of 1821, when he came onto the point on the north side of the river, he had as his destiny a point at the mouth of Slick Rock Creek; he had picked that out in advance, and I think he had his points picked out eight or ten miles in advance all along. When he was back on that Big Bald he saw this main leading ridge off there south of the river, and it was merely a question there—his selection only had to be as to which
237 ridge he would take from the river up to where this main ridge started again. And he had picked out, in coming down, the mouth of Slick Rock Creek as an objective point, and he came down and found that land rough; he made a detour around to the east and followed down the creek there to that point; then he went to the Big Fodder Stack Mountain, as being the next most prominent point before him and being the most accessible. From the data furnished to me by Mr. Bob Fisher—shall I tell that?

Q. Go ahead and let them make any exceptions they desire.

A. From the data furnished by Mr. Fisher and I find that Big Fodder Stack is not as high as the Hangover or the Heigh—he, but the continuous ridge from this junction by the Big Fodder Stack and on around that way you would be, if you will take the levels every one hundred feet and take your general average from that. By the Hangover you strike a section of territory; from the Hangover to the river is a succession of small peaks or ridges or bluffs, and is a rough country, is what I gather from looking at it as much as I was over there. I did not make the whole distance, to go out on it. These points, we spent several days along the line; two days north of the river were practically put in getting to and from the work, and around there where we had to stay, and then we were up on the other line four or five days, the line south of the river along through this gorge; and we spent such time as we had, and with such instruments as we had, trying to ascertain what the angles were along this line, and in a general way we could follow them; but I must say that the Slick Rock Creek, the Little Tennessee River, these points and peaks along there are small off-hand work; that the

line is made, in my opinion, from the survey, but the other work is off-hand work, wholly so.

Q. What was the point furthest south that you reached?

A. Going south?

Q. Yes?

A. From the point north of the river?

Q. What point south of the river was the furthest point south that you reached?

A. I never was further south on this line than the—well, I didn't scarce go up to where the two ridges joined, but from a point north of the river you can stand back of the Big Bald there, a point
238 below the state line road there, and get up on a high point; and you can see over this gap, or the junction of the two ridges where the ridges splices and you are looking right over the Slick Rock Basin; you are looking between the—leaving the Big Fodder Stack to your west and the Hangover to your east. You see the Big Stratton Bald and Hall Knob and a number of other prominent peaks and ridges that come down there, showing themselves by a general chain of mountains that end almost in the—you might say a hand only two or three fingers—where they butt off down there to the Tennessee River. When they come down they had one of those figures to go down a pond to this point. The commissioners had to pick which one of those fingers of how they would climb this hand.

Q. What distinction do you make between — you call a finger and the ridge itself?

A. I mean the ridge in speaking of it as a finger or comparing it to a hand; I mean the ridge; those ridges are many, but there is really but two quite prominent ones, one going east of the Slick Rock and the other going west of Slick Rock, and still another extending west, I do not know where, I never tried to trace it; there was one going off from the Hangover—I mean extending still eastward; I do not know where it went.

Q. Where does the real main ridge commence south of the river?

A. My experience was, when I climb up from Slick Rock Creek that night, they told me I had to go up eight hundred feet, and if I did not go up four thousand I did not go up a foot, and my experience is it begins right at the mouth of Slick Rock Creek. You can get on a ridge if you want on one.

Q. I am talking about where you would say that the main or principal ridge commenced?

A. Well, comparatively speaking—the size of the ridge has got to be judged by comparison, like you judge of the size of anything else; comparatively speaking, those ridges are not ridges at all; they are awful big mountains; and one of them terminates in the Big Fodder Stack, you might say, and the other one in the Hangover. Then many ridges extend from them. There are still a continuous high ridge that goes down by the Little Fodder Stack and on down to the Little Tennessee River. The Hangover Ridge, starting from the Hangover, runs more eastward, in my opinion; that is the highest range of it, and I do not know where it goes to; going towards the

mouth of Slick Rock Creek, from the Hangover, you would
239 cross many ridges or peaks. I do not know whether the water divides them, but I think it does; but it is an awful rough country.

Q. What I want to ask you is you have spoken of fingers and ridges?

A. Yes, sir.

Q. I want to ask you whether or not the main ridge commences where the Hangover and the Big Fodder Stack join, or does it commence nearer the river than that?

A. That junction of the Big Fodder Stack and the Hangover Ridge is continued on south as a great mountain range. Their junction is not a real high point, but it extends on into Bob's (Stratton) Bald and other points that are much higher than either the Hangover or the Heigh-ho or the Fodder Stack or any of the rest of them—much higher, I mean by that, several hundred feet.

Q. Then where would you say the real main ridge commences?

A. The real main ridge, and I have in mind when I say the real main ridge, that main mountain, Big Mountain, would either begin in the Hangover or in the Big Fodder Stack; the others are lesser ridges extending to the river.

Q. Would it begin before the junction of those two?

A. They are two prominent dividing points north of their junction; one the Fodder Stack and the other the Hangover, and Heigh-ho; the Hangover and Heigh-ho are close together; the Heigh-ho is a little the highest; the Hangover is between that and the river.

Q. You say you can stand north of the river over at the state line on a peak right by the side of the state line, or even on that point north of the river, and look down all over that country. Which of those ridges, as a surveyor, and with your knowledge of surveying and with your knowledge of the country there, would you pick out as the principal or main ridge as you see them before you?

A. If I was a surveyor, and if I had been the commissioner or working for the commissioners to locate that line, starting back from that Big Bald with all this country before me, I would have picked out as my objective point away south yonder this continuous ridge of mountains. I am presuming that I am working under the same limitations that I think they were. I would have come on down and crossed the river by the easiest most accessible and, as I consider, the generally high range, in getting across there when I got down
there I would have done just as I think they did do, and take
240 the easiest way to get there, and that was to go right up that creek until I could get a good straight lead that would take me on that high ridge. If I found one leading to the Hangover first, I would have went to it, but as I did not, I would have come down, and when I found the one that goes up to the Big Fodder Stack I would have went there. That would have been what I would have done if I had been running that line.

Q. You were, in your estimation, on what you call the main ridge?

A. No; it is a prominent ridge and it is—I cannot say that it is

any more the main ridge—it is just a part of the main ridge, and this other part is a part of it, and my object would be to get on it just as quick as I could.

Q. If that is a part of the main ridge and the other is also a part of the main ridge—what I am trying to get at is, in your estimation, the fact that the main ridge commences where these figures join?

A. Where it breaks off?

Mr. McCroskey: Respondents except to the attorney arguing with the witness.

A. (cont'd). I say that the Fodder Stack and the Hangover are each very prominent points and are near the termination of this general mountain that goes south, one standing a little to the right and the other a little to the left. Now, I cannot say that I consider the Fodder Stack the main ridge, but it is a very high point, almost as high, but not quite, as the Hangover or the Heigh-ho; but my object is to get back on this mountain south, if I was running these lines—my object was to go on to the main ridge; I wanted to get on that main ridge, and I had to cross the Little Tennessee River, and as soon as I got down there off of that Little Tennessee River I would start to get up that main ridge and I would not care much whether I followed up the creek or how I got there. I want to get there, and I go up that creek five miles and I find a lead that leads me up there to this Fodder Stack Mountain, and that will carry me around to where I am trying to get.

Q. Does this map of 1821 coincide in its courses and bearings with that rock that you have just spoken of?

A. Very nearly. That is, if you will take distances of a mile to three miles apart you can make those a- right. If you have got to take each separate distance every hundred yards, or every one-sixteenth of an inch, you cannot come that.

241 Q. Did you examine Burns' map?

A. Yes, sir; I have been over it pretty closely.

Q. How did it compare with this map in detail?

A. Burns' map is a very accurate map of the Slick Rock Basin, and the lines that he traces up Slick Rock Creek and up that ridge would be the one that I would adopt in getting from the mouth of Slick Rock Creek back on to the main ridge south. I would go up this ridge to the Fodder Stack and up along the Fodder Stack lead back to my south ridge.

Q. How does it correspond with the map of 1821 generally?

A. In the courses of two or three miles they correspond exactly; that is, within a degree or two of each.

Q. How about the general points on this map?

A. The general points will agree; the details are not the same. That is, I mean that you cannot take the map of 1821 and fit the off-hand work, as I accept the rivers, creeks and ridges, to anything in that country that I know of, except the mouth of this creek and the prominent point of Fodder Stack. In other words, I would accept the map of 1821 as correct when it came along the line, but the surveyors that made it did not have the time, nor I do not guess,

the inclination, to try to cover that whole country or make a topographical map of that mountain section.

Q. As you stand at that point, say a mile away, on which hand, and looking right at the river—on which hand is Slick Rock Creek?

A. As I stand where?

Q. About a mile north?

A. If I stand a mile north and look at the Tennessee River, if I was a mile north, you cannot see it back a mile; but if you go back a mile from the mouth of Slick Rock Creek, Tennessee River is off here four or five hundred yards from you, and you can see it down there — the river back one mile back of this line along the course that we call this crest leading from the state line to the river. There Slick Rock Basin and Creek is to my right.

Q. Where is the Cheoah?

A. Well, I have never been to the Cheoah, it is said to be up the river; that is all I know.

Q. Could you see it at all from there?

A. You can see some bluffs from points back of the north side that was pointed out to me as being Cheoah.

242 Q. That point that was pointed out to you—how far did it look from Slick Rock Creek.

A. I would guess it to be a mile and a half or two miles; some where within that.

Q. From your knowledge as a surveyor, and from having all this information before you, and being on the ground, I will ask you if that stream labeled "Creek" on that map of 1821 could be the Cheoah River?

A. Not if this line goes over the Big Smoky Bald. I do not believe you could ever get to Cheoah River and cross the Big Smoky Bald.

Q. Isn't the line undisputed? Did you not understand it was undisputed so far as the Big Smoky Bald was concerned?

A. I don't really know; I don't know anything about it.

Q. From the general bearings taken by you to Big Fodder Stack, to Hangover, to the junction and other main points, and from the general bearings taken from the map of 1821, would you say that the state line as shown on the map of 1821 could have struck the Cheoah River?

A. From a point north of the river I took the bearings to prominent points south, and comparing them with the angles that I had taken off the map of 1821 I decided that you were compelled to go up Slick Rock Creek to Big Fodder Stack Mountain—to follow those angles.

And further deponent saith not.

ED. MAYFIELD.

Sworn to before me this January 9, 1909.

[SEAL.] R. S. HUTCHINSON,
Notary Public, Knox County, Tenn.

Witness three days. Mileage, eighty-seven miles.

D. B. BURNS, next witness, being duly sworn, deposed as follows:

Examined by Mr. MATTHEWS:

Q. You have been previously sworn in this case when your testimony was taken?

A. Yes, sir.

Q. I want to ask you, taking a map like that of 1821, what is the best way to test and make use of a map of that kind, drawn upon that scale, for the purpose of ascertaining where the state line would be, and what that indicates as the state line—the two branches?

A. In the first place, I would make a thorough study of the map and the topography, etc., and then I would take up the gen-
243 eral courses of the line as it was surveyed. This map indicated that they ran on top of a ridge for mountains a place or two, crosses water courses where they were cut through the mountains, as it indicates they ran on top of the ridge in order to follow what the commissioners did in 1821 in running this line; of course we would have to run on top of the ridge as they show. When they show where they crossed a stream or running up a stream for any distance, of course we would have to look for such streams and look for their marked trees which they left behind them. The best way on a scale this small, as it is altogether impracticable to try to scale off with a scale and protractor every small distance and angle that is shown on this map, therefore the most practical way to take the general bearings in which the whole trend of the line seems to be practically straight and then by the aid of the marked trees and the ridges that this straight course seems to indicate that they ran on, is the most practical way to get at the location of the state line as it was run by them in 1821.

Q. In getting at the courses and distances, do you look for important points where they reach on the map—where they are designated or you can recognize them?

A. Yes, sir.

Q. And keep those in mind?

A. Decidedly so.

Q. Now, were you present when Mr. Hale and Mr. Miller were testifying as to the manner in which they tested that map, both on the map and on the ground?

A. I was present when they were testifying in regard to the tests they had made on the map of 1821. I was not present with them when they were on the ground.

Q. No, I do not say when they were on the ground, but when they testified as to the methods they used upon the ground as well as the methods of testing this map of 1821?

A. Yes, sir.

Q. Did you hear what they said about the results? That they got on the ground in trying to run the line according to that map?

A. Yes, sir.

Q. I want to ask you, as a surveyor and engineer, whether the methods that they detailed were fair methods of testing the accuracy of that map, and where the line ran according to that map?

244 A. In my opinion as an engineer or surveyor, the methods they used could not be considered a test by any means, for the following reasons: They would take the scale and undertake to scale the distance as shown by these little angles in the map of 1821 and undertake also to take a protractor and determine the course of such small angles as a matter of fact on a map of a scale this small, even if it was made absolutely perfect, it would not be possible to scale the distance closer than, I would say, about one hundred feet, possibly a little more or a little less, and while you would undertake to scale off a number of these courses and distances especially if the arrows were all running in the same way, you would soon get results which would be altogether different from the field notes from which the map was originally made by the commissioners of 1821.

Q. In attempting to scale off those small angles, would or would they not have to compare their work at the outcome or at some point between the beginning and the outcome with the salient points that are reached upon that map?

A. Yes, sir.

Q. And make corrections by these points?

A. Yes, sir. Upon this map of 1821, as it was made upon such a small scale, the commissioners did not undertake, in fact could not have put on in figures the distances and the bearings of these small lines, so they merely marked with a circle the distance or the ends of each mile, and these circles are shown upon the map, and we know that the commissioners in their field work measured just one mile, or three hundred and twenty poles, between these circles; and if a person should undertake to scale off these distances with a scale, and try to reproduce them on the ground as in the manner in which they were originally surveyed, they would have to balance the distance so that they would make just three hundred and twenty poles between a mile surface. Unless they would do that we would know in the start they would not be following the work that the commissioners did as laid down on this map.

Q. And what would be your opinion of the accuracy of the work and their ability to do it, adopting the method that you have stated of attempting to measure all the small lines and angles independently of each other, if they found out at the end of say, that seven miles, they were away off the point that was indicated on that map;

245 what would that, if anything, demonstrate to your mind as to the accuracy of the previous work done in that way?

A. I do not quite catch your question?

Q. If an attempt was made to measure all those small lines in distances and all the small angles there, if the result of that was to land them at a point away off from the point that you know by that map had to be reached by that map, what would that indicate to you as an engineer and surveyor as to the accuracy or ability to do the work of the prior measurements that had been made in the way that I have indicated?

A. You mean by that question to take the method that I stated awhile ago *in* which Mr. Hale and Mr. Muller used?

Q. Yes?

A. Well, it would indicate to me very clearly that there were very great errors in their scaling and measuring and angles to throw them clear off the track.

Q. Now, if you had their notes of their various measurements of those small lines and angles, could you, as an engineer and surveyor, find their error?

A. I think I could.

Q. Do you know of any better way of reading and testing that map than the way they indicated?

A. Yes, sir.

Q. What is it, and state the method you applied?

A. I would use the meridian on the map of 1821 as shown by the commissioners, and I would lay out an axis or a system of co-ordinates of lines running north and south and east and west, and I would determine by scale the co-ordinate of every point where there is any slight deviation in the lines as run by the commissioners. This method would eliminate cumulate of error that would necessarily be obtained in scaling a long distance in the manner in which it was platted. After having determined the co-ordinates of these points, I would then work out from those co-ordinates the bearing and the distance of each little angle on the line, and then I would take into consideration the mile circles, and if I fell a little short of the miles as they show between the circles, I would apportion my distances between the circles in order to make a mile. If I would get a little too much distance between the circles I would cut them down in order to make a mile. I would do that for the simple reason that they have indicated mile circles and therefore you would have to use just one mile between these circles or else we would
246 not use the distances that they measured on the ground when they ran the line. Now, I have gone to work and laid out such a system of co-ordinates upon the map of 1821, and determined a set of bearings, courses and distances of every little deviation of an angle as shown upon the map between the points of dispute, and have plotted such courses and distances to a scale of one thousand feet to the inch, which was the scale used on the map which I filed to my deposition as Exhibit "A," and I have applied this map to the tracing which was used, and I find that the thing corresponds almost exactly to the ridges and water courses which I actually ran the line a few months ago—so close that a mere child could not help but see and understand that the line actually ran from the junction of the Hangover to the main Fodder Stack Mountain, around over the Fodder Stack, down the Big Stack lead, to the Slick Rock Creek, down Slick Rock Creek to the Tennessee River, thence up the Smoky Mountain, where there is no dispute.

Q. Is that the method that you used in testing this map?

A. Yes, sir; one method. The other method used was the general courses which I thoroughly discussed in my other deposition.

Q. The map that you filed here, Mr. Burns, how nearly does it correspond with that as you tested it generally, I mean?

A. Well, generally speaking, it corresponds almost exactly—as to leading ridges and water courses, exactly.

Q. Now, as to running up Slick Rock Creek, how far in making that survey did you run up Slick Rock before you struck any ridge?

A. Between four and five miles, is my recollection; about five miles, I believe.

Q. About how far is it on this map?

A. Well, it shows about a mile and a half—something like that.

Q. How do you account for that?

A. Well, they simply sketched in the stream and they sketched it in too low down. They actually follow the water courses for a distance of about five miles.

Q. Taking that map and applying it on the ground, where would you first strike the ridge?

A. If you apply this map on the ground, beginning at the mouth of Slick Rock Creek, you would go up the creek to Big Stack lead—you cannot help it—about five miles. The error in this is simply the creek; it is not in the line.

247 Q. What have you to say as to those shadings that look like they were about a mile and a half from the Tennessee River? Should they be there or some place else?

A. The shading indicates to me that they ran up the creek some distance and just as soon as they left the creek they took up a ridge that leads to the main mountain. Of course the mountain here as it is shown on this map from there up to the first decided break to the left, or what we claim is the Big Fodder Stack, is decidedly greater than it is on the ground, for the simple reason that the creek has been sketched in at the wrong place.

Q. Do you mean that the creek has been sketched in at the wrong place, or the sketch of the creek is not as it is on the ground?

A. That is what I mean. The creek is not on the map as it is on the ground.

Q. You do not mean that it commences in the wrong place?

A. No, sir; not necessarily.

Q. Mr. Burns, can anybody say what the variation between the magnetic and a true meridian in 1821 at the mouth of Slick Rock Creek?

A. No, sir; not exactly. You can only approximate it.

Q. Is that element for which allowance would have to be made in ascertaining the location of that line?

A. Well, I hardly think I would split hairs over that. I do not think it would be necessary at all. The main thing in this map, if it leads you close enough to show you the right ridges and water courses, then it has served its purpose in my mind.

Q. Taking into consideration your experience as an engineer and surveyor, and what you know of the country, going over there and with the aid of this map, would that stream labeled "Creek" there, be Checah River?

A. It could not possibly be. No, sir; it could not be Checah River at all.

Q. What is the only stream it could be?

A. Slick Rock Creek is the only stream that it could be, in my opinion.

Cross-examination waived.

And further deponent saith not.

D. B. BURNS.

Sworn to beforeme this January 9, 1909.

[SEAL.] R. S. C. HUTCHINSON,
Notary Public, Knox County, Tenn.

Attendance waived.

248 T. E. H. McCROSKEY, recalled on behalf of the petitioners testified as follows:

Cross-examined by Mr. MATTHEWS:

Q. Mr. McCroskey, you stated in the deposition that was taken of yours in this case, that a few days after this case had been argued in Cincinnati before the Court of Appeals and after you returned home, you received a communication from the clerk, stating that the case had been affirmed. Now, this judgment was entered there on the 13th day of July of what year, 1900. It was argued some months before that, was it not?

A. Yes, sir.

Q. It was argued in February?

A. The last part of February or the first of March.

Q. And is it true that the Clerk notified you a few days afterward that the Court had affirmed it?

A. Yes, sir.

Q. By letter, I suppose, or by telegram?

A. I do not remember exactly how I got the information, but it was only a few days afterwards, and my recollection now is, that it was by letter or telegram that I received the information.

Q. And you say that you understood the Court in consultation that night after adjournment affirmed the case. Where did you get that information?

A. I cannot remember now just how I got that information. I can only state that my decided recollection is that was the last day that Judge Taft was on the bench, his resignation took effect that night and he was not on the bench later than that, and this was the last case heard by Judge Taft as a Judge.

Q. That is the night of the day on which this case was argued that you understood that?

A. Yes, sir. Now, as to how I got that information, stating definitely, I do not remember. Explanatory: The foot-notes to the opinion as published in the Federal Reporter recited that the case was decided before Judge Taft retired from the bench.

Q. That foot-note, however, did not appear until after it was published?

A. No, sir.

Q. Was that foot-note to the printed report of it in the Federal Reporter, or the foot-note of the opinion itself when it was handed down, the written opinion, the manuscript opinion?

A. I do not remember that I ever saw the manuscript opinion.

249 Q. Then, when you speak of that, you refer to the footnote that was printed in the volume of reports?

A. Yes, sir.

Q. Do you remember that that was in August of that year?

A. What was in August?

Q. The printing of the opinion in the advance sheet of the Federal Reporter?

A. I do not know.

Q. Now, when you learned of that you immediately telegraphed did you, to Mr. Hebard?

A. I sent a telegram to Mr. Hebard, is my recollection, when I first heard of the decision.

Q. I say, when you heard that, you immediately telegraphed that?

A. Yes, sir; that is my recollection now that I telegraphed him at once.

Q. Now, you say that you know that Blaisdell and others bought the land; that the negotiation was pending several months, at least two months or three months; the proposed purchasers came with experts to examine the timber on the tract of land and also came to Madisonville to investigate titles and conferred with you in regard to the title to the land. It was explained to them by you that there had been litigation over the State line which involved several thousand acres of land which they proposed to buy. Now, you explained to them that the litigation had been terminated, etc. When was it that those gentlemen came with those experts?

A. That as I now remember was sometime during the summer of 1900.

Q. After the opinion was rendered, was it?

A. Yes, sir. I will say, Mr. Matthews, that before that case was heard, that is my recollection, but several days, that these parties had been there prior to that time looking at the timber with a view of buying it, but I am not very distinct about that part, but my memory is very distinct that they were there during the summer of 1900 and prior to—after we understood that the case had been decided and prior to and after the 13th day of July, when the decree was entered of record.

Q. Were you Mr. Hebard's lawyer in any matter except this case at that time?

A. Yes, sir; I had charge of all his business pertaining to this land from the time he bought it until he sold it.

Q. Do you know how long his negotiation with Blaisdell and others had been going on, when it commenced?

A. No; probably a year, more or less.

250 Q. Did you conduct that negotiation in any way for Mr. Hebard?

A. I did.

Q. Where did you meet Mr. Blaisdell if at all, or if you did not meet him, with whom did you negotiate acting for him or others?

A. The first negotiation with the proposed purchasers was with F. L. Andrews and L. C. Seiberd, and they are the first parties that

came to the general property and brought an expert with them. They were here probably twice before any of the other parties came down. Afterwards some of the Blaisdell's, but I am not sure that I met them before the deed was executed for the land. I am not positive that I had any previous communication with any of the parties except Andrews and Seiberd.

Q. Where did Andrews and Seiberd come from; where did they live?

A. Coudersport, Pa.

Q. Now, a deed was made, which was put in evidence, that deed being dated on the 16th day of July, 1900. Did you draw that deed?

A. I think my son drafted the deed.

Q. Do you know the terms upon which it was in escrow—the conditions of the escrow?

A. I do not understand that that deed was placed in escrow. No, I do not. Personally I cannot say as to that, because that matter was transacted in Philadelphia, Pennsylvania, and I was not present.

Q. And you did not know the terms upon which it was placed in the Drexel & Company Bank?

A. Except from information.

Q. And you don't know whether those terms ever were complied with then?

A. Except from information.

Q. From being told by somebody?

A. Yes, sir.

Q. Do you know about the arrangements between Blaisdell and others and Andrews and Seiberd?

A. Yes, sir.

Q. Was there a written contract between them?

A. I do not know anything about a written contract. I know that the parties who came in representing the Smoky Mountain Land Lumber and Improvement Company were down in Tennessee with a view of looking at the property with Andrews and Seiberd.

251 I think both Andrews and Seiberd were here, at least one of then anyhow, and I met all the parties and the matter was discussed in my presence.

Q. What was the arrangement between them?

A. Some of the parties who originally bought the property and wanted to go out did not want to remain as purchasers and sold out to other parties who took their places in the Smoky Mountain Land Lumber and Improvement Company. As I understood, some of them were hardly able to meet their proportionate part of the purchase price; there was a little delicate question, and I did not press it very much, but the general plan of their conversation indicated that, and some of them were to step down and out and others to come forward and take their places.

Q. That deed remained in escrow for about three years, did not it?

A. No, probably a year or a year and a half. I am not sure about that.

Q. Have you not answered in this case that it remained till January 9, 1903?

A. I should think that ought to be 1902. I am not quite sure.

Q. You say where nearly three years after the final decree in this suit?

A. Well, I do not think it had been that long, Mr. Matthews.

Q. Where did you get this from, what information had you personally as to when it was delivered?

A. I got my information from Mr. Hebard in regard to the deed being cleared in escrow.

Q. And the time it came out of escrow?

A. No, I do not know that I got information from him as to when the deed came out of escrow.

Q. Where did you get your information, do you recollect, Mr. McCroskey; about how long it remained in escrow?

A. I can only assume, Mr. Matthews, from the day of the registration, my recollection is that when the deed was released or taken out of escrow that it was at once sent to Monroe County for registration.

Q. Was not that sent to your County for registration on the 18th day of December, 1903?

A. I do not remember sir.

Q. Look at that and see if that does not say so (referring to the certificate of the Register)?

A. Yes, sir; it shows that date. It says it was placed there for registration on the 18th day of December, 1903.

252 Q. If you judge then only when it was sent here, for by the time it was sent here for registration, then it would have been in there pretty well three and one-half years, wouldn't it, in escrow?

A. Yes, sir; three and one-half years.

Q. The deed was executed July 16th, 1900, you say, and if it remained there until December 18, 1903, that is three and one-half years?

A. Something over three years.

Q. Did you ever know the arrangement between Hebard and Andrews and Seiberd?

A. What do you mean?

Q. The sale—were they the first parties that became interested in this?

A. Yes, sir; Andrews, Seiberd and Blaisdell, two of them; I do not remember now the names of all the original purchasers.

Q. Do you know the arrangement between Mr. Hebard and those original purchasers?

A. As to the amount of the purchase price, or what do you mean?

Q. The agreement is what Hebard agreed to do and what he agreed for them, and what they agreed to pay for it, and the whole contract of purchase?

A. I think so.

Q. Please state it?

A. Counsel for defendant objects, as being wholly irrelevant and immaterial.

A. My recollection about it is that we sold the property to them at the rate of $5.00 per acre; and a part of the purchase price, in fact the larger part of it, nearly all, was on time. The interest was computed and added into the face of the deed as a part of the purchase price, making it something over two hundred and thirty thousand dollars.

Q. How did you get at the acreage?

A. Well, most of it was in section lands, nearly all of it, except that part of the land that is in dispute in this case, and it was very easy to calculate it.

Q. How did you get at the acreage of the land that was in dispute in this case?

A. We estimated that to be between or approximately six thousand acres.

Q. That was a mere estimate then?

A. Oh yes, the estimate of the whole acreage was forty-two thousand acres, as I now remember.

Q. And that was a mere estimate, was it?

A. Yes, sir.

253 Q. And there was actually paid over, was there, $5.00 per acre on the whole forty-two thousand acres?

A. That was my understanding.

Q. You do not know anything about that?

A. The payments were all made in Philadelphia and I had nothing to do with that.

Q. The payments were all made in Philadelphia and you had nothing to do with that, and you do not know anything about that?

A. No, sir.

Q. Your recollection is then that there were forty-two thousand acres, and at $5.00 per acre, which would make two hundred and forty thousand dollars principal and the balance mentioned in the deed was interest calculated on those payments up to some—up to some fixed date?

A. Yes, sir; I got that information from Mr Hebard himself.

Q. You know nothing personally about that?

A. No, sir.

Q. Nor whether the money was ever paid, do you, to your own knowledge?

A. No, sir; I do not.

Q. And do you know anything about any of the other terms of the contract except what you were informed?

A. No, I do not.

Q. When did this Smoky Mountain Land Lumber and Improvement Company first come upon the ground so far as you know—that is upon the field; when was that organized, do you know?

A. I cannot speak from memory.

Q. Well, can you speak from knowledge?

A. No, sir.

Q. Where was it organized, in what State?

A. Under the laws of Delaware, as I now remember.

Q. Where was their principal office so far as you heard?

A. I think their principal office was in New York.
Q. In New York?
A. Yes.
Q. Do you know who composed the Company? I mean of your own knowledge now?
A. I have seen a copy of the charter and possibly a literal copy of the charter, because I have used it a great deal.
Q. But you would not know except from that?
A. That is all.
Q. And those would be only the original incorporators, would they not?
254 A. Yes, sir.
Q. Who subsequently became interested in it or its organization you don't know, even for hearsay?
A. Personally I had nothing whatever to do with the incorporation of the company, its organization and the parties who are interested in it; I knew nothing about it until after the company was organized.
Q. Then what did you know about it after it was organized?
A. A copy of the charter was sent here or to Monroe County, and of course, I represented the company and the abstract of charter was filed with the Secretary of State, was my first direct knowledge except some members of the company were here and told me about the company and that they were members of it.
Q. Well, that is all the knowledge you had about who composed the organization of the company?
A. Oh yes, I hadn't anything to do with the organization.
Q. Do you know whether those original purchasers of the property organized and became the constituent members of that company afterwards—of the Smoky Mountain Company?
A. Personally I do not.
Q. You don't know then whether they took stock in that Company for their holdings?
A. Personally I do not know.
Q. You knew Mr. Blaisdell, do you, or you met him?
A. Yes, I knew several of them.
Q. And Mr. Cobb?
A. Yes ,sir.
Q. You have stated already that you knew Andrews and Seiberd?
A. Yes.
Q. Do you know of your own knowledge whether those gentlemen, or any of them, organized this company and became constituent members of it?

Counsel for defendant objects as irrelevant and immaterial.

A. Of my own knowledge I do not.
Q. How many of these gentlemen that I have named, Messrs. Andrews, Seiberd, Cobb, Raymond, Holbrook, P. C. Blaisdell and Walter Blaisdell, did you see afterwards in connection with the business of the Company?

A. I think I have seen all of them except Walter Blaisdell, you say?

Q. Walter is one, yes?

255 A. I do not remember him. I remember J. W. Blaisdell and F. L. Blaisdell.

Q. This is only P. C. and Walter here. How many of those told you that they were interested in the Smoky Mountain Land Lumber & Improvement Company, and that they had associated in organizing it?

A. J. M. Carpenter, Theodore Cobb.

Q. Excuse me a minute, we have not had Carpenter's name heretofore. Please tell me where he lived?

A. He now lives in Los Angeles, California.

Q. Do you know whether he is still interested in this company?

A. That is my understanding; I do not know.

Q. Now, what others told you that they were interested in the company and instrumental in organizing it?

A. I do not know that any of them ever told me that they were instrumental in organizing the company but Cobb, Carpenter and the Blaisdells.

Q*Q*. And Holbrook?

A. Holbrook.

Q. And Raymond?

A. I do not remember about Raymond, but the others were all here and told me they were all interested.

Cross-examination waived.

And further deponent saith not.

T. E. H. McCROSKEY.

Sworn to before me this January 9, 1909.

[SEAL.] R. S. C. HUTCHINSON,
Notary Public, Knox Co., Tenn.

One witness three days. Mileage, eighty-four (84).

ROBERT T. QUARLES, a witness for the respondent, having been duly sworn, testified as follows:

Examined by Mr. SHIELDS:

Q. What is your given name?
A. Robert T. Quarles.
Q. Your residence?
A. Nashville.
Q. Age?
A. I shall be sixty my next birthday, in November.
Q. Your occupation?
A. I am State Archivist.
Q. You are the State Archivist of the State of Tennessee?
A. Yes, sir.

Q. When were you first officially appointed as State Archivist??

256 A. Under Governor Benton McMillan's last term, his last two years; I do not recall—I believe it was in 1903; that is right. I went to work on the papers before I was actually appointed.

Q. Mr. Quarles, state to us where you found, and the time you found, the original map, of which the map before you is a certified copy, of 1821?

A. I took no special note at the time of the finding of either of the two maps; they were together when I found them; but it was between December, 1903, and February, 1904.

Q. You found the two maps?

A. Yes, sir.

Q. What other maps do you refer to?

A. That is, the upper part of the line running from White Top to the Big Pigeon River.

Q. Did you at any time find the commissioners' report of 1821?

A. Yes, sir; I found them about the same time, if not at the same time, that I found the maps.

Q. I hand you a certified copy of a report and ask if that is a copy of the report of which you speak of finding?

A. I see that has the Seal of the Secretary of State on it, and this copy was made in my department, and is a true copy of the agreement.

Q. If so, will you file that as exhibit "A" to your deposition?

A. I so file the same.

Q. When were you called upon, Mr. Quarles, to make the first certified copy of this newly discovered map of 1821, and for whom?

A. Now, I cannot—the time I remember fairly well; it was in March, 1905, and it was made for a man by the name of Allen, and he also had a copy of the agreement. That was the first map made. Mr. Muller had the second.

Q. Was that a part of general circulation; do yo uremember the map, of which you have knowledge?

Mr. MATTHEWS: We object.

A. I told the reporters about it, and they put a squib, and some of them published the whole map as an item of news.

Q. When was that?

A. That was prior to the making of the first; and was probably the latter part, maybe in November, 1904.

Q. Was that a paper in general circulation; do you remember the paper?

257 A. Well, it was some one of the three Nashville —; I do not recall now. The reporters were constantly coming into the office and asking if there was any news item they could get, and if they thought sufficiently of it, they published it; I think one of the papers, the Banner—I am not sure about that—published the matter in full, especially the report of the commissioners.

Q. Do you have knowledge of that article to which you refer as being published in Nashville being copied by other papers?

A. I think somebody sent me a Knoxville paper that had a map reproduced and some other matter in regard to it; I am not sure what time that was.

Q. You have stated that the publication as to the finding of the reports in a Nashville — was in November, 1904?

A. Yes, sir. I am not positive as to the month, but it was between—it was in the fall, the latter part of the fall, or early in the winter; that is about as early as I can place it.

Q. Of what year?

A. 1904.

Q. Was the article which you refer to as being published in the Nashville papers, and copied into the Knoxville paper which was sent to you, was that a report as to the finding of the map?

A. That pertained more—there was a squib in regard to that—and then they went into some details in a description of the matter; it seems to me that I did not charge my memory with it, and I would have to refer to the papers to give you the contents.

Q. But it referred to your finding of the map?

A. Yes, sir; there was a map of it; this map of 1821 was reproduced in it.

Cross-examination by Mr. MATTHEWS:

Q. At the same time that you found this, did you find a map of the survey of 1799?

A. Yes, sir.

Q. And did you find any field notes of that survey—you found no field notes of the survey of 1821?

A. No, sir.

Q. Is this a correct representation of this map we have here of 1821, of the scale on which the original was run?

A. It is an exact reproduction of the map, just as closely as we could make it.

Q. That survey of 1799 was a survey between Tennessee and Georgia?

258 A. Between North Carolina and Tennessee. I think it runs from the White Top Mountain to Big Pigeon River; that is my recollection.

Q. The White Top Mountain is the extreme northern limit, and the Big Pigeon is the one that is next?

A. Yes, sir.

Q. Was that map of 1799 about the scale of this?

A. About, yes, sir.

Q. And that, you say, you found the field notes of?

A. Yes, sir.

Q. Has there ever been any difficulty in ascertaining upon the ground exactly where that part of the line is from that map in connection with the field notes?

A. No, sir; there has been two points that have been in contest; one from Unicoi; and I forget just where the other one was; probably

both of them were in Unicoi; but the line was settled from those field notes without any trouble.

Q. By concession of the various surveyors?

A. Well, I really don't know about that. I just gave the information that they wanted, and I don't know anything about the balance of it.

Mr. SHIELDS: Counsel objects to the questions as being irrelevant.

Q. From what your knowledge of what the map of 1799 is, in regard to the scale as compared with this map of 1821, and the ability as demonstrated to work out the location of that line from the field notes, are you competent to say—for I don't want you to say, if you are not and cannot answer—but are you competent to say that if the field notes of this plat of 1821 were with it, the line could be in the same manner and as successfully worked out as the 1799 line?

Mr. SHIELDS: I object to the question, for the reason that there is no evidence, or presumption, that there ever were any field notes to this survey.

A. I am not competent to answer that question.

And further deponent saith not.

ROBERT T. QUARLES.

Sworn to before me this January 9, 1909.

[SEAL.] R. S. C. HUTCHINSON,
Notary Public, Knox County, Tenn.

One witness three days. Mileage, 216.

NOTE.—Exhibit "A" is a report of the commissioners of Tennessee and of North California, dated the 31st day of August, 1821, directed to Governor Joseph McMinn, of Tennessee, the same being already marked Exhibit "G" and already filed in this record.

259 *Agreement.*

It was agreed and stipulated between counsel to all the parties hereto that the stenographer and Notary Public might sign the names of the several witnesses to their depositions.

Bill of Costs.

JANUARY 9, 1909.

W. R. Hopkins et al in Account with W. D. Hale, Dr., January 9, 1909.

To railroad fare from Cherry Log, Georgia, and return....	$8.10
To board in Knoxville.....	3.25
To four days in State line suit.....	20.00
	$31.25

It was agreed by counsel for both parties that the above bill of costs be reported as paid.

KNOXVILLE, TENN., *January* 9, 1909.

W. R. Hopkins et al in Account with O. W. Muller, Dr. from January 7, 1909.

Railroad fare and hack	$2.00
Railroad fare from Madisonville and back	2.48
Board in Knoxville	3.50
Three days in State line suit	15.00
	$22.98

Paid by W. R. Hopkins for petitioners.

In the matter of the expense account of R. T. Quarles, from Nashville to Knoxville, Tenn., and return, January 7, 1908.

It is agreed by counsel for both parties that the above bill of costs is to be reported as paid.

Endorsed: No. 1056. In the U. S. Circuit Court at Knoxville. Chas. Hebard against D. W. Belding et al. Depositions. Filed Jan. 26, 1909. D. L. Snodgrass, Clerk, by C. A. Hill, Dep. Cl'k.

In the United States Circuit Court, Northern Division of the Eastern District of Tennessee.

No. —.

DAVID W. BELDING et al.
vs.
CHARLES HEBARD.

To the Honorable Justice Horace H. Lurton, United States Circuit Judge of said Court:

The petition of the Smoky Mountain Land, Lumber and Improvement Company respectfully represents:

That on the 16th day of January, 1896, Charles Hebard filed bill in this Honorable Court on the equity side of the docket against D. W. Belding, et al., to locate and settle the state line be-
260 tween Tennessee and North Carolina and to enjoin defendants from cutting timber on a certain tract of land and to quiet title, and remove a cloud therefrom. Said cause was prosecuted to a hearing in this Court in favor of Complainant Hebard. That the matter in dispute in said proceedings was a proper location of the state line between North Carolina and Tennessee for a distance of about ten miles, extending southwest from the Tennessee River in Monroe County, Tennessee.

That said case was appealed to the Circuit Court of Appeals for this Circuit and on hearing, the decree in favor of said Charles Hebard, was by the Circuit Court of Appeals affirmed, and entered on July 13, 1901.

That no appeal or certiorari was attempted from said decision of

the said Circuit Court of Appeals to the Supreme Court of the United States.

That subsequently after said affirmance in the Circuit Court of Appeals of the decree of this Court, William R. Hopkins and others, who had purchased the claim of title to said lands in dispute from said David W. Belding and others, filed a petition on August 6, 1907, in this Court for leave to file a bill of review, which petition was granted and said bill of review filed and testimony taken and completed and filed in the proceedings in support of said bill of review.

That said bill of review alleged the discovery of a map since the decree of the Court in favor of Charles Hebard, which map it was alleged would justify this Court in altering its decree. That to this bill of review the Smoky Mountain Land, Lumber and Improvement Company was made a party and has participated in the taking of testimony therein.

That the Smoky Mountain Land Lumber and Improvement Company purchased from Charles Hebard the land in dispute after the decree was affirmed in the Circuit Court of Appeals and long before the filing of the petition for said bill of review. That from said decree in the Circuit Court of Appeals there is and can be no appeal to the Supreme Court of the United States.

That one C. B. Matthews, attorney at law, was counsel for said W. R. Hopkins et al., petitioners in the Bill of Review, in the filing of the bill of review, and has conducted the examination of witnesses in support of said bill of review. That recently, after the examination of the chief witnesses in said bill of review, said C. B. Matthews and other counsel assisting the Attorney General of North Carolina have filed a bill in the Supreme Court of the United States for the State of North Carolina against the State of Tennessee, al-
261 leging that the State line between North Carolina and Tennessee over the said ten miles Southwest from the Tennessee River was in dispute, praying the Supreme Court of the United States to locate, define and adjudicate said boundary line between the States.

The petition for bill of review was granted by His Honor, Judge Clark, former Judge of this Court, who was unfortunately stricken by death previous to the time of hearing this case. His Honor, Judge Sanford, of this Court, who was appointed to fill the vacancy made by the death of Judge Clark, has been of counsel for Belding, et al., in the original case, and therefore was unable to hear this case, after which delay the case was set to be heard in January of this year. On January 25th, 1909, in this Court at Knoxville, Tennessee, at a Special Term of Court held by Judge McCall, W. R. Hopkins, et al., by their counsel, requested a continuance of this case, and the following order was entered:

"On application of petitioners W. R. Hopkins, et al., this cause is continued until the next regular term of court at which time the cause will be tried without further delay.

The parties are ordered to prepare the case for trial on or before the next regular term.

Enter this.

McCALL, *J.*"

At the time the order was made, the next term of the court was March term, which later by Act of Congress was made July term.

His honor, Judge McCall, has informed counsel of the Smoky Mountain Company by letter that he will not hold a special term of court at Knoxville, Tennessee, during the July term, but offered to hear argument of this case on a date to be agreed upon by opposing counsel. On a statement being made by the counsel for the Smoky Mountain Company of these facts, to the counsel of W. R. Hopkins, et al. said counsel refused to agree to any date for a hearing of this case, and do so continue to refuse.

That said C. B. Matthews, as counsel for the petitioners in said bill of review, has made every effort to delay the argument in this court on the testimony taken in support of said bill of review and has recently notified the counsel of the said Smoky Mountain Land, Lumber and Improvement Company that he was going to oppose the argument on said bill of review and ask that it be postponed until the final decision in the Supreme Court of the United States in the case between the state of North Carolina and the state of Tennessee. That there is no reason why the argument and decision in this case on the said bill of review and the testimony taken in support thereof should not be had. The decision of the Supreme Court of the
262 United States in the suit between the state of North Carolina and the state of Tennessee is likely to be delayed for a long time and the delay of the decision in the bill of review will work a great hardship upon the Smoky Mountain Land, Lumber and Improvement Company and all who may be interested therein. That some five or six thousand acres of land lies between the line established in the decree establishing the line in this case and the line claimed to be the line in said bill of review. That your petitioner cannot with safety occupy or cut timber upon said land in dispute, although it and its vendees are in possession of it. That the object and purpose of the said W. R. Hopkins and others is to delay and postpone the decision in the said bill of review and thereby continue to cloud the title of your petitioner.

That said postponement is an injustice to your petitioner and should not prevail. Your petitioner has made every effort to argue this case, but owing to the death of Judge Clark, who originally heard and decided the case in this court, and the interest and inability of his successor to hear the argument, the efforts of the said W. R. Hopkins, et al., petitioners, to postpone and delay the argument of the case on the bill of review has prevailed. Your petitioner therefore prays that your honor will set an early date for the argument on the testimony taken in support of this bill of review and hear the case or delegate some competent judge to hear it at any place within the district that it may be decided and the rights of your petitioner preserved.

And it will ever pray, etc.

WILLIAM A. STONE,
PECK, SHIELDS AND CLARK,
McCROSKEY AND PEACE,
Solicitors for the Smoky Mountain Land, Lumber & Improvement Company.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Personally appeared before me, a notary public, J. Newton Peck, who being duly sworn according to law, deposes and says that he is the secretary of the Smoky Mountain Land, Lumber and Improvement Company aforesaid, and that the facts set forth in said petition are true.

J. NEWTON PECK.

Sworn to and subscribed before me this 29th day of June, 1909.
[SEAL.]
ANNA H. HARE,
Notary Public.

Commission expires March 12, 1911.

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Decree.

And now, to-wit, —— —, 1909, the foregoing petition having been presented and duly considered it is ordered, adjudged and decreed that a rule be granted upon W. R. Hopkins, et al., petitioners in the bill of review filed in the above case, to show cause why a date should not be fixed for argument and final hearing in said case, and it is further ordered that a copy of this petition and rule be served upon counsel for the said W. R. Hopkins, et al., petitioners.
Returnable —— —, 1909.

BY THE COURT.

STATE OF TENNESSEE,
Monroe County:

T. E. H. McCroskey makes oath that he is solicitor for Smoky Mountain Land, Lumber & Improvement Company and that, on July 6th, 1909, he mailed to C. Matthews, Cincinnati, Ohio, Union Trust Building (the same being place of business and postoffice address of said Matthews) solicitor for W. R. Hopkins, et al., copy of foregoing petition, and also notice of filing same and of application to be made before Judge Lurton, a copy of said notice being herewith filed as Exhibit "A."

T. E. H. McCROSKEY.

Sworn to and subscribed before me this July 6th, 1909.
W. S. GRIFFITH.
Cir. Ct Clk.

July 6th, 1909.

C. B. Matthews, Esq., Union Trust Building, Cincinnati, Ohio.

DEAR SIR: In re W. R. Hopkins, et al., vs. Smoky Mt. Land, Lumber & Im. Co.

We enclose you copy of petition which we have forwarded to Clerk of U. S. Circuit Court at Knoxville, Tenn., to be filed.

On Saturday, July 10th, 1909, at 11 o'clock a. m., we will ask

Judge Lurton at chambers in Knoxville to take some action upon said petition looking to an early hearing of the cause.

Very truly,

McCROSKEY & PEACE,
Per McCROSKEY,
Solicitors.

Exhibit "A" to affidavit of T. E. M. McCroskey.

Endorsed: No. 1056. Petition for a hearing. David W. Belding, et al., vs. Charles Hebard. Filed 7-7-09. D. L. Snodgrass, Clerk. By C. A. Hill, D. C.

Hon. H. H. Lurton, Judge, etc.:

264 In the cause of Charles Hebard vs. D. W. Belding, et al., heretofore pending in the U. S. Circuit Court for the Northern Division of the Eastern District of Tennessee, and finally determined in the U. S. Circuit Court of Appeals at Cincinnati, in the year 1900, I was counsel for defendants, Belding and others; and in the bill of review filed by W. R. Hopkins and others, and now pending in said U. S. Circuit Court at Knoxville, I am incompetent to hear the same, because of the fact that I was of counsel in the original case.

This July 10, 1909.

EDWARD T. SANFORD,
U. S. District Judge.

Endorsed: No. 1056. David W. Belding, et al., against Charles Hebard. Certificate of Judge Sanford as to incompetency. Filed 7-10-09. D. L. Snodgrass, Clerk. By C. A. Hill, D. C.

In the Circuit Court of the United States in and for the Northern Division of the Eastern District of Tennessee.

No. 1056.

WILLIAM R. HOPKINS et al., DAVID W. BELDING et al., Complainants,
vs.
CHARLES HEBARD et al., Defendants.

On Petition for Leave to File a Bill of Review.

Deposition of J. N. Peck.

Deposition of J. N. Peck, taken before me, Harry T. Klein, a notary public within and for the county of Hamilton, in the state of Ohio, by consent of counsel for the respective parties, to be used as evidence on behalf of the defendants in an action pending in the Circuit Court of the United States, in and for the Northern Division of the Eastern District of Tennessee, on petition for leave to file a bill of review, wherein William R. Hopkins, et al., and David W. Belding, et al., are complainants and Charles Hebard, et al., defendants; C. B. Matthews, being present on behalf of complainants and T. E. H. McCroskey and W. A. Stone on behalf of defendants.

J. N. PECK, of lawful age, being by me first duly cautioned and sworn, deposes and says as follows:

Direct examination by Mr. T. E. H. McCROSKEY:

Q. What connection or relation have you to the Smoky Mountain Land, Lumber & Improvement Company?

A. I am secretary and treasurer, and one of the stockholders.

265 Q. How long have you been connected with the company?

A. Since November, 1900, and I might say since the inception of the company as an active corporation.

Q. What personal knowledge have you in regard to the deed executed by Charles Hebard to F. L. Andrews, L. B. Seibert, Blaisdell and others, dated July 16, 1900; please explain fully?

A. I was present with Mr. Hebard and his attorney at the time of its execution and was the party who made the arrangements for the vendees in that deed.

Q. Was an absolute delivery made of that deed, or was it delivered in escrow; please explain in regard to this?

A. There was not an actual delivery made of the deed. The deed was deposited with Drexel & Company of Philadelphia, in escrow, to be delivered to the parties therein named upon the payment of the purchase money called for therein.

Q. Go ahead and tell when it was taken out?

A. The deed was delivered to myself on January 9th, 1903, at the time that the contract was made.

Q. When was the purchase money finally paid and the deed taken out of escrow?

A. On the date—January 9th, 1903.

Q. How long did it remain in escrow?

A. Well, I did not go to Drexel & Company that day.

Q. How long did it remain in escrow—I mean from the date of the execution of the deed to its final delivery.

A. I found it with Drexel & Company some time in the latter part of July. Mr. Hebard had——

Q. July what?

A. July, 1900. Mr. Hebard had delivered it there according to the arrangement, and it remained there until January 9th, 1903. I have every reason to believe that Mr. Hebard delivered it to Drexel & Company on July 16th, 1900.

Mr. MATTHEWS: Objects to the statement of belief of the witness.

Q. What information had you in regard to the final determination of the state line litigation in the case of Charles Hebard vs. D. W. Belding and others and when did you get your information?

A. I think in May, 1900, myself, John M. Carpenter and John F. Stone were approached by P. C. Blaisdell, who claimed to have an option from Mr. Hebard on those lands. Mr. Carpenter went to Tennessee in pursuance of that, and on his return informed

266 us regarding the suit spoken of. We then met Charles Hebard in Philadelphia on July 14th, 1900, and in talking

with him about the matter, including that suit, he produced a telegram from T. E. H. McCroskey notifying him that the Circuit Court of Appeals had decided the case in his favor—that is, Hebard's favor. We did not conclude to purchase the lands then. Mr. Carpenter, Mr. Stone and Mr. Haskell went to Tennessee for examination of the land, the examination of records pertaining to this suit and after we had been satisfied that the suit had been determined in Mr. Hebard's favor, in November of that year, we concluded to purchase the lands.

Q. If I understand you then, while the deed was dated July 16th, 1900, as a matter of fact you did not decide definitely to buy the property until in November following?

A. That is correct.

Q. And as a matter of fact, then, the deed antedates the actual consummation of the deal?

A. No, I cannot say that, Mr. McCroskey.

Q. Well, explain?

A. The parties constituting the Smoky Mountain Lumber Company were not the parties having the option from Hebard and before we consented to go any further with the matter, on July 16th, 1900, we required Mr. Hebard, in pursuance of that option, to execute this deed and place it in escrow and the party named in that deed as vendee, in January, 1901, executed a deed to the Smoky Mountain Company. That deed was deposited in Bradford, Pennsylvania, with some party—I can't speak his name now—for both parties, to be delivered when we had the money. That is the arrangement as far as you ask me.

Q. That party was not paid until the 9th of January, 1903?

A. The final payment, which was the greater part of the purchase money, was not paid until January 9th, 1903—or about that date, I might say. The deed was delivered to me January 9th, 1903.

Cross-examination by Mr. C. B. MATTHEWS:

Q. Were those various options in writings, Mr. Peck, and the terms of them?

A. The one of July 16 was in writing—yes, sir.

Q. Was there no written option or contract of purchase between the Smoky Mountain Land, Lumber and Improvement Company and P. C. Blaisdell?

A. Was there no contract?

267 Q. Yes, sir; a written contract?

A. Nothing, Mr. Matthews, but what you would term an option to purchase, which was for three months, and that was extended I think for three months more.

Q. But that was in writing?

A. Yes, sir.

Q. Will you produce those options?

A. I can; yes, sir.

Q. Will you do so?

A. Yes, sir. (Attached hereto and made a part hereof. See "Exhibit A, HK.")

Q. Was this option to Blaisdell the original option from Hebard or had there been one previous to that?

A. That is the original that I have seen. There might have been some other, Mr. Matthews.

Q. Was that to Blaisdell alone, or to Blaisdell and others?

A. My recollection is that that was to P. C. Blaisdell and F. L. Andrews—I am not speaking now of any written options—I am speaking of the parties who claimed to have an option and know nothing further than that.

Q. Well, they had an option in writing?

A. I don't know that.

Q. Did they not exhibit an option in writing?

A. No, sir.

Q. Mr. Hebard seemed to recognize that they had an option on the property?

A. We were assured of that.

Q. Now was this money paid in cash, or were there deferred payments secured on the property?

A. How was that?

Q. Was the whole purchase price paid in cash, or were there deferred payments secured?

A. The payments were to be of a series of payments.

Q. Now that was the arrangement then in January, 1903, was it, when the Smoky Mountain Company took it up—they were to pay in serial payments?

A. In November of 1900 or January of 1901 you mean.

Q. Well, I thought you said the final arrangement was made in January of 1903?

A. The deed was taken up in January, 1903.

Q. Well, now, how were they to be paid—how much cash and how much in deferred payments, if anything?

A. The Smoky Mountain Company was to meet the payments required by Hebard in the option of July 16th, 1900.

Q. Well, do you know what those were?

268 A. I cannot answer now, Mr. Matthews—I have not the amounts, but there was to be a payment, I think, in January of 1901, and annual payments thereafter, the amount of which I don't now recollect.

Q. Can you recollect over how many years they extended?

A. My recollection now is four years. We anticipated the last payment—that is why I think it is over four years.

Q. The four years, then, would be 1901, 1902, 1903 and 1904—is that your recollection?

A. That would be my recollection now. The written option might correct me.

Q. You will furnish—you say—a copy of that option?

A. Oh, yes; I will furnish you a copy of that.

Q. And those payments have all been made, have they?

A. Yes, sir; those payments were all consummated by January 9th, 1903.

Q. Well, now, what do you mean by consummated?

A. The final payment was made.
Q. In cash or stock of the company?
A. In cash.
Q. Now Blaisdell and Andrews and their associates became members of the Smoky Mountain Land, Lumber & Improvement Company—did they not?
A. No, sir; not all of them. P. C. Blaisdell, and my recollection now is that Frank Raymond, one of the parties mentioned, took a little stock, but those are the only ones I now recollect.
Q. Was Carpenter a member of the Smoky Mountain Company?
A. Was he?
Q. Or did he become so?
A. He became so.
Q. And was he interested in this option?
A. Which one?
Q. The option to Blaisdell and Andrews?
A. No, sir; not the option other than the one of July 16th, 1900, of which I speak. He was interested in that simply knowing that such an option had been given by Hebard and then an option was given by the vendees therein named to himself, Mr. Haskell and myself, and I think Mr. Stone.
Q. Who were the gentlemen who were interested in the Smoky Mountain Land, Lumber & Improvement Company, originally?
269 A. I don't know how I can answer you there, Mr. Matthews. There was no active Smoky Mountain Company until we had concluded to purchase the land, in the latter part of November, 1900. I am under the impression that some time previous to that some of these people had taken steps to incorporate a company by that name, and we arranged the purchase and succeeded to all of their rights, but it was not an active company before we made the purchase.
Q. Prior to that it was just an organization then without incorporation?
A. That is my understanding.
Q. Now, Mr. Peck, when the Smoky Mountain Land, Lumber and Improvement Company took that property over, was there not something said about guaranteeing you against any action of the Beldings?
A. Not one word that I ever heard of.
Q. Was not this property that had been in dispute simply thrown into the general purchase?
A. No, sir.
Q. Had you had any negotiations with them prior to the decision of this suit with reference to a large amount of other lands that were included in this deed?
A. Not any of our parties. What P. C. Blaisdell and F. L. Andrews might have done, I know nothing about.
Q. Where are P. C. Blaisdel and Andrews now?
A. P. C. Blaisdell, the last I knew, was up in Maine. He is a stockholder.

Q. Whereabouts in Maine?

A. I cannot tell you, but I think it is Northport, if there is such a place. He is a stockholder now in this Smoky Mountain Land, Lumber & Improvement Company. F. L. Andrews' home is in Coudersport, Potter County, Pennsylvania.

Q. And Carpenter, where is he?

A. J. M. Carpenter is in Los Angeles, California.

Q. And has Mr. Blaisdell an office in New York where he transacts business there?

A. I think he has, Mr. Matthews, with the firm of Blaisdel Brothers, or the Standard Wood Company. I am not positive about that—I have not see him there for a long time.

Q. There was no variation in the payments or the assumption of obligations from the original option, was there, of July 18th, 1900—in your payments?

A. Yes, sir; we anticipated one payment.

Q. There was no lengthening?

270 A. No, sir.

Q. And those payments, you say, were made in cash and not in stock of the Company?

A. All in cash—yes, sir.

Q. Could you tell us when the Smoky Mountain Land, Lumber and Improvement Company was incorporated, who were the stockholders of it?

A. Mr. Matthews, I cannot state when that was incorporated. My recollection would be that it was two or three months before we took it over.

Q. Could you furnish us that from your books?

A. Not from my records, because I have not got them.

Q. Have you not been Secretary of the Company?

A. I have been Secretary a part of the time.

Q. I thought you said from its inception?

A. From its inception as an active Company.

Q. That is what I meant—I mean from the time that it became an active Company, could you not give us a list of its stockholders?

A. Yes, sir—I have them.

Q. Will you do that please?

A. I have no objection to doing that if the Company has not. I would like for you to write on to the Company and state your purpose to them. I can't see any objection to it. I can pretty near state them from memory now. Do you want their addresses?

Q. Yes, please. Please give us the names of the stockholders from the time the Company became an active Company?

A. All of the stockholders do you mean?

Q. If you can file a list of them, that will answer the same purpose, and it would be more accurate. Give them from the time it became an active Company. I would rather you furnish a statement—that would be authentic.

A. I think I would prefer to do that. I might leave out or I might overstate some. (Attached hereto and made a part hereof. See "Exhibit—A—HK.")

Q. Well if you will do that it will answer the purpose. That is all.

J. N. PECK,
By HARRY T. KLEIN,
By Stipulation.

Certificate.

THE STATE OF OHIO,
County of Hamilton, ss:

I, Harry T. Klein, a Notary Public in and for the State and County aforesaid, duly commissioned and qualified, do
271 hereby certify that the above named J. N. Peck, was by me first sworn to testify the truth, the whole truth and nothing but the truth; that by agreement of counsel for the respective parties, said depositions were taken down stenographically by me and thereafter reduced to typewritten manuscript, and by agreement of the said counsel, was subscribed by me for the said witness; that said depo-ition was taken by consent of counsel for the respective parties; and that I am not Counsel, Attorney or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on this 23rd day of June, 1909.

HARRY T. KLEIN,
Notary Public in and for Hamilton County, Ohio.

Cost Bill.

Swearing witness	$0.10
Taking, reporting and certifying deposition	6.65
Postage and other Expenses	.15
Total Cost of Depositions	$6.90

Received of defendants in the case mentioned *at* the caption hereof, the sum of $6.90 in full of my fees.

HARRY T. KLEIN,
Notary Public.

"EXHIBIT A–HK."

PHILADELPHIA, *June* 30, 1909.

Mr. H. F. Klein, Union Trust Building, Cincinnati, Ohio.

MY DEAR SIR: Replying to your favor of the 25th, I was waiting for a copy of my testimony which would show what papers Mr. Matthews requested me to send copies thereof. This was the understanding when I was at Cincinnati. However, I herewith send you copies of such papers as are in my hands, pertaining to the matter as I recall Mr. Matthews requested.

The first paper which came into my hands as belonging to J. M. Carpenter, W. L. Haskell, John F. Stone and myself, was dated July

12, 1900, and was in the form of a due bill for $20,000 given by P. C. Blaisdell to us four parties, and agreed upon his part to give us ninety days to examine the lands known as the "Charles Hebard Lands" of 41,000 acres in the State of Tennessee, Monroe
272 County, and if we did not conclude to purchase the $20,000 was to be returned to us with interest.

This paper being in the form of a due bill for the amount of money named was delivered to P. C. Blaisdell in the early part of 1901 when the purchase of his interest, and Mr. Andrews' holding option from Mr. Hebard, was consummated. Therefore I cannot furnish you with a copy of that paper.

The next paper was dated October 4, 1900, and was as follows:

"Whereas by Articles of Agreement made July, 1900, P. C. Blaisdell, W. F. Blaisdell, S. A. Holbrook, L. B. Siebert, F. A. Raymond, H. H. Cobb and F. L. Andrews, agreed to sell an undivided one-half interest in a certain tract of land in Monroe County, Tennessee, known as the Charles Hebard tract of about 43,000 acres more or less, to W. L. Haskell, J. F. Stone, J. M. Carpenter, and J. N. Peck, and gave to the said last mentioned parties ninety days' time to investigate said lands and conclude whether they desired to purchase, and

Whereas the said last mentioned parties have been delayed from several causes in investigating said lands and desire more time,

Now this Agreement Witnesseth That for a valuable consideration to option to purchase is hereby extended to said last mentioned parties until the first day of December, 1900, under the same terms as the original paper above mentioned, as to return to them of moneys paid by them, etc.

Also if said last mentioned parties at that time decide not to purchase, and a stock company be formed to purchase said lands, the last mentioned parties agree to take of said stock provided the whole amount be subscribed for, as follows: J. F. Stone, a one twentieth, J. M. Carpenter, a one twentieth, W. L. Haskell a one twentieth, J. Newton Peck a one twentieth.

Also parties of the first part agree to reserve a one twentieth each for the following persons under the last mentioned arrangement, if they desire, viz: Theo. Cobb, Angie Tullar, William Cobb and J. M. Carpenter.

Witness our hands this 4th day of October, 1900.

(Signed) J. NEWTON PECK.
(Signed) J. F. STONE.
(Signed) J. M. CARPENTER.
(Signed) P. C. BLAISDELL.
(Signed) W. F. BLAISDELL,
per P. C. BLAISDELL.
(Signed) F. A. RAYMOND.
273 (Signed) F. L. ANDREWS.
(Signed) W. L. HASKELL.

I hereby agree to the above with the understanding that the corporation when fully organized shall be so made that the provision for raising money other than for purchase money shall be in pursuance of agreement between the parties hereto under date of July 11, 1900.

(S'g'd) L. B. SEIBERT.
(S'g'd) H. H. COBB."

The other papers were as follows:

"Know all men by these presents, That whereas we, F. L. Andrews and P. C. Blaisdell, have, for value received, sold and transferred unto the Smoky Mountain Land, Lumber & Improvement Company a certain Contract with — Charles Hebard for the purchase of about Forty-one thousand (41,000) acres of land in the County of Monroe, State of Tennessee, we have and hereby authorize and request the said — Charles Hebard, his heirs, executors, administrators or assigns, to make and deliver a Deed for said land to the said The Smoky Mountain Land, Lumber & Improvement Company in compliance with, and upon the payment of the balance of said purchase money, and this shall be sufficient warrant and authority for so doing, we hereby releasing the said — Charles Hebard from all other and further claims by, from, through or under said Contract.

In Witness Whereof, we have hereunto set our hands and seals, this 12th day of February, A. D. 1901.

——— ———. [SEAL.]
——— ———. [SEAL.]

Memorandum of Agreement.

Made and entered into this 12th day of February, A. D. 1901, by and between the undersigned:

Whereas by Contract dated —

Charles Hebard contracted and agreed to sell and convey to F. L. Andrews and P. C. Blaisdell about forty-one thousand (41,000) acres of timber land, situated in Monroe County, Tennessee, for the price or sum of two hundred and ten thousand dollars ($210,000) or about that, which, together with the interest provided for on the deferred payments of said contract, will make the purchase price when paid, if paid when due, about two hundred and forty thousand dollars ($240,000.00); and,

Whereas by the laws and under the authority of the State of Delaware, a Corporation was organized under the names and title of The Smoky Mountain Land, Lumber & Improvement Company,
with a Capital Stock of six hundred and fifty thousand dol-
274 lars ($650,000.00), divided into thirteen thousand (13,000) shares at fifty dollars ($50.00) each; and,

Whereas the said E. L. Andrews and P. C. Blaisdell have transferred and conveyed all their right, title and interest in said contract to said The Smoky Mountain Land, Lumber and Improvement Company, subject to the payment of the purchase price to the said — Charles Hebard for said land:

Now, therefore, we, the undersigned, do hereby subscribe and agree to pay for, and take the amount of Capital Stock set opposite to our names in said Smoky Mountain Land, Lumber & Improvement Company, aforesaid, at par; the said stock or subscription to be paid for as the same may be called, from time to time, by the Directors of said Company when, in their opinion, it may be for the best interests of the Company to pay for and take up said Contract with said Hebard; the Capital Stock so paid in to be used in payment for said land and timber; the balance of said Capital Stock, to-wit, four hundred and ten thousand dollars ($410,000.00), to be held in the treasury as a reserve fund, and to be sold, from time to time, as the Directors of the said Company may deem for the best interest, and as may be necessary for the developing and improving said lands and operating or manufacturing said timber into lumber and other products; in which event, the said reserve stock, or so much as may be necessary to be sold from time to time, shall first be offered to the stockholders of said Company in proportion to their holdings therein, and if the same is not subscribed for by said Stockholders, or any one or more of said Stockholders shall not subscribe for his proportionate share, that then the other Stockholders shall have the right to subscribe for his or their proportionate share of said Stock, at par, before the same shall be offered or sold to any one not a Stockholder.

The said two hundred and forty thousand dollars of said Capital Stock is subscribed for as follows:

	Name.	No. of Shares.	Amount.
	Frank Raymond	240	$12,000.00
	S. A. Holbrook	240	12,000.00
	W. L. Haskell	480	24,000.00
	John Carpenter	480	24,000.00
	P. C. Blaisdell	720	36,000.00
	J. N. Peck	240	12,000.00
	C. E. Burt	240	12,000.00
	A. Johnson	240	12,000.00
	F. Greco	240	12,000.00
	George T. Whyte	240	12,000.00
	Theodore Cobb	720	36,000.00
275	Charles Lawrence	240	12,000.00
	John Hurley	240	12,000.00
	John F. Stone	240	12,000.00

It is further understood that the above agreement shall bind the individuals, their heirs, executors and administrators.

In witness whereof the said parties to this agreement have hereunto set their hands and seals, the day and year first above written.

——— ———. [SEAL.]
——— ———. [SEAL.]
——— ———. [SEAL.]
——— ———. [SEAL.]
——— ———. [SEAL.]
——— ———. [SEAL.]
——— ———. [SEAL.]
——— ———. [SEAL.]
——— ———. [SEAL.]
——— ———. [SEAL.]
——— ———. [SEAL.]
——— ———. [SEAL.]
——— ———. [SEAL.]

The agreement of July 16th, 1900, with the agreement annexed, which is called for, *are* as follows:

"This agreement made this sixteenth day of July, 1900, be and between Charles Hebard of the City of Philadelphia, and State of Pennsylvania, party of the first part, and P. C. Blaisdell, — Blaisdell, H. B. Seibert, H. H. Cobb, F. L. Andrews, F. A. Raymond and S. A. Holbrook, parties of the second part, witnesseth:

1. The annexed agreement, dated November 24th, 1899, and signed by the said Charles Hebard of the first part, and the said Frank L. Andrews and Philo C. Blaisdell of the second part is hereby modified as follows:

Whereas, the parties of the second part have made three payments on account of the said contract, in the aggregate $40,000.00 viz., $10,000 on Nov. 24th, 1899; $10,000 on April 10th, 1900, and $20,000 on July 14th, 1900.

And whereas, it has been agreed that $23,500 be added to the purchase price in consideration of extending the times of future payments, and other good and valuable considerations, making the whole purchase price $233,500, which leaves after deducting the said aggregate payment of $40,000.00 hitherto made, a balance of $193,500 due to the party of the first part.

Now it is stipulated and agreed that the said balance of
276 $193,500 shall be paid as follows: $28,500 on Jan. 1st, 1901; $57,500 on Jan. 1st, 1902; $55,000 on Jan. 1st, 1903; and $52,500 on Jan. 1st, 1904; with the right and privilege of the parties of the second part to anticipate payment of any or all of the said stipulated payments in sums of not less than $10,000.00 each on the first days of January of each and every year ensuing; and in case of such anticipated payments, interest at the rate of 5 per cent per annum shall be allowed on such anticipated payments up to the time of said stipulated payments.

(2) A Deed in escrow has been executed this day by the said Charles Hebard and Mary C., his wife, to the said parties of the said second part, giving a description of the property contracted to

be conveyed, with clause of special warranty, and which deed has been this day deposited with Drexel & Co., Bankers, of Philadelphia, to be by them held in escrow until final payment shall be made, when the said deed shall be delivered by the said Drexel & Co., to the parties of the second part or to their attorney; and it is hereby understood and agreed that Drexel & Co. shall have the right to receipt, in the name of the party of the first part, for all payments to become due or which may be anticipated.

And it is further agreed that the parties of the second part shall have the privilege of entering immediately into possession of the premises mentioned in the said deed for the purpose of erecting or constructing mills, manufacturing plants, railroads or any other operations for the purpose of removing the timber, bark, or minerals therefrom; but the proportion of the removal of the timber, bark or minerals shall not be greater at any time than the proportion that the payments made shall bear to the balance of the purchase money.

And it is further agreed that all taxes and all other assessments upon the said lands agreed to be conveyed shall be paid by the said parties of the second part, from January 1st, 1900.

And it is further agreed that in case of default in any of the stipulated payments for a period of ninety days, the party of the first part shall have the right to enter proceedings for the recovery or possession of the said premises by ejectment or otherwise, as provided by the laws of the State of Tennessee.

With the modifications herein provided, *and* annexed agreement of November 24th, 1899, is confirmed and ratified; and all the rights and remedies provided in the original and in this modified agreement shall enure and extend to the heirs, executors, administrators and assigns of all of the parties hereto.

277 Witness the hands and seals of the said parties.

(Signed)	CHARLES HEBARD.	[L. S.]
(Signed)	P. C. BLAISDELL.	[L. S.]
(Signed)	W. F. BLAISDELL.	[L. S.]
(Signed)	L. B. SEIBERT.	[L. S.]
(Signed)	H. H. COBB.	[L. S.]
(Signed)	F. L. ANDREWS.	[L. S.]
(Signed)	F. A. RAYMOND.	[L. S.]
(Signed)	S. A. HOLBROOK.	[L. S.]

Witnesses to the signature of Charles Hebard.

(Signed) J. NEWTON PECK.
(Signed) E. ARNOLD NEIL.

PHILADELPHIA, *Nov. 24th*, 1899.

Messrs. F. L. Andrews, P. C. Blaisdell et al.

GENTLEMEN: If you will pay me Ten Thousand Dollars ($10,000) down, I will give you an option to buy my lands situated in Monroe County, Tennessee, containing about 41,000 acres until March 1st, 1900, at the price of $210,000. Two hundred and ten thousand

dollars to be conveyed to you by me, or my heirs, executors, or administrators by Deed containing covenants of special warranty.

If you elect to take them, then the $10,000 to be applied on the purchase price. Otherwise to be forfeited to me, and all obligations on my part to cease after March 1st, 1900.

If you elect to buy, then you are to pay me on or before March 1st, 1900, the sum of fifty thousand dollars ($50,000) in addition to the $10,000 specified. I am to deposit the deed duly executed in escrow with Messrs. Drexel & Co. of Philadelphia to be delivered to you or your order at any time within two (2) years from March 1st, 1900, upon your paying the balance of One hundred and fifty thousand dollars ($150,000) purchase money, with interest at 5 per cent. You are to have the right to pay on account of said one hundred and fifty thousand dollars ($150,000) within two years.

Payments to be made as follows: In addition to the Sixty thousand dollars ($60,000) above provided for, seven-five thousand dollars ($75,000) March 1st, 1901, Seventy-five thousand dollars ($75,000) March 1st, 1902, with annual interest at 5 per cent — January 1st, 1900. You are to be permitted at your option during the time herein specified to pay the full amount of said purchase money and take title by the delivery of said Deed left with Drexel & Co. of Philadelphia, in Escrow.

Very respectfully,

CHARLES HEBARD.

278 Paid on within:

Nov. 24th, 1899. Ten Thousand Dollars.
Apr. 10th, 1900. Ten Thousand Dollars.
July 14th, 1900. Twenty thousand Dollars.

CHARLES HEBARD."

The first stock issued by the Smoky Mountain Company was October 16, 190–, and the first active stockholders were as follows: S. A. Holbrook, F. H. Raymond, F. A. Raymond, J. Newton Peck, J. M. Carpenter, Frank Greco, Fred C. Leonard, Theodore Cobb, William Cobb, Bayard C. Tullar, Angie C. Tullar, W. L. Haskell, Blaisdell Bros., J. W. Blaisdell, W. F. Blaisdell, F. L. Blaisdell, P. C. Blaisdell, John Hoerle, Charles Lawrence, George Whyte, C. E. Burt.

Trusting that this meets everything that Mr. Matthews requested,

Very truly yours,

J. NEWTON PECK.

P.—A. H.

(Endorsement:) No. 1,056. In the Circuit Court of the U. S. Northern Division Eastern District of Tennessee. William Hopkins, et al. David W. Belding, et al. Complainants, vs. Charles Hebard, et al. defendants. Deposition of J. N. Peck. On petition for leave to file a bill of review. Filed July 28th, '09. D. L. Snodgrass, Clerk, by C. A. Hill, D. C.

STATE OF OHIO,
Hamilton County:

Case No. 1056, Pending in the Circuit Court of the United States in and for the Northern Division of the Eastern District of Tennessee.

WILLIAM R. HOPKINS et al., DAVID W. BELDING et al., Plaintiffs,
vs.
CHARLES HEBARD, Defendant.

On Petition for Leave to File a Bill of Review.

The above named defendant will take notice, that on Thursday the 17th day of June, A. D. 1909, the plaintiffs above named will take the depositions of William R. Hopkins and M. E. Cozad sundry witnesses, to be used as evidence in the trial of the above cause, at the law offices of C. B. Matthews, 525-528 Union Trust Building, in the City of Cincinnati, in the County of Hamilton, in the State of Ohio, between the hours of eight o'clock, A. M., and six o'clock P. M. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

C. B. MATTHEWS,
Attorneys for Plaintiffs.

279 Service of the above notice is acknowledged, and proof of the official character of the officer before whom the said depositions may be taken is by agreement waived; also all exceptions as to time.

Done this — day of ——, 19—.

——— ———,
Attorney for —— ——.

In the Circuit Court of the United States in and for the Northern Division of the Eastern District of Tennessee.

No. 1056.

WILLIAM R. HOPKINS et al., DAVID W BELDING et al., Complainants,
vs.
CHARLES HEBARD et al., Defendant-.

On Petition for Leave to File a Bill of Review.

Depositions of William R. Hopkins and M. E. Cozad.

Depositions of Witnesses taken before me, Harry T. Klein, a Notary Public, within and for the County of Hamilton, in the State of Ohio, pursuant to the annexed notice, and at the time and place herein specified, to be used as evidence on behalf of the complain-

ants in an action pending in the Circuit Court of the United States in and for the Northern Division of the Eastern District of Tennessee, wherein William R. Hopkins, et al., and David W. Belding, et al., are complainants, and Charles Hebard, et al., defendants; C. B. Matthews being present on behalf of complainants, and T. E. H. McCroskey and W. A. Stone on behalf of defendants.

M. E. Cozad, of lawful age, being by me first duly cautioned and sworn, deposes and says as follows:

Direct examination by C. B. Matthews:

Q. Mr. Cozad, where do you live, and how long have you lived there?

A. I live at Andrews, Cherokee County, North Carolina, and have been there for a little upwards of ten years, although I have not declared my citizenship in North Carolina until only the last two years.

Q. What connection, if any, have you had with William R. Hopkins, Benjamin P. Bole, E. I. Leighton, F. W. Bruch, George Reeves, and John Matthews, petitioners in this case, since you went there?

A I have been care-taker of their lands ever since they bought them, and really brought their attention to the lands; before they made the purchase I examined the title—and in safe-guarding the land.

280 Q. During your residence there, did you become acquainted with the lands that were in dispute in what was known as the Hebard case in this case?

A. Somewhat so.

Q. And do you remember the point in dispute in the said case—about the location of the State line?

A. Yes, sir.

Q. Were you acquainted with the course of proceedings in that Hebard case, and the decisions in the case?

A. Why, only in a partial way—through statements made by other parties. I never made any investigation myself until quite recently.

Q. Do you understand the point of difficulty in the case with reference to the proof of defendant's title?

A. I think I did.

Q. Did you at the time when you went down there?

A. No, sir; later, after the property was purchased by the Cleveland people, the matter of dispute in the State line was brought to my attention, and I have since made some investigation of it.

Q. What did you learn about the location of that State line and the fixing of it between the States of Tennessee and North Carolina, and the Session Acts of the two States, with reference thereto?

A. I looked into the history of the matter somewhat, and learned that there was a dispute that arose between the parties interested, owing to the uncertainties of the State line, and so I went over onto the mountain overlooking that country to examine the topography

of the country to see what could be the probable course the line would run.

Q. Did you know about the inability to find the map of 1821?

A. Only from hearsay, until later along I learned all about it upon investigation myself; but in the early years—from 1890 to 1906 I only knew by hearsay and rumor—but in 1906 I gave the matter a great deal of personal attention.

Q. Now prior to February, 1906, what attention had you given to that property in what was called the Slick Rock Basin?

A. A very little—I made one trip there perhaps as early as 1901, but soon after the Cleveland people had purchased the property, I went over there—as I have formerly said—to look over the topography of the country, to see where I thought the line would be likely to run but beyond that, I did nothing, and never vis-
281 ited the Slick Rock Basin again until 1906 and 1907, and several times since that—also in 1908. Yes, I was there those three years.

Q. What had been your business prior to going down to North Carolina?

A. Most of my life was given to the examination of titles to real estate.

Q. Were you ever a surveyor?

A. I never held myself out as a surveyor, but have had very much to do with surveying for many years, and so was quite conversant with surveying.

Q. When did you first hear, and how, that the map of 1821 had been discovered?

A. In talking with some gentlemen in regard to the timber in that section, and what was known as the Belding lands, with a certain friend, he stated that he had heard that a map had been discovered recently at the State House in Nashville, that was likely to throw some light on the question of the location of the State Line between North Carolina and Tennessee. I inquired of this party very particularly in regard to it, but all he knew was rumor—somebody had told him about it.

Q. When was that, please state?

A. That was in the latter part of February, 1906.

Q. Go on?

A. I once wrote to a friend of mine in Knoxville and asked him if he had ever heard anything in regard to the discovery of that map, and if he knew anything about any publication in any of the newspapers at Knoxville or Nashville of the discovery of such map, and asked him, if he knew nothing about it, to make some inquiries and report to me.

Q. How did you come to say to him to find out if any publication had been made; had you ever seen any publication?

A. I never saw any publication—it was the party that I was talking with a few days before who said that he had heard it rumored that there had been some publication that a map had been found, and that there was some kind of publication in some of the papers in Tennessee.

Q. Had you prior to that time ever seen any publication?

A. Never—I never at any time saw any publication.

Q. Now after this, state just what steps you took to ascertain whether such a discovery had been made, and if it had, to get a copy?

A. Shortly afterwards I went to Asheville and stated to our attorney, General Davidson, the rumor I had heard, and ques-
282 tioned him as to the best course to find out the truthfulness of it. He suggested to me that he had a friend living in Nashville that could find out all about it, and that if there was any such map discovered could obtain a copy of it for me And right then, while I was sitting by, he dictated a letter to some gentleman (I don't remember the name of whom it was) in Nashville, making this inquiry. Then I made up my mind that if the map had been found in Nashville, that proper search might disclose a copy of the same map in Raleigh, the capital of North Carolina. So I went to Raleigh and stayed there, I should say, ten days—over a week—saw the Secretary of State, who gave me the assistance of one of the employés, and we spent four or five days in going all through the archives of the State House, handling every map that they said they had of record, and failed to find it. Some weeks afterwards, I made a second trip to Raleigh, and employed a person—offering him a large sum of money if he would discover the map—but we failed to find any map or any field notes accompanying the map. In the meantime General Davidson had heard from his friend in Nashville, reporting that there was such a map, and a week or ten days later—when I happened to be in the office—the map came to General Davidson through the mail and I gave him a check for it.

Q. Do you recollect when that map came?

A. Well—I refresh my memory by referring to my check book, from which I gave General Davidson the check to pay for the map, and find it was the 26th day of March, 1906.

Q. Your inquiries at Nashville through your own correspondence, and through the correspondence of General Davidson, resulted in what?

A. My own correspondence resulted in getting the answer that the field notes accompanying the map had never been discovered.

Q. And did it enable you to get any definite information other than you have already described?

A. Nothing further. I afterwards got several other copies of the same map.

Q. But up to the 26th day of March, 1906, did you get any definite information, other than getting the map on that date?

A. Yes, sir—I might say this—at Raleigh I found all of the correspondence between the Governors of the two States, and the report to the Governor by the Governor of Tennessee of the ratifi-
283 cation of the survey by the State of Tennessee; found also the correspondence between the Governor and the North Carolina Commissioners, giving them instructions in regard to making the survey; indeed, followed the proceedings in reference to that

survey of 1821 in all its details, excepting the map and the field notes, which I failed to find.

Q. What I want to now is whether you ever had any definite knowledge of the exact location of this State Line, by map, until this copy was sent to you on the 26th of March, 1906?

A. No, sir.

Q. How familiar were you with that country up there, and the location of Slick Rock Creek?

A. It was the most remote of all the lands claimed to be owned by the Cleveland people, and I paid very little attention to it until after the discovery of this map. My recollection is that I never was on Slick Rock Creek, except twice, prior to 1906, and then only for a short time.

Q. Is the certified copy of the map, that you obtained from Nashville, the one that is attached to this bill?

A. I should say that that was an exact copy of the map that was furnished to me by General Davidson, from the Secretary of the State of Tennessee.

Q. On that map, I wish you would state as a Surveyor, and what acquaintance you have had with that country, where the State line comes. I mean merely as shown by the map?

A. Why it seems to begin at Big Pigeon River.

Q. How is it indicated there?

A. It is indicated by a dotted line.

Q. Well, do you observe a hand?

A. I observe a hand at the beginning of the Survey, on the Big Pigeon River.

Q Now where it crosses (by that map) the Tennessee River, it seems to cross at or near the mouth of a Creek; have you sufficient knowledge of that country to state what that creek is?

A. I believe I have such.

Q. State what creek it is?

A. I believe that that creek is what is known as the Slick Rock Creek.

Q. And have you sufficient knowledge to say how the State line, as shown by that map, is located, with reference to the line claimed by the complainants in the Hebard case.

A. I might have been somewhat in doubt about that matter when I first received the map. My present impression and knowl-
284 edge is colored by information that I have derived by being on the ground and having a Survey, since that time, made. I am able to state from my own knowledge, now, very definitely as to that. Before this survey and before I made a critical examination, I could not have stated so positively as I can now. But I know very well where the other streams indicated on this map are, and was thoroughly convinced in my own mind as soon as I saw this map, that the line crossed the Tennessee River just below the mouth of Slick Rock Creek, followed Slick Rock Creek for a certain distance, and then bore off to the right to the Unicoy Mountain.

Q. How does that——

A. Or what we would call the Fodder Stack Lead, more properly.

Q. And how does that line, as indicated by that map, correspond with the line as claimed by Hebard in this case?

A. Well, I have read all the testimony in the Hebard case, that you speak of, and that would necessitate the line crossing up the Tennessee River above the mouth of Slick Rock Creek, and following around to leave all that territory that is marked here "Creek" and which I say is Slick Rock Creek, to the West of their line—of the line claimed by them.

Q. Well, what range of mountains does their claim follow?

A. That would be on a spur of the Hang-over lead.

Q. And how far above the crossing of the Tennessee River, as shown by this map?

A. From a quarter to a half a mile perhaps—more definitely a half a mile.

Q. Mr. Cozad, how did you come to go first to North Carolina?

A. Two years before I came into the State to look for timber, business called me into the State, and I became very much impressed with the cheap timber lands in the State.

Q. Did you meet a Mr. J. C. Creith, there, then, and if so, when did you meet him?

A. After I came to live in the State—I came to live in the State in the early Spring of 1900—I met at the Hotel where I was stopping, one J. C. Creith, who was claimed to be the agent of Archer and McGarry, Trustees, and had for sale the Belding lands, and he was the man that first brought my attention to the Belding lands.

285 Q. What connection have these lands in dispute in the Hebard case, with the Belding lands?

A. The Belding lands included a tract of land generally spoken of as the Big Survey or Tract.

Q. Give the number of it?

A. Tract No. 1035. That tract of land shows that the State Line begins at or very near the mouth of Slick Rock Creek, and runs some distance along Slick Rock Creek on the Westerly side thereof, and thence bears off to the right to the Fodder Stack Lead, so that this territory in dispute was claimed by the Beldings under that grant.

Q. 1035?

A. Entry 1035—grant 1035.

Mr. T. E. H. McCroskey: The defendant excepts to the testimony of the witness insofar as he states the boundary of tract, 1035, because that question was a matter in evidence in litigation in the original suit, and is not competent evidence in the present matter.

Q. And this disputed territory lies between Slick Rock Creek and Hang-over, does it?

A. Between Slick Rock Creek and Hang-over, yes, sir.

Q. So that the line claimed by Hebard is East of the Slick Rock line.

A. Yes, sir.

Q. Did you have any transaction with Mr. Creith, acting on behalf of Archer and Krohn or McGarry?

A. Yes, sir.

Q. What was it?

Mr. McCroskey excepts to the testimony of any transaction between the witness and Mr. Creith, because the same is not competent evidence in this matter.

A. He took a good deal of pains to show me over the lands and interest me in them, and indirectly bring them, through me, to the attention of the Cleveland people, who finally became the purchasers of them.

Q. State whom you mean by the Cleveland people?

A. Mr. Hopkins, Mr. Leighton, Mr. Burch, Mr. Matthews, Mr. Reeves and Mr. Bole.

Q. Well, what resulted?

A. One or two of the Cleveland people came down and looked at the lands, and it finally resulted in the purchase of the lands by the Cleveland people. I had nothing to do with those negotiations.

Q. When was the contract signed, do you recollect?

A. These negotiations took place during the summer of 1900, but I don't think the contract was formally signed until I
286 should say—the middle or last of October of that year, 1900.

Mr. McCroskey excepts.

Q. I want to offer in evidence at this point a copy of that contract. (Copy of contract handed witness for examination).

Mr. McCroskey excepts.

—. From a very hasty reading, I believe that that is a true copy of the contract between those parties.

Q. And the date?

A. That date refreshes my recollection—I think that is correct. I could not remember the exact date, but now I think that is correct.

The petitioners here offer in evidence copy of a contract, dated October 29, 1900, by which William R. Hopkins, Edward I. Leighton, Frederick W. Bruch, John Matthews, George Reeves and Benjamin P. Bole contracted to purchase the lands in controversy in the Hebard case, in connection with all of the so-called Belding lands in Graham County, North Carolina, and ask that same be attached hereto, made a part hereof, and marked "Exhibit HK-1," which is accordingly done. Petitioners state that they will furnish one of the originals of this contract, if it is desired by the Court or the parties.

Mr. McCroskey: The defendants except to the copy as offered, because:—first, the original is the best evidence, and secondly, the copy as offered is not properly authenticated.

Q. Prior to that contract, Mr. Cozad, what negotiations had been had between you and Robert N. Archer and Thomas F. McGarry with reference to the purchase of the so-called Belding lands in Graham County, North Carolina, and to what point had you arrived in the negotiations?

A. I had no negotiations at any time with Archer and McGarry in regard to the purchase of the Belding lands. My dealings were

entirely with their agent, Creith. I did little more in the matter than to examine the lands critically and report to Hopkins and others in regard to them, and care for the lands and timber. The terms were entirely left to and determined by them—I had nothing to do with that whatever.

Q. How long after you received this map did it take you to ascertain to your own satisfaction that it indicated, if it did indicate that, that the full facts had not been before the Court in the Hebard case, and how soon after that did you call the attention of the purchasers of the property to what you had discovered?

287 A. I had not had the map in my hands fifteen minutes until I was satisfied that it located the State line substantially where the purchasers claimed that the line ran. The only question in my mind was whether the map did not indicate that it embraced all of the Slick Rock Basin. I was misled in that from the fact that the rough draft of the topography, laid in streams and mountains, rather led me to believe that it not only embraced what their claim seemed to indicate, and what they had always supposed to be the true line, but it seemed to me that it embraced some three thousand acres West of Slick Rock proper, and what is generally known as Little Slick Rock Basin. That impression was not correct, as we discovered after we had made a very careful survey of it.

Q. Was your investigation at Raleigh after you received the tracing of this map, or before?

A. I think my first visit was made before I got the map. I am not quite positive now—I could tell if I was home and had the data before me; but my impression is that both of my trips to Raleigh were made between February and April, but it may be that the last trip was after I got this map instead of before. On further reflection, I am inclined to think that the second trip to Raleigh was after I got the copy of the map from North Carolina, because I remember, it was very hot weather. It may possibly have been as late as June or July when I made the second trip—I know it was very warm weather.

Q. Do you know how long after the making of the contract of October 29th, 1900, with William R. Hopkins, and others, it was that the deed to said property was made to them by Archer and McGarry and if there was any delay, what occasioned it?

A. There was a good deal of delay, caused by D. W. Belding bringing an action against Archer and McGarry to prevent the consummation of the deal. There was a long hearing in the Superior Court and it was carried to the Supreme Court of the State, and my recollection is that there was about two years of delay, although I can't remember exactly the length of the delay.

Q. And after that was decided in the Supreme Court, what took place with reference to the title?

A. The deed was made—well, there was a re-hearing in the Supreme Court. After it was finally disposed of, the trade was consummated and a deed passed.

Q. Do you recollect when that was?

A. Well, I can't recall the date of the deed, although I have seen it so many times.

288 Q. Would it refresh your recollection to say that it was in June of 1903?

A. I think that is correct—although it is a little later than I first thought it was—my first impression was that it was in the Fall of 1902—but I think that is correct—I think it was in June, 1903.

That is all.

Cross-examination by Col. T. E. H. McCROSKEY:

Q. Mr. Cozad, I believe you stated that you were not a Surveyor?

A. No, sir, I have never held forth as a Surveyor, but most of the family are; and I have been with surveyors from childhood, and can run an instrument, but I don't pretend to hold forth as a Surveyor.

Q. How many times have you ever been on Slick Rock Creek or in the Slick Rock Basin?

A. I was not in the Slick Rock Basin but twice—as I now remember—before 1906; since then I should say I have been there four or five times, possibly more—I can't remember distinctly, but I should say four or five times.

Q. Do you remember the first time you went there?

A. Yes, sir.

Q. What part of the Basin were you upon, and how long did you stay?

A. I went in from Dave Orr's about three miles above the mouth of the creek—did not make much of an examination of the timber at that time. Also went around on the top of the Fodderstack Lead to get a general impression of the topography of the country, but did not go down into the Basin, but was up on the high mountain above looking over the whole country; that was the first time I was there.

Q. How long?

A. I took part of one day and nearly all of the next day, and they were really two different trips.

Q. Tell about the next time you went there?

A. My impression is that that first trip was made in 1900—possibly 1901—and the next trip was made about a year afterwards, when I made quite a considerable examination of the timber, further up the stream than I had on the former trip; it was in what was known as Nichol's Cove and Big Fat Cove country. Then—I think—I did not visit it again until—I think now—in 1906. In 1906, 1907 and 1908 I made several trips in there; I should say four or five, possibly more, but I——

289 Q. What part of the basin were you on, on those trips?

A. One trip I would be in the upper part of the Basin, and sometimes was down near the mouth of the Creek, so first and last I have been all over it, but it is a great big country, and a man can't take it in in a day—you can take in a Cove or two: Possibly I have been there more times than I have stated, but I can't

call it up now—it is difficult for me to state how many times I have been there, I have been there so many times.

Q. Were you ever at the mouth of Slick Rock Creek?

A. Not right at the mouth—very close to it.

Q. Above or below?

A. Above—one trip I went for that very purpose, but the water was so high, and it was difficult, and before we got down to the mouth of the Creek it came so near to the close of the day, that we did not go to the mouth of it; I should say we were about one-eighth of a mile from it.

Q. As I understand you, when Mr. Hopkins and others were negotiating for the land, prior to that time the Beldings claimed that the State Line was over the Fodderstack Lead, and taking in all of Little Slick Rock Creek; is that right?

A. A. No, sir; if I conveyed that impression, I did not mean to. Mr. Creith, the agent, and some old citizens that I talked with there, claimed that the State Line ran up Slick Rock Creek about four or five miles; but the impression that I got about its taking in more than that was when I first got this map in my hands, the map lead me to believe that it took in not only Slick Rock Creek proper, but also the Little Slick Rock Creek Basin. In the drafting of the map, the Creek bears to the left more—as indicated—than it really does, and it left the impression with me that it must take in the Little Slick Rock Creek Basin as well—that was not correct, but I was not satisfied that I was wrong in that until after the survey. I was with the surveyors part of the time and became satisfied then I was wrong in that impression that the Little Slick Rock Basin was West of the Line indicated on the map of 1821.

Q. Mr. Cozad, what relation are you to any of the parties to this litigation?

A. W. R. Hopkins is my son-in-law. No relation to any of the others.

Q. What personal interest have you in the termination of this lawsuit?

A. I have no interest whatever in what is known as the lands purchased by the Cleveland people—I never put any money into it, and I have no interest in it. My interest in it is simply arises in an indirect way—if these lands are sold I get a commission, and
290 the more acres there are, the more commission I get.

Q. If you succeed in getting the land on Slick Rock Creek and they were sold, you would get a commission out of that also?

A. Yes, sir, that is correct.

Q. If I understand you, then, your parties claim that the line really runs up Slick Rock Creek about six miles from its mouth?

A. I should say about five miles from its mouth, and then bears to the right up what is known as Fodderstack Lead.

Q. And you- claim is that it follows the Creek as the line?

A. Yes, sir.

Q. But in this map that was filed, it shows that it does not follow the creek, how do you explain that?

A. I would say that the maker of the map did not make the creek

follow the line. I claim that the line is correct, as it is a surveyed line, and the drafting of the creek was freehand sketching that might be very incorrect. The line is correct because it is surveyed. The man that drafted in the topography was evidently doing very rough sketching—that is indicated by all the streams, the name of which—some of them—are marked on the map, none of which are really correct and very misleading, and the fact that they drafted in Slick Rock Creek as they did, was what left the impression on my mind that the true line, as surveyed, threw the Little Slick Rock Basin into North Carolina, which I found on surveying afterwards was not true.

Q. The etching along the line shows that they are following a Ridge: How do you explain that?

A. Just the same. The whole sketching from that line is freehand sketching, that is, only an approximation.

Q. So you insist that when they show that they are following a Ridge, they should have shown that they were following a Creek.

A. That is partly true and partly not true. The map would indicate that they followed the creek a mile or a mile and a half or two miles, when in fact they followed the Creek five miles.

That is all.

Mr. MATTHEWS (direct examination):

Q. Your information and knowledge is, then, that Slick Rock Creek is sketched east in its line from where it should be, after it leaves the Tennessee River?

A. All except the first mile and a half or two miles.

291 Mr. W. A. STONE (cross-examination):

Q. So far as it represents the streams and creeks and the mountains, this map is erroneous; is that correct, Mr. Cozad?

A. In most respects, the sketching on the map of mountains and creeks is erroneous.

Q. Including the stream which you claim to be Slick Rock Creek?

A. Including the stream that is indicated as Slick Rock Creek.

Mr. MATTHEWS (direct examination):

Q. Can that stream, indicated as Slick Rock Creek, as it is designated on that map, be the Cheoah River?

A. Absolutely impossible.

Q. In what sense do you say that it is correct?

A. The Cheoah River?

Q. No—in what sense do you say that the Slick Rock Creek is erroneously sketched?

A. Except the first mile and a half or two miles of Slick Rock Creek, he has sketched it in bearing too much to the Southeast.

Q. Is the mouth of Slick Rock Creek erroneously located?

A. No, sir.

W. A. Stone objects to the foregoing question and answer, because the witness says that he never was at the mouth of Slick Rock Creek.

Mr. W. A. STONE (cross-examination):

Q. As I understand you, Mr. Cozad, you claim that the surveyors who surveyed this land crossed the Tennessee River about the mouth of Slick Rock Creek, went up the creek a mile and a half along the bank of the creek and then deliberately climbed the mountain?

A. No, there is no mountain there.

Q. Then deliberately neither climbed a mountain or followed the creek but wandered along the land, following no boundary, no ridge or Lead until they got up about five miles; is that correct?

A. No, sir; that is not correct.

Q. Well, what is your claim then?

A. I claim that the surveyors followed along the creek, most of the time the west side, followed along the creek about five miles, when they came to a very considerable divide between two permanent streams or branches of Slick Rock Creek, and they followed that divide up to the main Fodderstack mountain—it is known as Fodderstack Lead, a big spur that runs right down there close
292 to Slick Rock Creek proper, and they took right up that mountain. The reason that I am satisfied of that is because we blocked more trees along that ridge than other place on the entire State Line survey and we have the blocks; I have seen the blocks and counted the blocks, and know just where they are taken from.

Q. Well now I would rather just have you answer my question. Of course, Mr. Cozad, the same parties that located that line made that map, did they not?

A. I can't answer as to that.

Q. They have signed it?

A. They have adopted it evidently. I don't know who the draftsman was.

Q. Well they signed their names to it, did they not?

A. All the Commissioners, and the Surveyor also?

Q. As a matter of fact, according to this map and the scale of it, the line is some three or four miles West of the creek, most of it, is it not?

A. I should say it was from half a mile to two miles and a half. The creek is sketched in.

Q. You understand then, as a matter of fact, according to the map the line is from one-half to two and a half miles from the Creek?

A. Just about, after the first two miles.

Q. Then for three miles, the map shows the creek to be from a half mile to two and a half miles East of the line?

A. Yes, sir.

Q. Is it level there along the back of the Creek?

A. Most of the way it is rocky.

Q. But it is not mountainous?

A. Oh, no, it is mountainous in some places; for instance, the mountains that run up to the little Fodderstack Lead.

Q. Well, Mr. Cozad, how old are you?

A. I am 62 years old.

Q. And you have been engaged all your life in the title business—examining titles to land?

A. Not all my life—the greater part of my business life I have given to that.

Q. What was the purpose or intention of that map; was it not to show where the line was?

A. Undoubtedly it was to show where the line was.

Q. And how was it adopted by the Commissioners?

A. It was ratified by the Legislature of each State.

Q. Showing the line, or the creek, from a half to two and a half miles from where it actually was; would you not regard that as a little strange from your experience?

293 A. On the contrary I think it would be about what you could expect of surveyors in a wilderness like that in 1821. I would not expect that they would draft in the mountains and the Creeks on either side of a line with any great degree of accuracy. They were not making topographical map, but they were surveying a line between two states, and the topography that they sketched in freehand was at best only approximated; they did not survey any of those creeks.

Q. I don't want so much Mr. Cozad; you are answering two or three questions in one answer. If they were inaccurate in 1821 in the preparation of maps, might they not have been inaccurate in their survey, too?

A. I don't think that necessarily follows.

Q. Then they were thoroughly accurate in their surveys and absolutely inaccurate in their plats?

A. I think that is about the correct statement.

Q. Well, if they were accurate in their surveys, how could they be so careless about their plats, unless they intended by their plots to deceive people?

A. Both States were represented by three Commissioners and a Surveyor; they went to do a certain thing and they were not employed to make a topographical map of the country, and they—for instance—indicated on the map the Tennessee River as nearly a mile wide at the point where they crossed it; the man that did the sketching indicates that it is about a mile wide, when we know that the Tennessee River, where they crossed it, or anywhere near where they crossed it is not more than three or four hundred feet wide.

Q. Why do you say the man who did the sketching; do you know that it was sketched by any particular person?

A. I know nothing about it, except I have a map in my hand which did not come of its own volition, but must have come from somebody.

Q. The makers of the map have signed it, have they not?

A. Yes, sir; I suppose the makers of it have signed it—they may have employed somebody to do the drafting.

Q. And sign it too?

A. I think not.

Q. You think it is signed by them?

A. Yes, sir; it is signed and ratified by the men that did it. But

I don't suppose that when they signed the map that they meant to hold forth to the citizens of North Carolina and Tennessee that the Tennessee River was a mile wide at the place where they crossed it, although the map would indicate that that was true.

294 Mr. MATTHEWS (direct examination):

Q. Mr. Cozad, so far as the line is concerned as indicated by that map, is there any difficulty, in your estimation, with your experience, in a competent surveyor running that line?

Defendant objects to the question because the witness declares he is not a surveyor; that he was not present all the time with the surveyor, but only a part of the time, and he has neither run the whole line nor was he present when it was run. Therefore he is not competent to pass an opinion of that kind.

A. I don't think there is. Of course, it would be attended with more difficulty than it would be if the courses and distances were all indicated upon the map.

Q. Now in speaking about running up Slick Rock and then striking the Fodderstack Range, what had the courses and distances of the map to do with your locating the line that way, and what did the course of that line as laid down on the map of 1821 indicate with reference to that?

W. A. Stone objects to the foregoing question because the map does not indicate or designate any courses or distances at all on that portion of the line.

A. By beginning on the north side of the Tennessee River on the state line between Swain county, North Carolina, and Blount county, Tennessee, where the line is well known and recognized and not in dispute—when you start and survey a few miles along the line indicated on the map that is known and recognized, then follow the line indicated by the map where the line is not known and recognized and is in dispute, you have no trouble in seeing that the line runs up Slick Rock Creek about five miles, bears sharply to the right and leads to Fodder Stack Mountain, then follows the line of that mountain, and there is a correspondence between the line as indicated on the map and that line of mountain, that is remarkable, they agree to a nicety; then striking the line again where it is known and recognized and there is no dispute, you still follow along the same line, and the line indicated on the map and the line of the mountains are identical and correspond to a remarkable degree of accuracy. Now I don't know whether I have answered your question, that is the answer I should give.

Q. You speak about following up Slick Rock Creek about five miles and then striking off to the Fodder Stack; I ask you if that is indicated on the map?

A. It is.

295 Mr. W. A. Stone objects to the foregoing question, because the map shows for itself and it is admitted by this witness

and by others that there are no courses and distances over this line that is spoken of.

Q. Now the surveyors were directed to run and mark this line?
A. You mean the surveyors of 1821?
Q. What aid had you, by any marks, in locating the line up Slick Rock Creek and then to the Fodder Stack Range?

Defendants object to the foregoing question because witness says that he did not locate the line, and was not with the surveyors who did locate it.

A. It is well known in that section of the country, the marks used by the surveyors in running the state line. We found those marks on trees on the line known and recognized and not in dispute. We found the same marks along the line surveyed that is in dispute, on the trees. Blocking those trees, we found it dates back to the year 1821. Not only the line itself, if there were no marked trees to be found, must lead up Slick Rock Creek about five miles and then bear off up Fodder Stack Lead, but we find where the line necessarily must run. These marked trees indicate that that is where they actually did run, and we find that the trees date back to 1821.
Q. Did the marks, the state line marks—indicate the same as you have said about the state line running up about five miles up Slick Rock Creek, and then running over——
A. They did.

Mr. W. A. STONE (cross-examination):

Q. Mr. Cozad, this line, then is located by your people from the marks on trees and from the undisputed line on the north side of the Tennessee River, is it not; and not by this map?
A. I would say that if anyone, with a map with no courses or distances——
Q. You don't answer my question. Please read the question to him. (Question read.)
A. By both the map and the trees.

That is all.

Mr. MATTHEWS (direct examination):

Q. When you say by both, do you mean the bearings of this map?
A. The bearings of the line indicated and by the trees, both; in other words, you put that map on the part of the line where
296 it is not in dispute, and follow the courses indicated, and it will lead you just where the marked trees will lead you.

M. E. COZAD,
By HARRY T. KLEIN,
By Stipulation.

WILLIAM R. HOPKINS, of lawful age, being by me first duly cautioned and sworn, deposes and says as follows:

Direct examination by C. B. MATTHEWS:

Q. Are you the W. R. Hopkins, a party to this petition to file a bill of review?

A. I am.

Q. Are you one of the purchasers of this property from Archer and McGarry?

A. I am.

Q. Do you recollect when you made the contract of purchase with them?

A. We had a preliminary agreement with Mr. Creith, which antedated the written contract with the principals. My recollection is that it was either late in March or early in April.

Q. What year?

A. 1900. I went down to Andrews to see Mr. Cozad and while I was there Mr. Creith presented to me the matter of these Belding lands. At that time we were interested in purchasing other lands, and I did nothing with a view to buying the Belding lands. In June I was there again and he took up the matter at that time. On my return to Cleveland, I took up with our people there the question of going into an investigation of this Belding property, and was authorized and arranged for a time to go over it and make some examinations. In pursuance of that arrangement, under which we were protected until such a time as we were either satisfied or not satisfied, we went ahead, and in August Mr. Bole went down and went over the ground to some extent. From that time on until the making or the actual written contract, we were making investigations under the agreement of Creith to protect us until they were made. On October 29 the contract was reduced to writing and we made a payment.

Q. How far previous to the making of that contract of October 29th, 1900, can you date this protection you speak of?

A. It was sometime in June. The arrangement with Mr. Creith was that we should let him know at once whether we cared
297 to make that agreement. I recall the time, because Mr. Leighton and Mr. Matthews went to Europe in June of that year, and I had their arrangement authorizing me to go ahead with Creith before they sailed.

Q. When did you first get information as to the discovery of that map of 1821?

A. In July, 1906.

Q. How did you get it?

A. Mr. Cozad sent us up a blue-print of the map, together with quite an extensive report, detailing his investigations at Raleigh, and the advice which he got from General Davidson and such matters, so that it was in shape to present to our people to determine what action they should take.

Q. Who had the management of the affairs of the purchasers of this property, with reference to this property?

A. In North Carolina, Mr. Cozad undertook to protect the property against trespassing, and safeguarded it generally while there on the ground, and at this end I always attended to all of the business.

Q. Can you say whether or not this time in July was the first time, or was there some previous time, that any member of your syndicate up there, obtained information of the discovery of this map?

A. I am sure they never knew anything about it except what I told them, because their interests were such that they looked to me for information about the matter.

Q. Had you ever seen any advertisement or a notice in the newspapers about the discovery of this map?

A. No, sir.

Q. Will you produce the contract—one of the originals of October 29th, 1900—to be attached to your deposition?

A. Yes, sir. I have an original, but would rather not attach that, but would prefer to attach a copy if that will answer.

The defendants agree that inasmuch as Mr. Hopkins says that he has the original, he may furnish a copy of same to be attached hereto, reserving all objections other than the fact that a copy is furnished.

Copy attached hereto, made a part hereof and marked "Exhibit H. K. No. 1."

Mr. MATTHEWS: I desire to offer in evidence, on behalf of the petitioners, the Trust Agreement between R. N. Archer and Thomas F. McGarry and Louis Krohn, trustees, dated December 9, 1899, and the deed of the Beldings and other owners of this prop-
298 erty, or alleged owners, made in pursuance of that, to Robert N. Archer and Thomas F. McGarry, trustees, both dated December 9th, 1899. Copies attached hereto, made a part hereof and marked Exhibits "HK No. 2" and "HK No. 3."

Also the deed made by Robert N. Archer and Thomas F. McGarry, trustees, to William R. Hopkins, Edward I. Leighton, and others, dated June 9th, 1913; the object not being to offer this a second time if it is already in the case. Copy attached hereto, made a part hereof, and marked "Exhibit HK No. 4."

I also want to offer now the original pleadings, evidence and record in the Hebard case, to-wit: the case of Hebard vs. Belding, et al.

The defendants do not object to copies of the originals being offered, but do except to any of the contracts, deeds or conveyances made by Belding and any of the trustees, prior to the deed of the trustees to William R. Hopkins and others of June 9th, 1903, because none of those papers are competent evidence in this cause, for any purpose.

No cross-examination.

WILLIAM R. HOPKINS,
By HARRY T. KLEIN,
By Stipulation.

"Copy."

"Exhibit—H. K. No. 1."

This memorandum of agreement, entered into this 29th day of October, 1900, between Robert N. Archer, city of Cincinnati, Ohio, and Thomas F. McGarry, of Grand Rapids, state of Michigan, trustees, parties of the first part, and Edward I. Leighton, Frederick W. Bruch, George Reeves, John Matthews, Benjamin P. Bole and William R. Hopkins of the city of Cleveland, state of Ohio, parties of the second part, witnesseth:

That the said parties of the first part hereby sell to the parties of the second part certain lands situated in the county of Graham and the state of North Carolina, known as the Belding lands, and which are more particularly described in two certain deeds of conveyance, one dated on the 9th day of December, 1899, and the other dated on the 22nd day of March, A. D., 1900, whereby Milo M. Belding and Emily E. Belding, his wife, of New York City; Alvah N. Belding and Lizzie Belding, his wife, of Rockville, Connecticut; David W. Belding and Jeanette Belding, his wife; Louis Krohn, widower; Henry Stix and Fannie Stix, his wife; Nathan Stix and Ricka Stix, his wife, all of Cincinnati, Ohio; D. M. Hyman and Bettie
299 Hyman his wife, of Denver, Colorado; and Thomas F. McGarry and Nettie B. McGarry, his wife, of Grand Rapids, Michigan, conveyed to the parties of the first part, as trustees, certain lands in said Graham county, in said deeds described and all other tracts and parcels of land situated in Graham, Clay, Swain and Cherokee counties, situated in the state of North Carolina, in which the grantors in said conveyance were interested jointly or in common, and that said lands in Graham county, which are covered by this contract and sold by virtue of the power conferred upon the parties of the first part by the deeds mentioned and by the contracts known as the trust agreement, entered into between Robert N. Archer, individually, and Louis Krohn, of Cincinnati, Ohio, and Thomas F. McGarry, of Grand Rapids, Michigan, trustees, and the Union Savings Bank & Trust Company, of Cincinnati, Ohio, dated respectively December 9th, 1899, February 24th, 1900, and March 15, 1900, on deposit with the said Union Savings Bank and Trust Company, of Cincinnati; and the said sale is upon the following terms and conditions:

1. The said parties of the second part agree to pay for said lands the sum of one hundred and twenty-five thousand dollars ($125,000) in the manner following, to-wit: The sum of fifteen thousand dollars ($15,000) cash upon the individual claim of the said Robert N. Archer, and the balance of said claim, amounting to seventy-five thousand dollars ($75,000) in equal payments of fifteen thousand dollars ($15,000) each every twelve months. The cash payment above mentioned to be made and the deferred payments to date from the date of the delivery of the deed of the said premises to the said parties of the second part, upon the conditions hereinafter named.

Said deferred payments are to bear 6 per cent interest, payable semi-annually, and to be secured by a first lien on the lands in Graham county above named, and evidenced by notes of the parties of the second part.

Out of the purchase price there shall be allowed the parties of the second part the sum of $10,536.42 for the acquisition of the interest of the Cooper estate in the lands in all four of the counties of Graham, Cherokee, Clay and Swain, in North Carolina, and for the acquisition of the interest of the Bragg estate in the lands in the same counties, the sum of $7,500; but the interest obtained from these two estates in counties other than Graham county shall be for the benefit of the parties of the first part; but for the purpose of accomplishing the acquisition of said interests the option to
300 purchase the respective interests of the Cooper estate and the Bragg estate shall be assigned to the parties of the second part. If the acquisition of the said interests require more than the two sums last mentioned, said additional sums shall be paid by the parties of the second part; but they shall be recouped out of the Bragg and Cooper interests in the lands in Cherokee, Clay and Swain counties, so far as said interests are sufficient, and there is no personal liability on the parties of the first part or deduction from the purchase-price first above mentioned, other than said sum amounting to $18,036.42. Six thousand dollars ($6,000) of said purchase price is to be paid to John G. Creith, as his compensation for the sale of said Graham county lands, the balance of said purchase price, to-wit: the sum of ten thousand nine hundred and sixty-three dollars and fifty-eight cents ($10,963.58) is to be paid to the parties of the first part, to be distributed under the terms of their trust.

This sale is also dependent upon the following further conditions: That there shall not be less than 38,000 acres of land in the purchase, and not less than 140,000,000 feet of timber, outside of the hemlock, of a marketable character, and the parties of the second part are, by November 15, 1900, or sooner, to verify the statement as to the amount of said timber and to proceed at once and as rapidly as possible to verify the statement as to the title and acreage; as it is understood that the parties of the second part, at their option, need not complete the said purchase unless the above mentioned acreage of 38,000 acres at least, with the above mentioned amount of timber, can be conveyed to them by a good title, unencumbered, except with the purchase price mentioned in this contract; and in case said parties of the second part complete the said purchase and go into the possession of said property in Graham county, North Carolina, and should cut more than fifteen million feet of timber per annum, the deferred payments herein mentioned shall be anticipated to the extent of one dollar per thousand feet of timber on the excess over said fifteen million feet, to be paid on said claims of Robert N. Archer, individually and any or all of these deferred payments may be paid at any time after the date of this contract, whether said payments are due or not. The said parties of the second part are to place in the custody of the Franklin Bank, of Cincinnati, Ohio, a check for $7,500, to be applied to the first pay-

ment to Robert N. Archer when the deed for the said prop-
301 erty is delivered in accordance with the terms of this contract.

Said sum to be forfeited and paid to the parties of the first part in case the parties of the second part should fail, upon reasonable notice, after compliance with the terms of this contract with the parties of the first part, to accept the said deed and carry out the terms of the contract to be performed by said parties of the second part, it being distinctly agreed that this sum shall be liquidated damages for the general breach of the contract by the parties of the second part.

In witness whereof, the parties hereto have attached their signatures on the day and year above first written.

(Properly signed by the parties hereto.)

"Copy."

"EXHIBIT—HK. No. 2."

Memorandum of agreement, made in triplicate, between Robert N. Archer, of Cincinnati, Ohio, part- of the — part, and Louis Krohn, of the same place, and Thomas F. McGarry, of Grand Rapids, Michigan, as trustees, parties of the second part, and the Union Savings Bank and Trust Company, of Cincinnati, Ohio, party of the third part, witnesseth:

That, whereas, the parties of the third part, together with J. W. Cooper, of Murphy, N. C.; the estate of C. S. Bragg, Henry Stix, Nathan Stix and D. W. Belding, of Cincinnati, Ohio; D. M. Hyman, of Denver, Colorado; Alvah N. Belding, of Rockville, Connecticut, and Milo M. Belding, of New York City, New York, are the owners and interested in about sixty-five thousand acres of land in Graham, Cherokee and Clay and Swain counties, North Carolina, about forty-five thousand acres in the county of Graham; the balance in the other counties above named; and, whereas, there has been litigation pending between the said Archer and the said Louis Krohn and others, in the Chancery Court of Loudon county, Tennessee, and in the Superior Court of Graham county, North Carolina, and the said Archer claims to have obtained judgment in his said case in Tennessee, and claims to have obtained the judgment of the court in his favor in the North Carolina case; and claims to have a lien on the timber rights on the Graham county lands, mentioned, as security to him for the amount due to him in said cases, the validity of which is disputed by said second parties:

Now, therefore, in order to settle said matters and all litigation, it is hereby mutually agreed as follows:

302 1. That the amount due the said Robert N. Archer is hereby settled and agreed upon as follows, at the sum of eighty-five thousand dollars ($85,000).

II. That the said sum shall be paid as follows: Fifteen thousand dollars ($15,000) in four months, fifteen thousand dollars ($15,000) in eight months, fifteen thousand dollars ($15,000)

in twelve months, twenty thousand dollars ($20,000 in sixteen months from date, and twenty thousand dollars ($20,000) in twenty months from date, with six (6) per cent on all of said sums. That in addition thereto there is due and shall be paid the sum of one thousand dollars ($1,000) still due on what is known as the Boom Company note at the Merchants National Bank of Cincinnati, Ohio, with interest thereon to the date of payment; and all costs in the suits between said Robert N. Archer and parties of the second part, and others, in London county, Tennessee, and in Graham county, North Carolina; but there shall not be included in said costs any further counsel or witness fees; all further expenses and counsel fees for appealing and arguing the case of Hebard vs. Archer, et al., in the United States Court of Appeals, at Cincinnati, Ohio, including the cost of transcript, clerk's fees, and the cost of printing record thereof; also the just and reasonable expenses, costs and charges of handling said property, first of managing and conducting the affairs thereof, under this agreement, and the deeds accompanying the same; and all taxes which are now or may be legally levied and assessed thereon; and all expenses, costs, charges and counsel fees in the premises; and a reasonable compensation to said Robert N. Archer and Thomas F. McGarry, trustees, and their successors, for their services in the premises, not exceeding one hundred dollars ($100) per month to each, but the said Archer and McGarry assume no personal obligation in regard to the sums mentioned in this paragraph, but merely consent that they may be ultimately paid out of said property.

III. As security for the payment of these various sums the parties of the second part undertake to obtain conveyances from the owners of the timber in Graham county, North Carolina, fully set forth and described in the contract between the parties of the first and second part, entered into on the 8th day of January, 1895, conveying a clear and unincumbered title thereto to the said Robert N. Archer, of Cincinnati, Ohio, and Thomas F. McGarry, of Grand Rapids,
303 Michigan, as and hereinafter called "trustee" under a suitable deed of trust prepared and agreed upon and executed by the parties in interest contemporaneously with the signing of this agreement; and in case of non-payment to said Archer of any of the amounts when due and for sixty days thereafter, the said whole amount then owing said Archer shall become due and payable at once, and said "trustees" or either of them, in case the other refuses to act, at the option of said Robert N. Archer, shall proceed to sell said Graham county lands and other lands hereinafter mentioned, or in any part thereof, after four consecutive weeks, to parties in interest, at public auction and pay the proceeds thereof towards the liquidation of amounts unless the said Archer shall exercise the option to assert his original rights, as specified in the seventh paragraph hereof. And said Archer or said McGarry, or both, their successors, are authorized to bid on said property, or any part thereof, at any sale of said property.

IV. Simultaneously with the execution hereof, as further security for the payments aforesaid, the said parties of the second part under-

take to be deeded from all the owners of the Graham county lands (except J. W. Cooper and the estate of Caleb S. Bragg, deceased), deeds conveying the clear and unincumbered title thereof in fee, but in trust to said Robert N. Archer and Thomas F. McGarry, as trustees, as well as deeds conveying the clear and unincumbered title thereof in fee, but in trust, to about Twenty thousand acres of land in the counties of Swain, Clay and Cherokee, North Carolina, owned by the parties mentioned in the first recited clause of this agreement (except said Cooper and said estate of Caleb S. Bragg, deceased), under and upon the same expressed trust as specified in the deed of the timber in Graham county, North Carolina, aforesaid; and also, as soon as practicable thereafter, to obtain, if possible deeds from said Cooper and the estate of Caleb S. Bragg, deceased, covering their interest in the property aforesaid, if the same can be done under suitable terms and arrangements. Provided, however, that the deeds of the twenty thousand acres in Clay, Swain and Cherokee counties, aforesaid, and the deed of the fee of the lands in Graham county, aforesaid, shall subject said property by them conveyed to the payment of the following parties, on or before five years from the date hereof, with interest at the rate of six (6) per cent per annum:

Estate of J. W. Cooper, Murphy, North Carolina	.....	$10,536.42
Estate of C. S. Bragg, Cincinnati, Ohio	.....	7,500.00
304 Henry Stix, Cincinnati, Ohio	.....	20,000.00
Nathan Stix, Cincinnati, Ohio	.....	6,975.00
D. M. Hyman, Denver, Colorado	.....	3,500.00
Louis Krohn, Cincinnati, Ohio	.....	25,000.00
Chas. C. and George H. Hopkins, Lansing and Detroit, Michigan	.....	15,000.00

That with the exception of the first two sums of those last above mentioned, to be paid to the estate of J. W. Cooper and the estate of C. S. Bragg, which are to remain liens only on their undivided interests, respectively, in said lands, and are to be paid only in case said estate of Cooper and said estate of C. S. Bragg, deceased, make the conveyances aforesaid, all other amounts shall be subordinated to the said Archer for the sum to be paid to him and of said expenses, taxes, counsel fees, costs and Boom Company note; and after the said Archer's lien, said Henry Stix shall have priority over the balance for the sum of ten thousand dollars ($10,000) and interest (on) one-half of the sum due him; otherwise said sum last above itemized, including the remaining ten thousand dollars ($10,000), and interest to Henry Stix, shall be paid ratably; which deeds of conveyance and the amount due thereon, and the terms upon which the same shall be delivered, shall first be deposited in escrow with the Union Savings Bank and Trust Company, of Cincinnati, Ohio, hereinafter designated as the "depository" to be delivered by it to said trustee, when this contract is signed and delivered. Provided, also, that the said trustees shall, prior to final payment have the right to sell the timber separately on the said twenty thousand acre tract, to be cut and removed therefrom; but no title therein shall pass to or vest

in the purchaser of said timber until the sum of one dollar per thousand feet of timber shall be first paid in or deposited with the said depository for and on account of the indebtedness of the estate of J. W. Cooper, estate of C. S. Bragg, deceased, (provided they deed to said trustees, Henry Stix, Nathan Stix, D. M. Hyman, Louis Krohn and Charles C. and George H. Hopkins, to whom the same shall be disbursed by said depository, preferring the estate of J. W. Cooper and the estate of C. S. Bragg, provided they deed as aforesaid) and Henry Stix, under the terms, priorities and conditions as aforesaid; but otherwise in proportion to their several and respective indebtedness, aforesaid; the balance to be paid to said Robert N. Archer, or sufficient thereof to satisfy his claim in full.

V. And the said trustees, Robert N. Archer and Thomas F. McGarry, are also authorized and empowered, at any time, to
305 sell said property, or any part thereof, at private sale, at such price, in such manner and upon such terms and conditions as they deem proper. Provided, however, that no such sale shall be made of the whole of said property, unless sufficient be realized to satisfy the claims of the several parties herein mentioned, principal and interest, hereinbefore scheduled and set forth.

VI. In the event of the death or resignation of either or both prior to the termination of the said trust, said Robert N. Archer's place shall be filled by the joint agreement of Frank K. Rodman and C. B. Matthews, or their successors, of Cincinnati, Ohio, and Thomas F. McGarry's place by Krohn and D. B. Belding, or their successors, of Cincinnati, Ohio, and in case either side fails to act for ten days after vacancy, the others shall make said appointment.

VII. In consideration of the premises, aforesaid, and as further security for the several amounts aforesaid, the said Robert N. Archer agrees to legally execute and deposit with said depository a deed for the said timber in Graham county, North Carolina, and his interest in the boom and mill at Lenoir, Tennessee, all his interest in the Tennessee Improvement Company, conveying the same to the said Robert N. Archer and Thomas F. McGarry, for the purpose of the trust herein specified; and an absolute and complete discharge and satisfaction of the judgments obtained by him in Tennessee and North Carolina, aforesaid; and a release of all personal liability for the payments provided by this agreement, to be delivered by said depository to Louis Krohn and Thomas F. McGarry upon the payments of the moneys mentioned above, to said Robert N. Archer; and in case of the non-payment of the moneys above mentioned to said Robert N. Archer, in manner and form as above expressed, the said Robert N. Archer, shall, for the space of ninety days after any default, have the option to enforce this instrument or be remitted to his original rights under the contract of January 8, 1895, and the suits mentioned (in) the third paragraph hereof, as if this contract had never been made, and said discharge and satisfaction and said deed just mentioned shall be null and void, and all parties shall be returned to their original rights.

VIII. It is further mutually understood and distinctly agreed that, after the payments herein provided for in this contract, with

interest thereon, shall have been made, the balance or residue, if any, shall belong to and shall be legally conveyed, transferred and assigned to Milo M. Belding, of New York City, New York;
306 Alvah N. Belding, of Rockville, Connecticut; David W. Belding, of Cincinnati, Ohio, and Thomas F. McGarry, of Grand Rapids, Michigan, their heirs, legal representatives and assigns.

IX. Said Robert N. Archer further agrees to convey at the same time, to said trustees, for the purpose of the trust, the amount of money, if any, now in his hands in the custody and control of or due master and receiver of the Superior Court of Graham county, North Carolina, as well as the master and receiver of the Chancery Court of Loudon county, Tennessee.

X. It is distinctly understood and expressly agreed that no authority is vested in said Robert N. Archer and Thomas F. McGarry, trustees, to incur any liability or debt against the owners of the said property personally, in the use of the property or otherwise; and that the trust imposed upon the said Robert N. Archer and Thomas F. McGarry in this agreement, is accepted upon the express condition that said trustees shall not incur any personal liability or responsibility whatever, except for their own willful and intentional breaches of the trust herein expressed and contained.

XI. It is further agreed that all moneys received by said trustees, in the matter of this trust, shall be deposited with said depository and that as soon as the sum of one thousand dollars is on hand, applicable to the payment of any of the respective claims to be paid under this contract, it shall be so applied by the depository upon receipt of the joint voucher or vouchers of said trustees.

XII. It is further mutually agreed that upon receiving payment in full and being relieved from all obligations in the premises, the said Robert N. Archer's trusteeship herein shall cease and terminate and that he shall thereupon execute the necessary deeds and conveyances, without recourse to him to legally vest the property in the successors or the owners, as the case may be.

XIII. It is further agreed that after the payment of the said Robert N. Archer in full, all the lands and timber hereinabove mentioned shall, as security for the payment of any of the sums due the parties mentioned in paragraph IV. of this contract, in the order therein expressed *and said lands shall* be sold or disposed of, and the avails in the depository paid under the terms and provisions of this agreement.

XIV. The trust herein created is hereby fixed and terminates five years from the date hereof, but shall remain as long as any of the funds herein provided for remain unpaid; but no charges shall be made for their services by said trustees after five years.

307 XV. Said Henry Stix and Nathan Stix are hereby, by each of the parties hereto, absolved, released and discharged from any and all personal liability which may in any manner be claimed to exist against them, or either of them, by reason of any of the amounts claimed or named herein as being due or under

any judgments or suits or proceedings heretofore instituted, to which either of the parties hereto are parties, and all claims which may or might be asserted against them, or either of them, arising out of said suits or any of the proceedings hereinbefore referred to, or under this contract, *is*, by each of the signers hereof expressly waived and released and all such claim is in consideration of the premises and the sum of one dollar paid by said Henry Stix and Nathan Stix, expressly waived and hereby discharged, said Robert N. Archer, however, expressly reserving the personal liability if any of all others.

In witness whereof, the parties of the first part and second part have hereunto signed their names and affixed their seals; and the said Union Savings Bank and Trust Company to witness its acceptance of the trust herein conferred, has caused its corporate seal to be hereunto affixed, and these presents to be signed by its president.

This 9th day of December, A. D., 1899.

(Signed) ROBERT N. ARCHER. [L. S.]
LOUIS KROHN. [L. S.]
T. F. McGARRY. [L. S.]
THE UNION SAVINGS BANK AND TRUST CO., [L. S.]
By A. B. VOORHEES, *V. P.*
—— ——, *President.*

"EXHIBIT HK No. 3."

Copy.

This indenture, made this 9th day of December, A. D. 1899, between Milo M. Belding and Emily Belding, his wife, of New York City; Alvah H. Belding and Lizzie Belding his wife, of Rockville, Connecticut; David W. Belding and Jeannette Belding his wife; Louis Krohn, widower; Henry Stix and Fannie Stix, his wife; Nathan Stix and Ricka Stix his wife, all of Cincinnati, Ohio; D. M. Hyman and Bettie Hyman his wife, of Denver, Colorado; and Thomas F. McGarry and Nettie B. McGarry his wife, of Grand Rapids, Michigan, parties of the first part, and Robert B. Archer, of Cincinnati, Ohio, and Thomas F. McGarry of Grand Rapids, Michigan, Trustees, parties of the second part: Witnesseth:

That the said parties of the first part, for and in consideration of
One Hundred Dollars ($100) to them in hand paid by the
308 said parties of the second part, the receipt whereof is hereby
acknowledged, do by these presents grant, bargain, sell, remise, release, and forever quit claim unto the said parties of the second part, and to their heirs, successors and assigns, forever, the following pieces, parcels and tracts of land, situated in Graham County, North Carolina, and described as follows, to-wit:—

Grant No. 96, containing fifty (50) acres.
Grant No. 98, containing One Hundred (100) acres.
Grant No. 99, containing One Hundred (100) acres.

Grant No. 101, containing six hundred and forty (640) acres.
Grant No. 92, containing six hundred and forty (640) acres.
Grant No. 93, containing one hundred (100) acres.
Grant No. 90, containing one hundred (100) acres.
Grant No. 91, containing fifty (50) acres.
Grant No. 94, containing fifty (50) acres.
Grant No. 42, containing fifty (50) acres.
Grant No. 2435, containing fifty (50) acres.
Grant No. 2436, containing fifty (50) acres.
Grant No. 2438, containing fifty (50) acres.
Grant No. 1853, containing fifty (50) acres.
Grant No. 1864, containing one hundred (100) acres.
Grant No. 3860, Entry No. 683, containing one hundred (100) acres.
Grant No. 86, containing one hundred (100) acres.
Grant No 87, containing one hundred (100) acres.
Grant No. 47, containing one hundred (100) acres.
Grant No. 85, containing one hundred (100) acres.
Grant No. 1761, containing fifty (50) acres.
Grant No. ——, Entry No. 749, containing one hundred (100) acres.
Grant No. 2993, containing six hundred and forty (640) acres.
Grant No. 2904, containing one thousand (1,000) acres.
Grant No. 2905, containing six hundred and forty (640) acres.
Grant No. 2906, containing six hundred and forty (640) acres.
Grant No. 2908, containing six hundred and forty (640) acres.
Grant No. 2909, containing six hundred and forty (640) acres.
Grant No. 2910, containing four hundred and fifty (450) acres.
Grant No. 2911, containing six hundred and forty (640) acres.
309 Grant No. 2913, containing four hundred and ninety-five (495) acres.
Grant No. 2915, containing six hundred and forty (640) acres.
Grant No. 2916, containing six hundred and forty (640) acres.
Grant No. 2917, containing six hundred and forty (640) acres.
Grant No. 2919, containing six hundred and forty (640) acres.
Grant No. 2920, containing fifty (50) acres.
Grant No. 2921, containing six hundred and forty (640) acres.
Grant No. 2937, containing one hundred and fifty (150) acres.
Grant No. 2940, containing six hundred and forty (640) acres.
Grant No. 2946, containing six hundred and forty (640) acres.
Grant No. 2947, containing five hundred and forty (540) acres.
Grant No. 2912, containing six hundred and forty (640) acres.
Grant No. 2948, containing six hundred and forty (640) acres.
Grant No. 2949, containing six hundred and forty (640) acres.
Grant No. 2950, containing three thousand (3,000) acres.
Grant No. 2951, containing six hundred and forty (640) acres.
Grant No. 2952, containing six hundred and forty (640) acres.
Grant No. 2956, containing one thousand (1,000) acres.
Grant No. 2957, containing six hundred and forty (640) acres.
Grant No. 2959, containing six hundred and forty (640) acres.

Grant No. 2960, containing six hundred and forty (640) acres.
Grant No. 2961, containing three hundred thirteen (313) acres.
Grant No. 2963, containing six hundred forty (640) acres.
Grant No. 2964, containing three hundred (300) acres.
Grant No. 2966, containing five hundred (500) acres.
Grant No. 2967, containing six hundred and forty (640) acres.
310 Grant No. 2968, containing one hundred and twenty-five (125) acres.
Grant No. 2969, containing fifteen hundred (1,500) acres.
Grant No. 2970, containing six hundred and forty (640) acres.
Grant No. 2974, containing six hundred and forty (640) acres.
Grant No. 2975, containing six hundred and forty (640) acres.
Grant No. 2976, containing six hundred and forty (640) acres.
Grant No. 2979, containing six hundred and forty (640) acres.
Grant No. 2980, containing six hundred and forty (640) acres.
Grant No. 2981, containing three hundred (300) acres.
Grant No. 2983, containing six hundred and forty (640) acres.
Grant No. 2336, containing fourteen thousand, eight hundred (14,800) acres.

Situated in Clay County, North Carolina.

Tracts No. 93 and 127—one, one hundred acres, more or less, and known as "Lee Farm."
Grant No. 2938, containing six hundred and forty (640) acres.
Grant No. 2939, containing six hundred and forty (640) acres.

Situated in Swain County, North Carolina.

Tract No. 58, entry No. 6076, containing fifteen (15) acres.
Grant No. —, entry No. 987, containing three hundred (300) acres.

Situated in Cherokee County, North Carolina.

Grant No. ——, entry No. 69, containing six hundred and forty (640) acres.
Grant No. 3442, containing two hundred (200) acres.
Grant No. 3440, containing two hundred (200) acres.
Grant No. ——, entry No. 1273, containing two hundred (200) acres.
Grant No. 3438, containing two hundred (200) acres.
Grant No. 7212, containing four hundred (400) acres.
Grant No. 2896, containing one hundred and sixty (160) acres.
Grant No. 2897, containing one hundred and eighty (180) acres.
Grant No. 2898, containing sixty-four (64) acres.
311 Grant No. 2899, containing six hundred and forty (640) acres.
Grant No. 2900, containing nineteen (19) acres.
Grant No. 2901, containing forty-eight (48) acres.
Grant No. 2902, containing two hundred (200) acres.

Grant No. 2907, containing six hundred and forty (640) acres.
Grant No. 2914, containing two hundred and twenty-two (222) acres.
Grant No. 2918, containing five hundred (500) acres.
Grant No. 2922, containing five hundred and fifty-seven (557) acres.
Grant No. 2923, containing sixty-two (62) acres.
Grant No. 2924, containing six hundred and forty (640) acres.
Grant No. 2925, containing three hundred eighty-one (381) acres.
Grant No. 2926, containing six hundred forty (640) acres.
Grant No. 2927, containing one hundred (100) acres.
Grant No. 2928, containing one hundred (100) acres.
Grant No. 2930, containing four hundred (400) acres.
Grant No. 2931, containing four hundred and forty (440) acres.
Grant No. 2932, containing six hundred and forty (640) acres.
Grant No. 2933, containing five hundred (500) acres.
Grant No. 2935, containing sixty (60) acres.
Grant No. 2936, containing one hundred and ninety-four (194) acres.
Grant No. 2941, containing four hundred (400) acres.
Grant No. 2942, containing two hundred and three (203) acres.
Grant No. 2943, containing six hundred and forty (640) acres.
Grant No. 2944, containing seventy (70) acres.
Grant No. 2945, containing six hundred and forty (640) acres.
Grant No. 2953, containing six hundred and forty (640) acres.
Grant No. 2954, containing six hundred and forty (640) acres.
Grant No. 2955, containing two hundred (200) acres.
Grant No. 2950, containing six hundred and forty (640) acres.
Grant No. 2971, containing two hundred (200) acres.
Grant No. 2972, containing four hundred and twenty (420) acres.
312 Grant No. 2973, containing two hundred (200) acres.
Grant No. 2977, containing fifty (50) acres.
Grant No. 2978, containing one hundred (100) acres.
Grant No. 2982, containing one hundred and two (102) acres.
Grant No. 2984, containing two hundred (200) acres.
Grant No. 2985, containing two hundred thirty-seven (237) acres.
Grant No. 2986, containing three hundred (300) acres.
Grant No. 2987, containing four hundred (400) acres.
Grant No. 2988, containing two hundred and fourteen (214) acres.
Grant No. 2989, containing six hundred and forty (640) acres.
Grant No. 2990, containing one hundred twenty-five (125) acres.
Grant No. 3500, District No. 11, on the waters of Yellow Creek, runs with the line of No. 750 S. 50 deg. W. crossing Yellow creek at 20 poles and crossing the second time at 75 poles, and crossing the same at 130 poles, and crossing at 184 poles to the southeast corner of No. 397; thence S. 55 deg. E. 90 poles to a stake; thence N. 50 deg. E. 184 poles to a stake; thence N. 50 deg. W. 90 poles to the

beginning. Tract No. 2022, on the waters of Buffalo Creek lying between 1965 and 1972, containing 540 acres, formerly owned by Fain and Beal. Grant No. 95, District No. 11, on Tennessee River; Beginning on a chestnut tree, near the northeast corner of No. 1062, and runs S. 30 deg. W. 226 poles to a stake; thence E. 453 poles to a stake; thence N. 30 deg. E. 226 poles to a stake; thence W. 452 poles to the beginning.

Entered September 5, 1853.

Grant No. 2962, containing three hundred (300) acres.

Grant No. 2965, containing six hundred forty (640) acres.

All the other tracts and parcels of land situated in the said four counties (Graham, Swain, Cherokee and Clay), in North Carolina in which the granters therein are, or might be jointly interested, or in which they might have an estate in common not heretofore conveyed by proper deed of conveyance.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining:

To have and to hold the same, and every part thereof, unto the said parties of the second part, their heirs and assigns, in trust for the use, benefit and security as hereinafter mentioned, of the
313 several persons, their respective executors, administrators and assigns, and for the purpose of carrying out a contract of even date herewith between Robert N. Archer, of the one part, and Thomas F. McGarry and Louis Krohn, Trustees, of the other part, with the preference, priority and distinctions herein mentioned; nevertheless to take immediate possession of the same, manage, control, safeguard, sell, dispose of, cause to be manufactured and sold the timber of said lands, in whole or in part, in such manner as the said parties of the second part shall deem best to convert said timber or lumber into money in the speediest and most advantageous way, but without authority to incur any indebtedness or liability binding upon grantors, and immediately deposit their proceeds in the Union Savings Bank and Trust Company, of Cincinnati, Ohio. With and out of the avails of such money the said Savings Bank & Trust Co., upon vouchers duly approved by said Trustees, shall—

1. Pay and discharge the just and reasonable expenses, costs and charges of handling said property, and in managing and conducting the affairs of the same, including the expenses of any agent or agents therein employed; to pay all taxes which shall be levied and assessed thereon, and all expenses, costs, charges, counsel fees in the premises, and a reasonable compensation to the parites of the second part, or their successors, for their services in the premises, not exceeding the sum of One hundred Dollars ($100.00) per month each: Provided, that no more than this amount shall be paid from said trust for services, notwithstanding a similar amount is provided in a certain deed executed by David W. Belding and wife and Henry Stix and wife of even date herewith.

2. To pay or deposit with The Union Savings Bank and Trust Company, of Cincinnati, Ohio, the amount of One Dollar ($1) per thousand feet for all the timber or lumber sold and removed from the

lands embraced in this conveyance in the Counties of Cherokee, Clay and Swain; it being the intention of this paragraph of this instrument that before any title shall pass to or vest in the purchaser of said timber so removed from tracts situated in the Counties of Clay, Swain and Cherokee the sum of one dollar per thousand feet shall be first paid in and deposited with the said Union Savings Bank and Trust Company, and on account of the indebtedness of J. W. Cooper, estate of Caleb S. Bragg, deceased, Henry Stix, Nathan Stix, D. M. Hyman, Louis Krohn and Charles C. and George H. Hopkins, to whom the same shall be disbursed by the said Union Savings Bank and Trust Company, as provided in a certain contract
314 or agreement entered into as of this date between said Robert N. Archer, as party of the first part, Louis Krohn and Thomas F. McGarry, as Trustees, parties of the second part, and the Union Savings Bank and Trust Company, of Cincinnati, Ohio, as party of the third part.

3. Pay and discharge in full the amount due the said Robert N. Archer, at the time and in the manner mentioned in said agreement last above mentioned.

4. After the payment of said expenses, cost, charges and liabilities, as aforesaid, to pay and discharge in full the amounts due estate of J. W. Cooper, estate of Caleb S. Bragg, deceased, Henry Stix, Nathan Stix, D. M. Hyman, Louis Krohn, Charles C. and George H. Hopkins, at the time in the manner and under the terms and conditions mentioned in the order and under the terms specified; the surplus or residue, if any there be, shall be paid or turned over to Milo M. Belding, Alva N. Belding, David W. Belding and Thomas F. McGarry, their heirs, legal representatives, nominees or assigns.

5. And the said parties of the second part covenant and agree, that upon the payments being made as in the first four paragraphs above provided, they will execute and deliver their deeds or deed to the said Milo M. Belding, Alvah N. Belding, David W. Belding, and Thomas F. McGarry, duly, fully and legally conveying to them, their legal representatives and assigns, all the rest, residue and remainder of said property and every part and parcel thereof.

6. It is further understood and agreed however, that the parties of the first part convey no other, further or different rights by this instrument than sufficient to place the title of said lands in the parties of the second part, under and by virtue of this conveyance.

8. The trust herein created is hereby fixed and terminates five years from the date hereof, but, however, said lands and timber thereon shall be and remain as security to Robert N. Archer for the payments to be made to him as set out in said contract at the time therein specified, and shall so remain as security as long as any part of said payments remain unpaid; and in case of default in making any of the payments, as mentioned in the said contract, said lands and the timber thereon shall be sold by the grantees herein and the proceeds of said sales shall be made on account of the sums so due said Archer. And the said lien hereby created shall be paramount to every other lien or interest in said property.

315 In witness whereof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

(Signed)

MILO M. BELDING.
EMILY E. BELDING.
ALVAH H. BELDING.
LIZZIE BELDING.
DAVID W. BELDING.
JEANETTE BELDING.
LOUIS KROHN.
HENRY STIX,
FANNIE STIX.
NATHAN STIX.
RICKA STIX.
D. M. HYMAN.
BETTIE HYMAN.
THOMAS McGARRY.
NETTIE B. McGARRY.

"EXHIBIT HK No. 4."

Know all men by these presents, that,

Whereas, by deeds of conveyance dated respectively the 9th day December, A. D., 1899, and the 27th day of March, A. D., 1900, ilo M. Belding and Emily E. Belding, his wife, of New York City, w York; Alvah N. Belding and Lizzie Belding, his wife, of Rock- le, Connecticut; David W. Belding and Jeanette Belding, his fe; Louis Krohn, widower; Henry Stix and Fannie Stix, his wife; than Stix and Ricka Stix, his wife, all of Cincinnati, Ohio; D. M. rman and Betty Hyman, his wife, of Denver, Colorado; and omas F. McGarry and Nettie B. McGarry, his wife, of Grand pids, Michigan, conveyed by good and sufficient deed in fee sim- to Robert N. Archer, of Cincinnati, and Thomas F. McGarry, of nd Rapids, trustees, the following tracts of land, among others, ated in Graham county, North Carolina, to-wit:

Grant.	Entry.	Acres. (about)	County.
4	750	100	Graham
42	423	50	Graham
47	3090	100	Graham
85	1883	100	Graham
86	686	100	Graham
87	855	100	Graham
90	745	100	Graham
144	418	300	Graham
8100	1035	16800	Graham
91	1060	50	Graham
92	2339	640	Graham
93	753	100	Graham

	94	771	50	Graham
	95	2340	640	Graham
	96	1063	50	Graham
	47	3090	100	Graham
	85	1883	100	Graham
	86	686	100	Graham
	87	855	100	Graham
	90	745	100	Graham
	144	418	300	Graham
	8100	1035	16800	Graham
	91	1060	50	Graham
	92	2339	640	Graham
	93	753	100	Graham
	94	771	50	Graham
	95	2340	640	Graham
	96	1063	50	Graham
	98	1082	100	Graham
	99	1081	100	Graham
	101	499 (479)	640	Graham
	1761	397	50	Graham
	1853	1787	50	Graham
	1864	1636	100	Graham
	2336	1035	14800	Graham
	2435	754	50	Graham
	2436	770	50	Graham
	2438	757	50	Graham
	2903	1969	640	Graham
	2904	1947	1000	Graham
	2905	1946	640	Graham
	2906	1980	640	Graham
	2908	1976	640	Graham
	2909	1979	640	Graham
	2910	1961	450	Graham
	2911	1957	640	Graham
	2912	1981	640	Graham
	2913	1977	495	Graham
	2915	1950	640	Graham
	2916	1982	640	Graham
	2917	1965	640	Graham
	2919	1975	640	Graham
	2920	1974	50	Graham
	2921	1966	640	Graham
	2937	4452	150	Graham
	2940	4477	640	Graham
	2946	5051	640	Graham
	2947	5053	540	Graham
317	2948	5056	640	Graham
	2949	5052	640	Graham
	2950	4456	3000	Graham
	2951	5055	640	Graham
	2952	5057	640	Graham

2956	1949	1000	Graham
2957	1998	640	Graham
2959	1959	640	Graham
2960	1997	640	Graham
2961	4871	313	Graham
2963	1972	640	Graham
2964	1973	300	Graham
2966	4454	500	Graham
2967	1945	640	Graham
2968	4872	125	Graham
2969	4455	1500	Graham
2970	4457	640	Graham
2974	4707	640	Graham
2975	1953	640	Graham
2976	5050	640	Graham
2979	931	640	Graham
2980	1963	640	Graham
2981	1978	300	Graham
3500	749	100	Graham
3860	683	100	Graham
3477	2022	540	Graham

Subject nevertheless to all deductions if any arising, by, through or under the "State Line" suit hereinafter mentioned Grants Nos. 8100 for 16,800 acres and No. 2336 for 14,800 acres, above mentioned, being for the same lands. And all other tracts and parcels of land situated in Graham county, in the state of North Carolina, the grantors therein were or might be jointly interested or in which they might have any estate in common not theretofore conveyed by proper deed of conveyance. Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining. And said deeds of conveyance were duly registered in the Record of Deeds in said Graham county, to-wit: In Book "J" commencing at page 24, and in Book "J" pages 403 to 413, inclusive, respectively, and, whereas, said conveyances were made for the purpose of vesting the titles in said tracts among others, in the said Robert N. Archer and Thomas F. McGarry, as trustees, for the purpose of carrying out the trusts mentioned in said deeds, and in certain contracts in pursuance of which said deeds were executed and delivered; said contracts having been entered into between the said Robert N. Archer of the first part and the
318 said Louis Krohn and Thomas F. McGarry of the second part, and the Union Savings Bank and Trust Company, of Cincinnati, of the third part, dated respectively the 9th day of December, A. D. 1899, the 24th day of February, A. D., 1900, and the 15th day of March, A. D., 1900; said contracts and deeds having been placed in the custody of the said Union Savings Bank and Trust Company, of Cincinnati, Ohio, and, whereas, the purpose of said contracts and deeds and the object of this trust created thereby were, to secure the payment to the said Robert N. Archer of the sum of Eighty-five Thousand Dollars ($85,000) then and there due

the said Robert N. Archer, in payments therein mentioned and at times therein designated, with interest to-wit: Fifteen Thousand Dollars ($15,000) in four (4) months; fifteen thousand dollars ($15,000) in eight (8) months; fifteen thousand dollars ($15,000) in twelve (12) months; twenty thousand dollars ($20,000) in sixteen (16) months from date; and twenty thousand dollars ($20,000) in twenty (20) months from date, with six per cent interest on all of said sums. And said purposes were, after said payments, for the purpose of securing further payments as follows, to-wit:

Estate of J. W. Cooper, Murphy, North Carolina.....	$10,536.42
Estate of C. S. Bragg, Cincinnati, Ohio.....	7,500.00
Henry Stix, Cincinnati, Ohio.....	20,000.00
Nathan Stix, Cincinnati, Ohio.....	6,975.00
D. M. Hyman, Denver, Colorado.....	3,500.00
Louis Krohn, Cincinnati, Ohio.....	25,000.00
Chas. C. & Geo. H. Hopkins, Lansing and Detroit, Michigan	15,000.00

But the amounts designated to be paid to the estate of J. W. Cooper and the estate of C. S. Bragg were only to be paid in case the interests of those estates in the above described property were bought in and those sums were only to be liens upon the interests so bought in. That by the supplementary agreement of February 24th, 1900, above mentioned the time for making the payments mentioned in the contract of December 9th, 1899, to the said Robert N. Archer was fixed to begin to run from February 1st, 1900, but with interest on the whole sum from the said date of December 9, 1899; and in the last mentioned contract it was provided that if any of said payments should remain in default for sixty days after said payments should become due, then the whole of the said sum owing to the said Robert N. Archer should become due and payable at once; and the said Trustees, Robert N. Archer and Thomas
319 F. McGarry, or either of them, should proceed to sell the said lands or any part thereof, after fou- consecutive weeks' notice to the parties in interest at public auction and pay the proceeds of said sale towards the liquidation of the amounts secured on said lands, unless the said Robert N. Arches should exercise his option to assert his original rights under certain prior contracts; and,

Whereas, the said contracts and deeds further provided as follows: And the said Trustees, Robert N. Archer and Thomas F. McGarry, are also authorized and empowered at any time, to sell said property or any part thereof, at private sale at such price, in such manner, and upon such terms and conditions as they shall deem proper; provided, however, that no such sale shall be made of the whole of said property, unless sufficient sum be realized to satisfy the claims of the several parties herein mentioned, principal and interest, as hereinbefore scheduled and set forth," And,

Whereas, no part of said payment was ever made and the first subsequent payments remained in default for more than sixty days;

and the said Robert N. Archer elected to stand upon said contracts of December 9th, 1899, February 24th, 1900, and March 15th, 1900, and the deeds made in pursuance thereof; and declared the whole amount owing to him then due and payable; and thereupon the said Trustees, Archer and McGarry, sold the lands above described situated in said Graham County, North Carolina, at private sale to the parties hereinafter mentioned, and,

Whereas, said Graham County lands were only a portion of the lands conveyed by the deed of December 9th, 1899, and March 27th, 1900; and,

Whereas, all events having transpired authorizing the sale of the said Graham County lands at private sale; and

Whereas, in a certain suit instituted in the Superior Court of Cherokee County, North Carolina, by David W. Belding against Robert N. Archer, Thomas F. McGarry and Louis Krohn individually and as Trustees, which was removed and tried at the Fall Term 1901, in the Superior Court of Clay County, North Carolina, a judgment was entered in favor of the defendants on the first day of October, 1901, finding that the sale to the grantees herein above mentioned was for a fair price and was valid sale, and directing the grantors herein to carry the same in accordance with the contract of sale already mentioned herein.

320 Now, therefore, in consideration of the premises and of the payment of One Hundred and Twenty-five Thousand Dollars ($125,000) made to the said Trustees by William R. Hopkins, Edward I. Leighton, Frederick W. Bruch, George Reeves, John Matthews the receipt of which is hereby acknowledged by said Trustees, with the exception of the sum of Eighteen Thousand and Thirty-six dollars and Forty-two cents ($18,036.42) which is to be used by said purchasers in purchasing the interests of the estates of J. W. Cooper and C. S. Bragg, as above mentioned, the said Robert N. Archer and Thomas F. McGarry, Trustees, do hereby Grant, Bargain, sell, remise and release unto the said William R. Hopkins, Edward I. Leighton, Frederick W. Bruch, George Reeves, John Matthews, their heirs and assigns forever all the above described tracts and parcels of land in the said Graham County above described, and covered by said two conveyances; and all of the rights, title and interest of the said Robert N. Archer and Thomas F. McGarry, Trustees, of, in and to every and each portion of said lands, and all the privileges and appurtenances appertaining thereto;

To have and to hold said lands to them and their heirs and assigns forever. And the said Robert N. Archer and Thomas F. McGarry, Trustees, do covenant and agree with the said William R. Hopkins, Edward I. Leighton, Frederick W. Bruch, George Reeves, and John Matthews, their heirs and assigns that they are seized of said lands in trust, and have good right to convey the same, and they will warrant the same to the said William R. Hopkins, Edward I. Leighton, Frederick W. Bruch, George Reeves, John Matthews, their heirs and assigns forever against any right, title or claim of any person claiming by, through the grantors herein. But there is especially excepted from the covenants of this conveyance all those lands situated

at or near the State Line between the State of North Carolina and Tennessee which were recovered in a certain action known as the "State Line suit" which was pending in the United States Circuit Court for the Eastern District of Tennessee, and was brought by one Hebard against David W. Belding and others, if future proceedings do not recover the title thereof.

In witness whereof, the said Robert N. Archer and Thomas F. McGarry, Trustees, have subscribed their names and affixed their seals this 3rd day of March, A. D. 1903.

ROBERT N. ARCHER, *Trustee.* [SEAL.]
THOMAS F. McGARRY, *Trustee.* [SEAL.]

321 Witnesses:

M. A. SCHELL.
C. B. MATTHEWS.
F. H. ELMORE.
ARTHUR MEIGS.

STATE OF OHIO,
Hamilton County:

I, M. A. Schell, a notary public in and for Hamilton County, Ohio, do hereby certify that the said Robert N. Archer, Trustee, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and Official Seal, this 3rd day of March, A. D. 1903.

[L. S.]

M. A. SCHELL,
Notary Public, in and for Hamilton County, State of Ohio.

STATE OF FLORIDA,
County of Duvall:

I, F. H. Elmore, a notary public in and for Duvall County, Florida, do hereby certify that Thomas F. McGarry, Trustee, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and Official Seal, this 5th day of June, A. D. 1903.

[L. S.]

F. H. ELMORE,
Notary Public in and for Duvall County, Florida.

STATE OF NORTH CAROLINA,
Graham County:

The foregoing and annexed Deed of conveyance, together with the certificates, viz: The certificate of M. A. Schell, a notary public in and for the County of Hamilton, State of Ohio, attested by his notarial seal, and the certificate of F. H. Elmore, a notary public in and for the County of Duvall, in the State of Florida, attested by his notarial seal, having been this day exhibited before me for probate,

and the same is adjudged to be correct, in due form and accordance to law.

Therefore, let the deed, together with the said certificates and this certificate be registered.

Witness my hand, this the 7th day of January, A. D. 1904.

R. V. McELROY,
Clerk Superior Court, Graham County, North Carolina.

The foregoing deed of conveyance was this day duly registered in the Office of the Register of Deeds for Graham County, North Carolina in Book "M" of Deeds on page 170 et seq.

Witness my hand this the 9th day of January, 1904.

ROBERT B. SLAUGHTER,
Register of Deeds, Graham Co., North Carolina.

322 NORTH CAROLINA,
Graham County:

I, R. B. Slaughter, Register of Deeds in and for said County and State, do hereby certify that the foregoing and annexed instrument of writing is a true, correct and exact copy of a deed from Robert N. Archer and Thomas F. McGarry Trustees to William R. Hopkins, et als. as registered in said office in Book "M" of Deeds on page 170 et seq.

In testimony whereof, I have hereunto set my hand and affixed my official — , at office in Robbinsville, N. C., on this the 22nd day of July, 1909.

R. B. SLAUGHTER,
Register of Deeds.

(Endorsed:) Deed. Robt. N. Archer & Thomas F. McGarry to William R. Hopkins. Certified copy.

Certificate.

THE STATE OF OHIO,
County of Hamilton, ss:

I, Harry T. Klein, a Notary Public in and for the State and County aforesaid, duly commissioned and qualified, do hereby certify that the above named M. E. Cozad and William R. Hopkins, were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth; that by agreement of Counsel for the respective parties, said depositions were taken down stenographically by me and thereafter reduced to typewritten manuscript; and by agreement of counsel were subscribed by me for the said witnesses; that said depositions were taken at the time and place specified in the notice hereto attached, and were continued from day to day as heretofore stated; and that I am not Counsel, Attorney or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on this 23rd day of June, 1909.

HARRY T. KLEIN,
Notary Public in and for Hamilton County, Ohio.

Cost Bill.

Swearing two witnesses	$0.20
Taking, reporting and certifying depositions	18.25
Postage and other expenses	.35
Total Cost of Depositions	$18.80

Received of complainants in the case mentioned at the caption hereof, the sum of $18.80 in full of my fees.

HARRY T. KLEIN,
Notary Public.

323 (Endorsed:) No. 1,056. In the Circuit Court of the U. S. Northern Division, Eastern District of Tennessee. William R. Hopkins, et al., David W. Belding, et al., Complainants, vs. Charles Hebard, et al., Defendants. Depositions of William R. Hopkins and M. E. Cozad, on behalf of Complainants. On Petition for leave to file a Bill of Review. Filed July 28, 1909. D. L. Snodgrass, Clerk, by C. A. Hill, D. C.

In the Circuit Court of the United States, Eastern District of Tennessee, Northern Division.

W. R. HOPKINS et al.
vs.
SMOKY COUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY.

Statement of the Case.

The case of Charles Hebard against D. W. Belding and others was pending and determined in the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee, and on appeal, in the United States Circuit Court of Appeals for the Sixth Circuit.

The purpose of the bill filed by Hebard in the original case was to restrain trespass and remove a cloud from the title to a large tract of wild mountain land claimed to lie within Monroe County, Tennessee. The complainant claimed title to the land under a grant from the State of Tennessee. The defendants claimed title to the land under a grant from the State of North Carolina. The title turned upon the location of the boundary line between the State of Tennessee and the State of North Carolina. The object of the bill was to have the State line ascertained and determined between the points where the State line crosses the Little Tennessee River and the

junction of Hangover and Big Fodder Stack ridges, near a mountain peak called Stratton Bald, a distance of about eight miles.

The claim of complainant Hebard was that the State line reaches the Little Tennessee River about one half mile above, and nearly east, of where Slick Rock creek empties into said river. That it there crosses the river and follows a leading ridge of the mountain known as Hangover ridge, and along the extreme height of that ridge to its junction with "Fodder Stack" ridge.

This contention, if sustained, places the lands lying between Slick Rock creek and Hangover ridge within the State of Tennessee and would confirm the title to complainant Hebard under his Tennessee grant.

The defendants to the bill contended that the State line crosses the Little Tennessee River at or near the mouth of Slick Rock
324 creek and runs up said creek, following its meanders, about five miles, thence up Little Fodder Stack ridge to Big Fodder Stack Ridge, and thence southwesterly with the crest of Big Fodder Stack ridge to the junction with Hangover Ridge, at or near "Stratton Bald" point.

This contention, if sustained, places the lands lying between Slick Rock Creek and Hangover Ridge within the State of North Carolina, and would defeat the title of complainant Hebard under his Tennessee grant.

When the case was at issue, it was referred to Asbury Wright, Esq., as Special Master, to hear the evidence and to determine and report to the Court "the true State line between the States of Tennessee and North Carolina from the Little Tennessee River to the junction of Hangover and Fodder Stack ridges, as run and located by the Commissioners of the States of North Carolina and Tennessee, in 1821, and confirmed by the respective legislatures of said States."

Special Master Wright's report was submitted July 7th, 1898, wherein he finds and reports, among other things, as follows, to-wit:

"After a careful consideration of the whole case, I am of the opinion, and so report, that the line between the States of Tennessee and North Carolina from the Little Tennessee River to the junction of the Hangover and Fodder Stack Ridges, as run and located by the Commissioners of said States, in 1821, and confirmed by the respective legislatures of said States, crosses the Little Tennessee River at a point where it reaches the river on the northeast side, and from the river runs up the Hangover lead, as shown on complainant's map, and along the extreme heights of this ridge, passing the black or red oak, Slick Rock Gap, Cold Springs Knob, Big Flat Knob, Hangover, Haoe, Grassy Gap, and Stratton Bald, to the junction of Hangover with Fodder Stack."

Defendants filed exceptions to this report, which were heard by the Court, and on June 10th, 1899, a decree was entered, overruling the exceptions and confirming the report of the Special Master in all things.

The Court found and decreed the line between the States of Tennessee and North Carolina to be located as reported by the Special Master and that the titles of the complainant to the lands described

in the bill were valid, and the titles claimed by defendants thereto were void, etc.

From this decree of the Circuit Court an appeal was prayed and prosecuted to the United States Circuit Court of Appeals for the Sixth Circuit at Cincinnati, Ohio, where the same was heard
325 on March 14th, 1900, and decided July 13, 1900, in an opinion by Judge Lurton, in which he carefully reviewed the whole case, affirming the decree of the Circuit Court.

Charles Hebard vs. D. W. Belding, et al., 103 Fed. 532.

On August 6th, 1907, more than seven years after this final decree was made and entered by the Circuit Court of Appeals, W. R. Hopkins, et al., presented their petition to this Court, alleging that on Oct. 29, 1900, they became the purchasers of the eight thousand acres of land involved in the case of Hebard vs. Belding, et al., and praying that they be permitted to file a bill of review which accompanied the petition, and in which was set out certain newly discovered evidence. This new evidence, it is alleged, when considered with the evidence in the original case, would lead the Court to a different conclusion, and enable the Court on reconsideration to right said petitioners in matters in which they were aggrieved by the decree in the original case. And it appearing to the Court by affidavits and a certified transcript of the record in the United States Circuit Court of Appeals for the Sixth Circuit, where said original case was decided on appeal, in which court, as appeared by said transcript, a petition for leave to file a bill of review was filed and leave given to apply to this court; upon consideration this court permitted the bill of review to be filed, subject to all legal objections by demurrer, answer, plea or otherwise as the defendants may be advised.

Thereupon the bill of review was filed, and after stating the history of the original case, it is alleged that while said original case was pending, on, to-wit, Dec. 9, 1899, the interests of all the defendants thereto in the lands involved in that case, except Braggs and Coopers, came to petitioners, W. R. Hopkins and his associates, and the title to said land is vested in said Hopkins and his associates. That sometime in the year 1905 the map made by the original commissioners of the States of North Carolina and Tennessee, who ran the line under the Cession Act was discovered in a barrel of waste at Nashville, Tennessee. A certified copy thereof is attached to the bill of review. That in February, 1906, one M. E. Cozad heard a rumor for the first time of the discovery of said map, and that he obtained on the 26th day of February, 1906, a certified copy thereof. That further attempts were made to find the written report of said Commissioners accompanying the map, and the field notes of the survey, but after the most diligent search, no other papers connected therewith could be found.

326 That none of the grantees had any information of the finding of said map, and none of the defendants herein knew of it until about June 26th, 1906, and the existence or contents of said report could not have been proven at the trial of the cause.

It is alleged that said newly discovered map shows that the State

line "crosses the Little Tennessee River at or near the mouth of Slick Rock Creek, and that it includes all the land, and more, than said defendants claimed."

That said map is new and decisive evidence of the contention of the defendants in the original case, and that if it had been found and presented to the court, would have been decisive in favor of the defendants, and would have resulted in a decree in their favor. That petitioners and their grantees have exercised true and perfect diligence and could not have ascertained the existence thereof sooner than it is alleged.

On August 6th, 1907, the day in which the petition was filed praying for permission to file the bill of review, an order was made and entered, directing that a rule issue and be served on the Smoky Mountain Land, Lumber and Improvement Company, grantees of Charles Hebard, the complainant in the original case, and T. E. H. McCroskey, attorney representing said company, to show cause why the prayer of said pettiion should not be granted and directing said company to answer thereto on or before the next rule day of this Court, which was Sept. 2nd, 1907.

The said Land Company filed its answer to the petition and to the bill of review, setting up the following defenses necessary to be noticed:

The suit sought to be reviewed was finally heard and determined in the U. S. Circuit Court of Appeals for the Sixth Circuit, July 13, 1900.

The application by W. R. Hopkins, et al., to file a bill of review was first made in the said U. S. Circuit Court of Appeals, Sept. 25th, 1906.

On August 6th, 1907, said Hopkins and others filed in this court their petition to file a bill of review in said suit.

The petitioners and all other parties are barred by the Statute of limitations. Section 4848 Shannon's Code of Tennessee provides that "No bill of review shall be brought or a motion made therefore, except within three years from the time of pronouncing the decree," with certain exceptions not material here. Act 1801, Ch. 6, Section 53, Legislature of Tennessee.

The newly discovered evidence, the map itself, is not such evidence as is decisive or controlling in character as to the essential merits of the litigation, or would justify the court in granting the relief prayed for in the bill of review.

The petitioners having purchased the right, title and interest of Harding, et al., to the lands in dispute, after title to said lands had been by final decree vested in Hebard and before the discovery of the new evidence, have no interest which gives to them a right to ask a reversal of said final decree upon newly discovered evidence.

The Land Company having in good faith purchased the right, title and interest to said lands from Charles Hebard, the successful party in the suit sought to be reviewed after final decree vesting title in Hebard, its title cannot be affected by this bill of review filed by complainants, based upon newly discovered evidence, which was not discovered until after the Land Company purchased.

The laches of complainants bars their right to any benefits from a bill of review.

Opinion of the Court.

An attentive examination of this record leads me to the conclusion that the relief sought by those filing the bill of review should be denied upon more than one of the grounds relied upon by the defendants. I shall content myself, however, with discussing only one of them, and that one goes to the merits of the controversy, and, in my judgment, is clearly conclusive of the case.

It must be assumed at the outset that the original case of Hebard vs. Belding, et al., was decided correctly upon the testimony in that case. That decision must stand as the law of that case, and is not now subject to review, except in connection with the newly discovered evidence set out in the bill of review.

As has been seen, the question to be determined in the original case was the correct location of the boundary line between the States of North Carolina and Tennessee, and especially between a point on the North bank of the Little Tennessee river and the point of junction of Hangover and Big Fodder Stack ridges, a distance of about eight miles.

By final decree in the original case it was held that said State line between these two points runs from the Little Tennessee River to and along the crest of Hangover ridge, to its junction with Big Fodder Stack. Why? Because, as pointed out by Judge Lurton in Hebard vs. Belding, et al., 103 Fed. 532, the Cession Act of North Carolina, 1789, provides among other things that the line
328 between Tennessee and North Carolina shall run "to the top of Bald Mountain; thence along the extreme heights of the said mountain to the Painted Rock, on French Broad River. Thence along the highest ridge of said mountain to the place where it is called the Great Iron or Smoky Mountain; thence along the extreme height of the said mountain to the place where it is called Unicoy or Unaka Mountain."

It is as to the last run named that the dispute arises, and from the point where the line reaches the Little Tennessee to a point, about eight miles southwesterly thereof, at the junction of Hangover and Big Fodder Stack ridges.

The Act of the Tennessee Legislature 1821, Ch. 35, p. 45, confirming the report of the Commissioners, after the Little Tennessee is reached, provides as follows: "From the Tennessee river to the main ridge and along the extreme height of the same to a place where it is called the Unicoy or Unaka Mountain."

"The general course of the line," says Judge Lurton in Hebard vs. Belding, et al., supra, "as called for by the calls which brought the line to the river, was southwesterly, and this course was to be continued to the Unaka. This course would require the line to cross the river. The general direction of the Cession Act would keep the line on the extreme height of the mountain range or ridge. Immediately across the river, and in the general course of the line

was the Hangover Ridge." This is the main, or highest ridge, and is the course which the line was given by the Circuit Court and approved by the Circuit Court of Appeals.

Now, what is there in the newly discovered map that would have warranted the Circuit Court in rendering a different decree in the original case and to have found in favor of the defendants in that case?

Upon an examination of the newly discovered map, it appears that the State line crosses the Little Tennessee River at right angles, and at the point where the line first reaches the river, and that it proceeds in a southwesterly direction along the ridge, lying adjacent to and immediately south of the river, towards the Unicoy Mountains. There is a black line upon the newly discovered map, marked "creek" which forms a junction with the Tennessee River a short distance above where the line crosses the river, and east of the line. But there is no indication upon the map, nor in the report accompanying it that this line ran up said creek for any distance, or that it touches the creek at any point. Indeed, if the line followed either
the river or creek for any distance, that fact is not indicated
329 upon the map, nor is there any reference to such thing in the
Commissioner's report.

In order that the map or the report of the Commissioners be of any service to the petitioners, it should show that the State line, after crossing the River, followed Slick Rock Creek, if, indeed, it be Slick Rock Creek that is indicated on the map, to a junction with Little Fodder Stack. From the location of this stream marked "Creek" on the map, considered in the light of all the evidence in the case, I am inclined to the opinion that it is Cheoah River, and not Slick Rock Creek.

The map and the report upon their faces failing to shed any new light upon the issues in the original case, let us examine the evidence taken upon the issues under the bill of review.

Here we are met with the testimony of witnesses seemingly of equal credibility and of equal opportunity to know the facts about which they testify that is contradictory and unreconcilable. Instead of elucidating the newly found map, it tends to confuse that which appears upon the face of the map, and also it is confusing in its relation to the evidence and findings in the original case.

Indeed, if this map sheds any additional light upon the issues, it is to make clearer and more certain the correctness of the conclusion reached in the original case, now under review.

An examination of the Commissioners' map, discloses that the State line approaches the north bank of the Little Tennessee river, running in a southwesterly direction, crosses it at right angles, leaving the south margin of the river in a southwesterly direction immediately at the point of crossing, and runs along the crest of a ridge toward Unaka Mountain, and in this particular follows the direction of the Cession Act, from the Smoky to the Unaka Mountains, wherein it is provided as follows: "Thence along the extreme height of the said mountain to the place where it is called Unicoy, or Unaka Mountain."

The report of the Commissioners and the Confirmatory Acts of the North Carolina and the Tennessee Legislatures all use identical language in describing this line from the Tennessee River, to-wit: "From the Tennessee River to the main ridge and along the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain."

This is the course and location given the State Line by the final decree in the original case. There is nothing in the newly discovered evidence to warrant this court in holding that had it been before the court at the original hearing, a different conclusion would have been reached, but, on the other hand, the newly discovered evidence rather tends to strengthen the correctness of the original decree.

It would require a far stretch of the imagination to hold that the newly discovered map, which is silent on this point, except the use of the word "creek" is sufficient to warrant the court to reverse the holding in the original case, and write upon the face of the map, and into the Commissioners' Report, according to the showing on the Burns Map, the words. "Thence along the North bank of the Tennessee River to the mouth of Slick Rock Creek; Thence westerly up said creek with its meanderings about five miles to Little Fodder Stack lead; thence along the extreme height of Little Fodder Stack to Big Fodder Stack; thence along the crest of Big Fodder Stack to its junction with Hangover." Yet this, in substance, must be done, if the petitioners are granted the relief sought by their bill of review.

As indicated above, there are other grounds upon which the relief sought by the bill of review should be denied, but I prefer to base my action upon the ground that the newly discovered evidence, if it had all been before the Court at the original hearing, would not have led the Court to a different conclusion than the one reached.

It is pointed out in the brief of counsel for petitioners that Judge Clark, in deciding the original case in the Circuit Court said that, "It is a very close case on the facts and the equities of the case are rather with the defendants," etc. And that Judge Lurton, speaking for the Circuit Court of Appeals, said that "The case, on the whole, is one not free from doubts," etc.

And it is argued, from this language and the further fact that permission was granted to file the bill of review, that the court granting such permission must have entertained the opinion that the bill of review was of sufficient merit to warrant the Circuit Court in granting the relief sought by it.

If this were all, or the substance of all, that was said by these learned judges in the decision of the original case, it might be of great weight in tending to support the contention of the petitioners, but this is not all, or the substance of all, that was said.

Judge Clark used this language in his opinion deciding the case:

I do not underestimate the great force found in the better marked line of the defendant. It must not be forgotten, however, that the Commissioners, in surveying and marking the line, followed the mountain range down to the Tennessee River, and that according to the calls actually made, they would cross that

river and proceed along the mountain crest, where complainants contend the line is. It was the crest of this same mountain range which brought them to the river and it was the obvious and conspicuous range to have followed by directly crossing the river and keeping up the previous course. It is extremely difficult to believe that the commissioners at this point would have dropped down the river for half a mile and then followed Slick Rock Creek for a distance of five or six miles without ever making the slightest reference to this water stream.

Granting as argued that the creek may at that time have had no name whatever, nevertheless, it would have been so natural and so necessary to avoid misleading for the commissioners to have said that they changed their course, and instead of going directly across the river went down and then followed a creek or water stream up the valley and then to the ridge which led out to the junction, that it is next to impossible to think that such a deviation as this would have been made without a word to give any indication of the fact. Following the calls as actually given, it would be impossible to run the line as claimed by the defendants.

"Looking at the case from the legal point of view (and no other seems permissible) I am certain that by the weight of the evidence the case is with the complainants."

This is a positive statement of the law and the evidence in the original case as viewed by Judge Clark, expressed in clear and positive terms, and this view was affirmed on appeal after careful consideration, by the Circuit Court of Appeals, composed, as then constituted, of Judges Taft, Lurton and Day.

But this is not all. When application was made to the Circuit Court of Appeals for leave to file the bill of review, that court declined to act upon it further than to enter an order allowing the petitioners to make application to the Circuit Court that originally tried the case for permission to file the bill of review.

This application was made before the late Judge Clark and in passing on it, he said:

"It does seem, upon examination of this case, that there is no ground on which the success of the proposed bill might finally be expected."

Yet, out of a great abundance of caution, he permitted the bill of review to be filed, because, as he said, he was not sure
332 that his act in refusing the application would be subject to review.

So it appears from these utterances of the Court trying the original case that it was satisfied that the conclusion reached in that case was correct. It further appears that Judge Clark, after having considered the bill of review, in which was set out the newly discovered evidence, was of opinion that there was no ground set out therein on which the relief prayed for might finally be expected.

In that view I concur. An order will be entered denying the relief prayed for, and dismissing the bill of review with costs.

JNO. E. McCALL, *Judge.*

(Endorsed:) No. 1056. In the U. S. Circuit Court, at Knoxville, Chas. Hebard, et al., against D. W. Belding, et al. Opinion. Filed, Sept. 8, 1909. D. L. Snodgrass, Clerk, by C. A. Hill, D. C.

Be it remembered that at a Circuit Court of the United States began and held for the Northern Division of the Eastern District of Tennessee, at the Federal Court Rooms in the City of Knoxville, within said District and the Sixth Circuit, on the first Monday, it being the 5th day of July, A. D., 1909. Present and presiding the Hon. Edward T. Sanford, Judge of the District Court of the United States for the Eastern and Middle Districts of Tennessee, the following proceedings were had, to-wit:

MONDAY, *September 20th*, 1909.

Court met pursuant to adjournment, presiding the Honorable Edward T. Sanford, Judge, etc.

W. R. HOPKINS et al.
vs.
SMOKY MOUNTAIN LAND, LUMBER, AND IMPROVEMENT COMPANY.

In this cause it appearing that the Honorable Edward T. Sanford, was disqualified to try the same, because of the fact that he was of counsel in the original suit, the Honorable John E. McCall was designated to hear and dispose of the case in the room and stead of the Hon. Edward T. Sanford.

And thereupon, the bill of review came on to be regularly heard before the Hon. John E. McCall, on this — day of ——, 1909, upon the petition for leave to file bill of review, the bill of review, the answers of the defendants and all of the proof in the cause, from all of which after consideration the court is of the opinion that the petitioners, W. R. Hopkins, et al., are not entitled to relief sought in their bill of review and the same is therefore dismissed; the court being of the opinion that the newly discovered evidence upon
333 which it was sought to reverse the decree in the original suit is not sufficient to change the original decree:

It is therefore ordered, adjudged and decreed that the relief prayed for by petitioners be denied and both the petition for leave to file the bill of review and the bill of review be dismissed and the petitioners, Wm. R. Hopkins, Benjamin H. Bole, Edward S. Leighton, Fred W. Bruch, George Reeves and John Matthews, and the sureties on their prosecution bond pay all the costs of the cause incident to the bill of review, for which execution will issue.

September —, 1909.

Enter this.

JNO. E. McCALL, *Judge*.

Copy mailed to attorney for petitioners.

D. L. SNODGRASS,
Clerk, U. S. C. C't,
By C. A. HILL, *Deputy Cl'k.*

(Endorsement:) No. 1,056 in the U. S. Circuit Court, at Knoxville, W. R. Hopkins, et al., against Smoky Mountain Land L. & Imp't Co. Decree. Ent'd Journal T. P. 64. Filed 20 day of Sept., 1909. C. A. Hill, Deputy Clerk.

In the Circuit Court of the United States, Sixth Circuit, Northern Division of Eastern District of Tennessee.

In Equity. No. 1,056.

D. W. BELDING, M. M. BELDING, A. N. BELDING, HENRY STIX, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg, and R. N. Archer, Plaintiffs,

vs.

CHARLES HEBARD, Defendant.

Bill of Review.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, Fred W. Bruch, George Reeves, and John Matthews, Complainants,

vs.

CHARLES HEBARD, Defendant.

Petition for an Appeal.

The above named plaintiffs, William R. Hopkins, Benjamin P. Bole, Edward I. Leighton, Fred W. Bruch, George Reeves and John Matthews, prosecuting the bill of review herein in the name of the original defendants, to-wit: D. W. Belding, M. M. Belding, A. N. Belding, Henry Stix, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg, R. L. Cooper, J. W. Cooper and R. N. Archer; complain against The Smoky Mountain Land, Lumber and Improvement Company, a corporation, defending said Bill of Review in the name of the original plaintiff, Charles Hebard, and his
334 heirs; and conceiving themselves aggrieved by the decree made and entered on the 20th day of September, 1909, in the above entitled cause, do hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Sixth Circuit, for the reasons specified in the assignment of error which is filed herewith, and they pray that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, and including the original record herein, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit.

C. B. MATTHEWS,
Attorney for Plaintiff in Bill of Review.

Dated Oct. 29th, 1909.

The foregoing claim of appeal is allowed.

JNO. E. McCALL,
District Judge.

Dated Nov. 1st, 1909.

(Endorsement:) No. 1056, in equity, Bill of Review. Circuit Court of the United States, Northern Division of Eastern District of Tennessee. D. W. Belding, M. M. Belding, A. N. Belding, Henry Stix, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg and R. N. Archer, plaintiffs, vs. Charles Hebard, defendant. William R. Hopkins, Benjamin P. Bole, Edward I. Leighton, Fred W. Bruch, George Reeves and John Matthews, Complainants, vs. Charles Hebard, Defendant. Filed Nov. 2, 1909. D. L. Snodgrass, Clerk, by C. A. Hill, D. C. Petition for an appeal. C. B. Matthews, Attorney.

In the Circuit Court of the United States; Sixth Circuit, Northern Division of Eastern District of Tennessee.

In Equity. No. 1056.

D. W. BELDING, M. M. BELDING, A. N. BELDING, HENRY STIX, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg, and R. N. Archer, Plaintiffs,

vs.

CHARLES HEBARD, Defendant.

Bill of Review.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, Fred W. Bruch, George Reeves, and John Matthews, Complainants,

vs.

CHARLES HEBARD, Defendant.

Assignment of Error on Appeal.

And now, on the 29th day of October, 1909, came the said plaintiffs, William R. Hopkins, Benjamin P. Bole, Edward I.
335 Leighton, Fred W. Bruch, George Reeves and John Matthews, prosecuting a Bill of Review herein in the name of the original defendants, to-wit: D. W. Belding, M. M. Belding, A. N. Belding, Henry Stix, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg, R. L. Cooper, J. W. Cooper and R. N. Archer; by C. B. Matthews, their Solicitor; and say that the decree in said cause is erroneous and against the just rights of said plaintiffs, for the following reasons: (The said assignment of error to be taken in connection with the original record)

1. Because the newly discovered evidence, to-wit: the map and report of the Joint Commissioners of the States of North Carolina

and Tennessee, respectively, showed that the State line between said States, which was in contention herewith, struck the Tennessee River opposite the mouth of Slick Rock Creek, and crossed said River just below the said Creek, and ran with said Creek about five miles, and thence to the Big Fodderstack Range, and thence to the junction of Hangover and said Big Fodderstack Range.

2. That said newly discovered evidence mentioned in the first assignment of errors, together with the explanatory evidence of D. B. Burns, W. P. Chambers, Ed. Mayfield, C. Z. Denton and M. E. Cozad, all of which evidence, including the map of said Commissioners of 1821, and their report, were in evidence in this cause—showed that the former decree of this Court was erroneous and mistaken, and that said line struck the Tennessee River opposite the mouth of Slick Rock Creek, and crossed said River just below the said Creek, and ran with said Creek about five miles, and thence to the Big Fodderstack Range, and thence to the junction of Hangover and said Big Fodderstack Range.

3. That the newly discovered evidence, together with the other evidence on the Bill of Review and the evidence in the original record, showed that the said State line did not reach the Tennessee River opposite the Hangover Range and thence proceeded along said Range to its junction with the Big Fodderstack Range, as found by the Court on this Bill of Review, but on the contrary crossed the river at the point and ran on the line as designated in the first and second assignments of error.

4. That the newly discovered evidence, together with the other evidence on the Bill of Review, and the evidence in the original record, showed that the State line did not reach the Tennessee River about opposite the Hangover Range, as assumed by the Court, and therefore the Court erred in that regard.

336 5. That the evidence offered on the Bill of Review showed that the Hangover Range or ridge, as adopted by the Court as the line in the original decree, was not the main ridge.

6. Because the evidence offered on the Bill of Review showed that the main ridge was the Unicoy, and the Unicoy in connection with the Big Fodderstack Range, and that the Hangover from that point to the river was a spur.

7. Because the evidence offered on the Bill of Review showed that while there were three peaks on the Hangover Range or ridge between the Tennessee River and the Unicoy Ridge that were higher than the peaks of the Big Fodderstack, yet that the latter had a greater average height than the Hangover.

8. Because the evidence offered on the Bill of Review showed that the line mentioned in the first and second assignment of error, to wit: from near or below the mouth of Slick Rock Creek; was the only line that bore conclusive evidence of having been marked by the State Line Commissioners in 1821.

9. Because the evidence offered on the Bill of Review showed conclusively that the stream marked "Creek" at the point where the map of 1821 shows that the line crossed the Tennessee River, was Slick Rock Creek and not the Cheoah River.

10. Because the map of 1821, which is the official map of the Commissioners who ran the boundary line aforesaid, shows that the said line did not cross the River at right angles to the river from a point opposite Hangover ridge.

11. Because the map of 1821, mentioned in assignment No. 10, and the Commissioners' report, together with the evidence explanatory thereof, considered with the evidence in the original case, were sufficient to change the original decree in favor of the complainants in the Bill of Review; and the evidence showed that complainants were not guilty of laches.

12. Because the Court found that there were other grounds on which relief sought by the Bill of Review should be denied, but without specifying any of said grounds.

13. That the evidence showed that the Bill of Review should have been sustained and the relief granted, and it was error for the Court to deny the said relief and dismiss said Bill.

14. Because the evidence on this Bill of Review showed that the lands claimed by the plaintiff in the original case were to the east of the true boundary line between said States of North Carolina and Tennessee, and within the State of North Carolina, and
337 not within the boundaries of the State of Tennessee.

15. Because the evidence showed that the plaintiff in the original cause had no title to the lands in controversy.

16. Because the evidence showed that said lands in controversy were in the State of North Carolina, and that the Court had no jurisdiction over the same, or to determine the title to same.

17. Because the newly discovered evidence, together with the evidence explanatory thereof, showed that the plaintiff in the original suit had no title, and that on the contrary the title of the defendants was good and valid.

18. Because the newly discovered evidence introduced on this Bill of Review, taken in connection with the evidence in the original case, shows that each of the above assignments of error is good and valid.

19. Because the newly discovered evidence, and the evidence explanatory thereof, showed that the following assignments of error made in the original cause, and found at page 463 of the Printed Record of this Court, and the proceedings therein, upon which record this Court affirmed the original decree, should have been sustained, to-wit:—the first, second, third, fourth, fifth, sixth and ninth.

Wherefore, these complainants in said Bill of Review pray that the said order and decree, whereby the Court below denied the relief asked for in said Bill of Review and dismissed the same, be reversed, and that the said Court may be directed to enter a decree, in favor of these complainants, and dismissing the original bill, with such order as to costs as to this Court may seem just and right.

C. B. MATTHEWS,
Solicitor and Attorney for Complainants in Bill of Review.

(Endorsement:) No. 1056. In Equity, Bill of Review. Circuit Court of the United States, Northern Division of Eastern District of

Tennessee; Sixth Circuit. D. W. Belding, M. M. Belding, A. N. Belding, Henry Stix, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg and R. N. Archer, Plaintiffs, vs. Charles Hebard, defendant. William R. Hopkins, Benjamin P. Bole, Edward I. Leighton, Fred W. Bruch, George Reeves and John Matthews, complainants, vs. Charles Hebard, defendant. Filed, Nov. 2, 1909, D. L. Snodgrass, Clerk, by C. A. Hill D. C. Assignment of Error, C. B. Matthews, attorney.

TUESDAY, *November 2nd,* 1909.

Court met pursuant to adjournment, presiding the Hon. Edward T. Sanford, Judge, etc.

338 In the Circuit Court of the United States, Sixth Circuit, Northern Division of Eastern District of Tennessee.

In Equity. No. 1056.

D. W. BELDING, M. M. BELDING, A. N. BELDING, HENRY STIX, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg, and R. N. Archer, Plaintiffs,

vs.

CHARLES HEBARD, Defendant.

Bill of Review.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, Fred. W. Bruch, George Reeves and John Matthews, Complainants,

vs.

CHARLES HEBARD, Defendant.

Order Granting an Appeal.

In this cause the complainants in the Bill of Review, William R. Hopkins, Benjamin P. Bole, Edward I. Leighton, Fred W. Bruch, George Reeves and John Matthews, having prayed an appeal from the decree entered herein on the 20th day of Sept. 1909, to the United States Circuit Court of Appeals for the Sixth Circuit and filed their assignment of error therewith and given an appeal bond approved by the Court, it is ordered and decreed by the Court that said appeal be and hereby is allowed and that the Clerk send a transcript of the record, proceedings and papers herein, together with all original exhibits heretofore ordered to be made a part of the transcript to said United States Circuit Court of Appeals, at Cincinnati, Ohio; and bond is fixed at the sum of One Thousand Dollars ($1,000.00), to cover the costs of this appeal.

Enter this.

JNO. E. McCALL, *Judge.*

(Endorsement:) No. 1,056. In Equity, Bill of Review. Circuit Court of the United States, Northern Division of Eastern District of Tennessee; Sixth Circuit. D. W. Belding, M. M. Belding, A. N. Belding, Henry Stix, Nathan Stone, Louis Krohn, D. W. Hyman, Mary Bragg and R. N. Archer plaintiffs, vs. Charles Hebard, defendant. William R. Hopkins, Benjamin P. Bole, Edward I. Leighton, Fred. W. Bruch, George Reeves, and John Matthews, Complainants, vs. Charles Hebard, defendant. Ent'd Journal T. P. 78, filed 2nd day of November, 1909, C. A. Hill, Deputy Clerk. Order granting an appeal. C. B. Matthews, Attorney for complainants in the Bill of Review.

Know all men by these presents, that we W. R. Hopkins as principal, and the American Bonding Company of Baltimore, Maryland, as sureties, are held and firmly bound unto Chas. Heb-
339 ard in the full and just sum of One Thousand Dollars to be paid to the said Chas. Hebard, certain attorneys, executors, administrators or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this 8th day of November in the year of our Lord, One Thousand Nine Hundred and Nine.

Whereas, lately at a term of the U. S. Circuit Court at Knoxville, Tennessee in a suit depending in said Court, between W. R. Hopkins, et al. vs. Smoky Mountain Land & Improvement Co. a judgment was rendered against the said W. R. Hopkins, et al., and the said W. R. Hopkins having obtained an appeal and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Chas. Hebard citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said circuit, on or before 3rd day of December next.

Now, the condition of the above obligation is such, that of the said W. R. Hopkins prosecute said appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

W. R. HOPKINS. [SEAL.]
AMERICAN BONDING COMPANY, [SEAL.]
By M. T. FLENNIKEN. [SEAL.]
WM. BAXTER, *Sec.*

Sealed and delivered in presence of:

C. R. LAURENTH. [SEAL.]

(Endorsement:) No. 1056. W. R. Hopkins, et al. vs. Chas. Hebard. Bond on Writ of Error or appeal to the United States Circuit Court of Appeals for the Sixth Circuit. Filed Nov. 8, 1909. D. L. Snodgrass, Clerk, by C. A. Hill, D. C.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To Charles Hebard, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit, not exceeding thirty days from this date, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States for the Eastern District of Tennessee, Northern Division, wherein William R. Hopkins, Benjamin P. Bole, Edward I. Leighton, Fred
340 W. Bruch, George Reeves and John Matthews are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said defendants, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this third day of November, in the year of our Lord, One Thousand Nine Hundred and Nine and of the Independence of the United States of America, the One Hundred and Thirty-fourth.

JOHN E. McCALL, *Judge.*

I hereby accept service of this citation on behalf of Charles Hebard, Appellee, this 6th day of November, A. D. 1909.

K. H. McCROSKEY.

(Endorsement:) No. 1056. In the U. S. Circuit Court at Knoxville. W. R. Hopkins, et al. against Charles Hebard. Citation. Filed Nov. 6th, 1909, D. L. Snodgrass, Clerk, by C. A. Hill, D. C.

United States Circuit Court of Appeals, Sixth Circuit.

No. —.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, Fred W. Bruch, George Reeves, and John Matthews, Petitioners and Complainants,

vs.

CHARLES HEBARD, Defendant.

Entry in the Matter of Petition to File Bill of Review.

No. 1651.

The complainants having filed a motion in this cause, which motion is worded as follows: "Now comes William R. Hopkins, Ben-

jamin P. Bole, Edward I. Leighton, Fred W. Bruch, George Reeves and John Matthews, Complainants in the Bill of Review herein in the name of David W. Belding, M. M. Belding, A. N. Belding, Henry Stix, Nathan Stix, Nathan Krohn, D. W. Hyman, Mary Bragg and R. N. Archer, and move the Court to permit them to use the original record on file in this Court, and brought into this Court on appeal from the original decree in the case of Charles Hebard vs. David W. Belding, et al., number 783 on the docket of this Court; for the purpose of attaching same and making it a part of the record of the appeal from the Bill of Review filed in the Circuit Court of the United States, Northern Division of the Eastern District of Tennessee, for the purpose of saving the expense and delay in re-copying and sending up a new transcript of said original record."

341 On consideration of said motion by the Court, said motion is hereby granted, and it is ordered that the original record in the case of Hebard vs. David W. Belding, and others, number 783 on the Docket of this Court be and considered a part of the transcript upon the appeal taken from the finding of the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee, upon the Bill of Review filed in said original case of Charles Hebard vs. David W. Belding, and others, numbered 1056 on the docket of said last mentioned court, and upon the certification of the transcript of the evidence and proceedings, entries and other papers filed on said Bill of Review, by the Clerk of said last mentioned Court, that the said transcript filed in the original case and now in this Court, shall be attached to and be made a part of the transcript upon appeal from the finding and judgment upon said Bill of Review, and printed therewith by the Clerk of this Court, as the record for consideration upon the appeal from the finding and judgment of the Court on the aforesaid Bill of Review.

Solicitor for Complainants in the Bill of Review is authorized to send a certified copy of this entry to the Clerk of the Court at Knoxville, Tennessee, for his guidance.

United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of order entered November 12, 1909, in the case of William R. Hopkins, et al. vs. Charles Hebard, No. — as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 12th day of November, A. D., 1909.

[SEAL.] FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

(Endorsed:) United States Circuit Court of Appeals for the Sixth Circuit. William R. Hopkins, et al. vs. Charles Hebard. Certificate for Copy of Order of Nov. 12, 1909. Filed Nov. 13-'09, D. L. Snodgrass, Clerk, by C. A. Hill, D. C.

FRIDAY, *November 26th*, 1909.

Court met pursuant to adjournment, presiding the Hon. Edward T. Sanford, Judge, etc.

342 No. 1056.

W. R. HOPKINS et al.
vs.
CHAS. HEBARD et al.

In this cause for sufficient reasons appearing to the Court fifteen (15) days' additional time is allowed for making the transcript and filing the same in the United States Circuit Court of Appeals, at Cincinnati, Ohio.

Enter.

JOHN E. McCALL, *Judge*.

Endorsed: No. 1056. In the U. S. Circuit Court at Knoxville. W. R. Hopkins, et al. against D. W. Belding, et al. Order allowing additional time for filing transcript. Ent'd Journal T, p. 82. Filed 26 day of Nov. 1909. C. A. Hill, Deputy Clerk.

UNITED STATES OF AMERICA,
Eastern District of Tennessee, Northern Division, ss:

I, D. L. Snodgrass, Clerk of the United States Circuit Court, in and for the Eastern District of Tennessee, do hereby certify that the foregoing 478 pages of typewriting is a true, full, correct and complete copy of the original record and proceedings in the case of William R. Hopkins, et al. vs. Charles Hebard, et al., No. 1056, as the same remains upon the files and records of said United States Circuit Court.

In testimony whereof, I hereunto set my hand and seal of the said Circuit Court, at Knoxville, Tennessee, this 17th day of December, A. D., 1909.

[SEAL.]

D. L. SNODGRASS, *Clerk*,
By C. A. HILL, *Deputy Clerk*.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To Charles Hebard, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth

Circuit, to be holden at the City of Cincinnati, in said Circuit, not exceeding thirty days from this date, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States for the Eastern District of Tennessee, Northern Division, wherein William R. Hopkins, Benjamin P. Bole, Edward I. Leighton, Fred. W. Bruch, George Reeves and John Matthews are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said defendants, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this third day of November, in the year of our
343 Lord, One Thousand Nine Hundred and Nine and of the Independence of the United States of America, the one Hundred and Thirty-fourth.

JNO. E. McCALL, *Judge.*

I hereby accept service of this Citation on behalf of Charles Hebard, Appellee, this 6th day of November, A. D., 1909.

T. E. H. McCROSKEY.

No. 1056. In the U. S. Circuit Court at Knoxville. W. R. Hopkins, et al., against Charles Hebard. Citation. Filed Nov. 6-09. D. L. Snodgrass, Clerk, by C. A. Hill, D. C.

Filed Aug. 6, 1907. D. L. Snodgrass, Clerk, By W. L. Edington, Deputy Clerk. No. 1651. United States Circuit Court of Appeals, Sixth Circuit. William R. Hopkins, Benjamin P. Bole, Edward I. Leighton, Fred W. Bruch, George Reeves and John Matthews, Petitioners and Complainants, vs. Charles Hebard, Respondent. Petition and Affidavits on behalf of Petitioners for leave to file a Bill of Review. Filed Dec. 18, 1909. Frank O. Loveland, Clerk.

TRANSCRIPT OF RECORD.

Circuit Court of Appeals of the United States in and for the Sixth Circuit.

No. 1651.

DAVID W. BELDING, MILO M. BELDING, ALVAH N. BELDING, HENRY Stix, Nathan Stix, David M. Hyman, Eugenia H. Bragg, Marion B. Laws and Caleb S. Bragg, a Minor, by Eugenia H. Bragg, His Next Friend, Heirs at Law of Mary Bragg; Henry Cooper and Emily Cooper, Heirs at Law of R. L. Cooper; W. N. Cooper, T. Z. Cooper, Amanda Bryson, Mary Jackson and Hester Ferguson, Heirs at Laws of J. W. Cooper, and Robert N. Archer, Complainants,

vs.

CHARLES HEBARD, Defendant.

Petition for Leave to File Bill of Review.

Filed Sep. 25, 1906, Frank O. Loveland, Clerk.

To the judges of the Circuit Court of Appeals of the United States in and for the Sixth Circuit, Sitting at Cincinnati:

Your petitioners William R. Hopkins, Benjamin H. Bole, Edward I. Leighton, Fred W. Bruch, George Reeves and John Matthews, represent to the court that on the 29th day of October, A. D.,
344 1900, they became the purchasers from the owners thereof, of a large body of timber lands in the county of Graham, in the State of North Carolina abutting upon the boundary line between the States of North Carolina and Tennessee, and the said lands so purchased included a body of about 8,000 acres of valuable timber lands in the western part of said county and abutting upon the said state line, that the source of the title of said lands was grants from the State of North Carolina in which State said lands were situated and conveyances thereof from the precedessors in title.

That on the 16th day of January, 1896, one Charles Hebard filed a bill in equity in the Circuit Court of the United States in and for the Northern Division of the Eastern Dist. of Tenn. against D. W. Belding, Henry Stix, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg, R. L. Cooper, J. W. Cooper and R. N. Archer, in which the complainant alleged that he was the owner and in possession of about 40,000 acres of land including 8,000 acres above mentioned under grants from the State of Tennessee and conveyances from the original grantees and their successors and claiming that the said 8,000 acres in dispute were in the State of Tennessee and alleging that one of the defendants to-wit, R. N. Archer and others, claiming the right thereto from the co-defendants of the said R. N. Archer were cutting and removing timber from the said disputed lands and asking that the court find the state line aforesaid the true

state line and to protect the title of the said complainant. That the point in dispute in said case as made by the said bill and the answers that were filed, was the true location of the state line between the States of North Carolina and Tennessee, and according as the said state line was located according to the contention of the complainant or of the defendants so the said disputed lands belonged to the complainant or defendants respectively.

That the said case was at issue and was referred to a master who heard the evidence on each side pro and con and after argument of counsel found that the state line between the said States was located in accordance with the contention of the complainant, and that the said 8,000 acres of land in dispute were included in the grants and conveyances to the complainant and that the defendants who claim said disputed lands under grants from the State of North Carolina and subsequent conveyances of said grantees and their successors, had no title thereto because the fixing of the location of the state line as contended for by the complainant located those lands
345 in the State of Tennessee, and not in the State of North Carolina so that the pretended grants from the State of North Carolina were of no force or effect and that the subsequent conveyances of the grants by the State of North Carolina and their successor conveyed no title.

That the finding of the said master in favor of the complainant upon exceptions was affirmed by the said Circuit Court of the United States, and a decree in favor of the complainant was entered which on appeal has been affirmed by this court, all of which will more fully — in the bill of review which is now sought to be filed and the record of the case on appeal in this court.

Your petitioners state that the evidence given before the said master was strongly favorable to the contention of the defendants but it appeared that in 1821 by virtue of acts of the States of North Carolina and Tennessee respectively a joint commissioner was created to run and locate said division line and it was so run and located. But at the time of said hearing and until very recently it was impossible to discover the report or maps accompanying said survey of the state line and in the evidence offered before the said master it was conceded that said papers were not in existence but said paper consisting of a map of said dividing line made by the said joint commissioners has very recently been discovered in the city of Nashville, in the State of Tennessee under the circumstances and at a time set out in the bill for a re-hearing sought to be filed herewith, that such evidence could not have been produced at the trial by any amount of diligence, nor the existence and contents of said papers be proven and the existence and production of said map would have been decisive that the contention of the defendants was correct and that the said lands in dispute unquestionably did belong to them under their grants from the State of North Carolina, and subsequent conveyances.

That your petitioners have been aggrieved by the decree of the court below and the affirmance thereof by this court in such manner and to such extent that they are remediless except by the action of this court and the court below in reviewing said decree.

Now, your petitioners respectfully ask this court to permit them to file a bill of review which is presented herewith with accompanying affidavits in order that the court may consider this new evidence in connection with the former record and evidence and in order that the court below may re-consider said case and enter such decree as may seem right and just in connection with said record and evidence and newly discovered evidence, and that said court
346 may right your petitioners in matters in which they have been aggrieved upon such terms as may be proper and your petitioners now offer to enter into bond for such cost or other damages in case they should fail to establish their right to a review of said decree in such sum and upon such conditions as this court may award.

E. P. McQUEEN,
THEO. F. DAVIDSON,
Of Counsel.
C. B. MATTHEWS,
Att'y and of Counsel for Complainants and Petitioners.

STATE OF OHIO,
County of Cuyahoga, ss:

— Having been duly sworn says that he is one of the petitioners herein, and that the allegations of the foregoing petition are true.

WILLIAM R. HOPKINS.

Subscribed in my presence and sworn to before me this 21st day of September, 1906.

[NOTARIAL SEAL.] A. H. FIEBACH.

Circuit Court of Appeals of the United States, in and for the Sixth Circuit. David W. Belding, et al., Complainants, vs. Charles Hebard, Defendant. Petition for Leave to file Bill of Review.

Circuit Court of the United States in and for the Eastern District of Tennessee, Northern Division.

DAVID W. BELDING, MILO M. BELDING, ALVAH N. BELDING, HENRY Stix, Nathan Stix, David M. Hyman, Eugenia H. Bragg, Marion B. Laws and Caleb S. Bragg, a Minor, by Eugenia H. Bragg, His Next Friend, Heirs at Law of Mary Bragg; Henry Cooper and Emily Cooper, Heirs at Law of R. L. Cooper; W. N. Cooper, T. Z. Cooper, Amanda Bryson, Mary Jackson and Hester Ferguson, Heirs at Laws of J. W. Cooper, and Robert N. Archer, Complainants,

vs.

CHARLES HEBARD, Defendant.

To the Honorable Judges of the Circuit Court of the United States in and for the Northern Division of the Eastern District of Tennessee:

Your orators, David W. Belding, Milo M. Belding, Alvah N. Belding, Henry Stix, Nathan Stix, Louis Krohn and David M. Hyman,
347 Eugenia H. Bragg, Marion B. Laws and Caleb S. Bragg, a minor, by Eugenia H. Bragg, his next friend, heirs at law of Mary Bragg, and Henry Cooper and Emily Cooper, heirs at law of Robert L. Cooper and W. N. Cooper, T. Z. Cooper, Amanda Bryson, Mary Jackson and Hester Ferguson heirs at law of J. W. Cooper, state that on the 16th day of January, 1896, said Charles Hebard filed in the Circuit Court of the United States, Eastern District of Tennessee, Northern Division at Knoxville, a certain bill in equity, in which he alleged that he was the owner in fee of about 40,000 acres of land lying in the Northern Division of the Eastern District of Tennessee, in the eastern portion of Monroe county, south of the Little Tennessee river, and adjoining North Carolina state line. That said state line is the eastern boundary of said 40,000 acres owned by the complainant, and that the title of said lands was derived from the state of Tennessee by grants duly and regularly issued, mesne conveyances and descent terminating in the complaint.

That the defendants, with the exception of the said Robert N. Archer, claimed to own by deeds themselves and as tenants in common a large body of land containing 20,000 acres or more in Graham county North Carolina, adjoining the lands of complainant, the said state line being the dividing line between the two bodies of land, and that defendants claimed to derive their title by grants from the state of North Carolina and that there was then a contention between the complainant and the defendants as to the true location of the state line, which contention involved some 8,000 acres of valuable timber lands upon which and from which the defendant, Robert N. Archer, by authority from the other defendants, had recently entered and was cutting and removing the timber.

That the lands thus in dispute included all the land drained by the waters of Slick Rock Creek, which has its source in the mountains west of the main or leading mountain, the crest of which

forms the dividing line between North Carolina and Tennessee, as complainant insisted, and after flowing some 6 miles in a northeast course, empties into the Little Tennessee river about ½ mile below, and west of the point where the state line crosses the river. And that the land thus drained by Slick Rock Creek formed an irregular basin the eastern side or rim being what is called Hang Over Mountain, running in a northeast and southwest direction and which is higher and more nearly straight than any other mountain on the right or left in that vicinity. That on the south and west side
of the basin, the Fodder Stack lead and smaller spurs or
348 ridges form the rim of the basin and are much lower than Hang Over and gradually diminishing until the river is reached. The basin thus formed being about 6 miles in length and extending northeast and southwest with an average width of about 3 miles.

The complainant further alleged that in the year 1821 joint commissioners were appointed by North Carolina and Tennessee to locate and establish the line between the two states, and that said commissioners located and established the line "Beginning at a stone set up on the north side of the Chattahoochie turnpike, marked on the west side "Ten.," and on the other side, N. C., 1821. Running thence southwest to the Bald Rock on the summit of the Great Iron or Smoky Mountain, and continuing south west on the extreme heights thereof, and where it strikes the Tennessee river, 7 miles above the old Indian town of Tallassee." * * *

"Crossing the Tennessee river at a distance of 65 miles from the beginning. From the Tennessee river to the main ridge and along an extreme height of same to the place where it is called Unicoi or Unaka Mountain."

That the latter clause to-wit: "From the Tennessee river to the main ridge along the extreme height to where it is called Unicoi or Unaka Mountain," is the portion of the state line in dispute, and the said bill describes the said state line as running southwestly from the beginning, crossing the Tennessee river about ½ mile above, nearly east of the mouth of Slick Rock Creek, where it crosses the river, following a leading ridge, reaching the main ridge at a place near the Hang Over, thence running along the extreme heights of the Hang Over Mountain, passing Stratton's Ball some 6 miles or more from the river, and thus continuing on top of the mountain same course southwestwardly to where the ridge is called Unicoi or Unaka Mountain.

It was further alleged that from the Little Tennessee river to the Unicoi or Unaka Mountain the Hang Over lead is more direct in its course southwestwardly and Hang Over is from 400 to 1,000 feet higher than any other ridge or spurs in that section, and that along this ridge the old marked line still exists, as made by the commissioners in 1821 when they located and established the line and it was therefore insisted by the complainant that the same is the true state line as established by the commissioners, and that the Slick Rock Creek basin, including all the land drained by said creek is entirely within the boundary of the state of Tennessee.

349 That on the other hand, the defendants insisted that the state line crosses the river from ½ to 1 mile below the mouth of the Slick Rock Creek, and thence following low ridges and spurs, first northwest then west, southwest, south and southeast, until it strikes the main ridge at the Stratton Ball, intercepting the line as contended for by complainant, and by this line including all the lands in the Slick Rock basin and tributary to its waters within the boundary of North Carolina.

The complainant thereupon sets out various reasons why the contention of the defendants cannot be correct, and further sets out the history of the title of the lands in controversy, and the fact that in surveying the said lands supposed to be in the state of Tennessee in 1837-1839, in pursuance of an act of the legislature of Tennessee said survey stopped at Slick Rock Creek Basin, that he derived the same from the state of Tennessee, and charges further that the complainant and those from whom he derives title, have had for many years tenants living upon the land in the Slick Rock Creek dated back as far as 1882, and claims that he and those under whom he derives title have been in open and continuous possession since 1882, and that they were at the time of the filing of the bill in possession claiming under the deeds as set out.

It is further alleged that the defendant, Robert N. Archer, under contract with the other defendants who were claiming to own said property had entered upon said lands and was cutting and about to remove timber, and that on the 10th day of June, 1895, an action was brought in the Chancery Court of Monroe county, Tennessee, against Robert N. Archer and others to prevent them from cutting and removing the timber which action was removed on the 31st of August, 1895, into this court, where it was at the time of the filing of this bill then pending, and alleged that the complainant was in sole and undisputed occupation of said land, and that the respective defendants are not in occupation of said land. The complainant then alleges the collusion of the defendants and refusal to recognize the rights and titles of the complainant, sets out their trespasses and prays that the court will settle the position of the said state line between the said states of Tennessee and North Carolina at the point designated, and in accordance with the claims of the bill, that the court will award a writ of possession, and that the defendants be enjoined from cutting and removing timber, or otherwise trespassing upon the said lands, and that upon final hearing
350 the said injunction be made perpetual, and that the cause above mentioned that was removed from the Chancery Court of Monroe County, Tennessee, be consolidated with this cause, and a prayer for general relief and for process.

That such proceedings were had that a preliminary injunction issued in accordance with this prayer, and on June 28th, 1895, complainant filed his amended bill, correcting the name of the said Archer.

That both to the bill in the case that was removed and in this case a plea was filed by the said R. N. Archer, in which he set up the pendency of the suit that was brought in Monroe county in said

Chancery Court, and removed to this court, as a plea in abatement to the filing to the bill herein.

That the said defendant, J. W. Cooper, on May 30th, 1896, filed his separate answer to the bill, in which he specifically denied that the complainant had any title to that part of the lands set out in the bill, which were bounded and described as follows:

"Beginning at a beech tree in the state line where the Hang Over Mountain strikes said line, and near a corner of No. 5051, and running with said line of No. 5051 south 80 degrees, east 320 poles to a mountain oak, then with the line of No. 4455, north 40 degrees, east 320 poles to a Spanish oak, then east 92 poles to a large rock on the second high peak of the Hang Over Mountain, then down the ridge with its meanders to a service tree on the bank of the Cheoah river, then down said river with its meanders to the Tennessee river, then down the Tennessee river to a corner of No. 611 at the mouth of Slick Rock Creek and the state line. Then up with said line to the top of said mountain to a locust on said line, then with said line and its meanders to the beginning, containing 14800 acres more or less, and alleges that the said line marked by the commissioners who ran the same in 1821 from the Little Fodder Stack to the Unicio or Unaka Mountain is plainly marked, that said line from the Little Fodder Stack to the intersection of the Hang Over Ridge is 752 poles and nearly a due east course from the said state line as shown by the angles and lines of the defendant's deeds and grants. That to follow the Hang Over Mountain and its main heights will end at the Cheoah River, 6 miles above Slick Rock Creek, and not at the Tennessee River. The Hang Over top, the Little Fodder Stack top, and the place of intersection of the Hang Over Mountain and the state line mountain form the triangle, that to follow the state line mountain by way of the Fodder Stack and the Tennessee river, the same ends about 150 yards below
351 the mouth of Slick Rock Creek, which point is about 7 miles below the old Indian town of Tallassee, and that was the one line which could be run agreeing with the line described in the survey of 1821; that to cross the Tennessee river ½ mile above the Slick Rock Creek a line over there could not reach the Little Fodder Stack and Big Fodder Stack, without running a line almost due west, and crossing both Big and Little Slick Rock Creeks and then to go by Hang Over would require another southeast line crossing both Creeks again and would be leaving the plain marked line which has been recognized by the citizens of North Carolina for the last 40 years, and has been known and recognized by the citizens of both states since 1821. That the state line does not cross the Tennessee river ½ mile above the mouth of Slick Rock Creek, but on the contrary, that it does cross the said river below the mouth of Slick Rock Creek, and said answer specifically denies the allegation of the said state line as alleged in the bill, and all of the reasons given for said allegation, and denies that the complainant had tenants on any of the said land, or that he is in possession of any part thereof, and asserts that the defendants are, and have been in actual, notorious and adverse possession since 1883 under grants issued in

1860, and disclaim any title or possession in any of the lands claimed by the complainant which are not within the boundary set out in said answer, and after denying all other allegations in the bill, not specifically mentioned in the answer, states that one McGarry of Grand Rapids, Michigan, was owner of 1-12 of the said property and was a necessary party in order to give the court jurisdiction of the case, and prays that the complainant's action be dismissed at his costs.

On August 10th, 1895, the other defendants filed their answer, in which they denied that the complainant is the owner of the 40,000 acres of land set out in the bill, deny that the said line is the Eastern boundary of said land, deny that he is in possession, and deny that said lands vested in complainant that it was derived from the state of Tennessee by grants duly and regularly issued and by mesne conveyances and descent terminating in complainant.

The defendants further allege that they are the tenants in common of a tract of land of 20,000 acres or more in Graham county, North Carolina, parts of which form the boundary of the state line between North Carolina and Tennessee. Admit that they derived their title from the state of North Carolina, deny that until
352 the suit was brought, there was a contention between the defendants and complainant as to the true location of the state line, but admit that that part of the defendant's lands sought to be recovered by the complainant amounts to about 8,000 acres, and denies that the said R. N. Archer was trespassing upon any lands of the plaintiff. Deny that the said line between the two said states crosses the Tennessee river about ½ mile above and nearly east of the mouth of the Slick Rock Creek, deny that the state line was established as set out and alleged, and say that the lands in controversy are in North Carolina. The answer then contains a long history of the title to the property, and alleged that the said lands claimed by them were duly granted by the state of North Carolina, being within that state, and that in accordance with the laws of the state by grants and subsequent conveyances were vested in the defendants, who have ever since by them and their tenants been in actual, open and notorious and visible possession thereof, and that subsequent to the original running of the said state line under said law, the state of North Carolina did re-run it, and said state line as re-located corresponded with the line originally located in 1821, and that both of said sets of commissioners located the lands in controversy within the state of North Carolina, and that said state line has been ever since recognized by the inhabitants of both states as constituting the boundary line between said states and it was for this reason that the state of Tennessee did not survey or cause to be surveyed or granted or transferred prior to 1873 said lands as lands belonging to said state of Tennessee. That the state of North Carolina has exercised jurisdiction over said lands which has been acquiesced in by said state of Tennessee. That maps in the land department of the United States, locate said state line substantially as claimed by these defendants, and thereupon sets out various charters, grants, treaties, correspondence, compacts, reports, maps

and the exercise of jurisdiction over the said lands by the said state of North Carolina and acquiescence therein by the said state of Tennessee as corroborating the contention of the defendants, and alleged possession of and title to the said lands, and deny any title in the complainant. That on September 28th, 1896, the said Mary Bragg filed her answer which is substantially a copy of the answer of the other defendants just alluded to.

The plea in abatement of said Robert N. Archer having been overruled, he on March 9, 1888, filed his separate answer, in which he said that the other defendants all claimed title to the property in controversy, but that his only interest was in the timber
353 under a contract with the owners and in other respects as far as the title in dispute is concerned, substantially follows the answer of the main defendants. Your orators further state that the said complainant having on September 29th, 1896, filed his general replication to the answers, an order was entered appointing a special master to report to the court the true state line between the states of Tennessee and North Carolina, and before said master, a large amount of evidence was introduced upon both sides, consisting of the evidence of surveyors, some of whom located the line from Tennesse, southwest along the Hang Over Ridge, while others located it as crossing the Tennessee river at the mouth of Slick Rock Creek, and thence along that Creek to the Fodder Stack Range, to the Unicoi or Unaka Mountain. Both of the lines contended for reach that point. Evidence of the marks upon the trees, evidence of people who had the line pointed out to them by people who were concerned in the original survey, evidence of people in possession of the said land as to where they considered it located. Evidence of the survey of the state of Tennessee of the Ocoee land district which stopped at the Slick Rock Creek, evidence on file in the United States land department, and the subsequent re-survey of the state of North Carolina, and the session acts relating to the survey and report of the commissioners of the two states. Other evidence which is summed up in the case of Belding against Hebbard in the 103 Federal Reporter on pages 542 and 546 inclusive. Your orators allege that upon the said evidence and argument of counsel the special master commissioner found the said state line as claimed in the bill of the said Hebbard, and on exceptions the said report was confirmed and a final decree entered for the complainant, and in this connection your orators beg leave to refer to the printed record of the said case in the Circuit Court of Appeals of the Sixth Circuit, which is exhibited with this bill, an appeal having been taken, from the decree of this court, which record contains all of the pleadings, evidence and decree of the court.

Your orators say that the original field notes report and the map of the commissioners who ran and established said state line in 1821 were all lost, and the said defendants after the most diligent search were unable to find any of the said papers in the archives of the state of North Carolina, or of the state of Tennessee, and evidence was given of the search that had been made therefor, which satisfied this court and the said Circuit Court of Appeals, that none of said

papers were then in existence. That about 1835 the state
354 house at Raleigh, North Carolina had been burned, and it was supposed that said papers had been lost at that time, and destroyed by the fire. But a most exhaustive search among the archives at Nashville, Tennessee, where such papers if preserved, would have been on file, failed to reveal the existence of any of them, and in the opinion of the Circuit Court of Appeals on appeal in the 103 Federal Reporter, page 532, it is stated that none of said papers were then in existence.

Your orators allege, however, that about two years since by the legislature of Tennessee as your orators are informed and believe, a law was passed, ordering that the rubbish which had accumulated in the basement of the state house at Nashville should be cleared out and destroyed, and at some time during the year 1905, as your orators are further informed and believe, but at what particular date they are ignorant, some of the employees of the state of Tennessee started to clear out this rubbish, and in a barrel, where it had been put loosely and carelessly, and as if it were of no value, the map made by the original commissioners of the states of North Carolina and Tennessee, who ran the line in pursuance of the session acts passed prior thereto was discovered and a certified copy thereof is attached to this bill of review.

That while this suit was pending, the interest of the defendants in the said lands was for a valuable consideration sold and conveyed by the original defendants, excepting the Bragg and Cooper interests, on December 9th, 1899, and by subsequent conveyances all of said interests came to Edward I. Leighton, Fred W. Bruch, George Reeves, John Matthews and William R. Hopkins, and that said conveyance was for the purpose of finally vesting title, and said title has been vested in the persons just above named. That in the latter part of February, 1906, one M. E. Cozad, whose affidavit is filed herewith, heard a rumor for the first time that said map had been discovered in Nashville. That the said M. E. Cozad resided at Andrews, in the state of North Carolina, and was a representative of the said grantees just named as a caretaker of the said property, but he immediately and with due diligence set about ascertaining whether said map in fact had been found, and made two trips to North Carolina to Raleigh, to ascertain whether or not its counterpart could be found in Raleigh, but failed to find it there, but obtained as soon as he could, a certified copy of the Tennessee record which is hereto attached, which he obtained on the 26th day of March, 1906.

355 And further attempts were made to find said written report accompanying said map and the field notes of said survey. But after the most diilgent search no other papers connected therewith could be found, but none of the said grantees had had any information concerning the finding of said map and none of the defendants herein knew of it until on or about July 20th, 1906, and the existence or contents of said report could not have been proven at the trial of the original cause.

That the said map shows that the said line crosses the Little

Tennessee river at or near the mouth of Slick Rock Creek as contended herein by the defendants, and that it includes all of the lands and more than were claimed by the said defendants. That said map is new and decisive evidence of the contention of the defendants in the original case, and if it had been found and presented to the court would have been decisive in favor of the defendants, and would have resulted in a decree in their favor. That it was found in a place where no one would have thought it to be, and your orators and their grantee have exercised true and perfect diligence and could not have ascertained the existence thereof sooner than is above alleged.

Your orators further allege that the original decree had been performed and that since the filing of the original bill in this case, Mary Bragg, R. L. Cooper and J. W. Cooper have all deceased, the former leaving Eugenia H. Bragg, Marion B. Laws and Caleb S. Bragg, a minor, who sues by Eugenia H. Bragg, his next friend, as her heirs at law, and the said R. L. Cooper leaving Henry Cooper and Emily Cooper as his heirs at law, and the said J. W. Cooper leaving W. N. Cooper, T. Z. Cooper, Amanda Bryson, Mary Jackson and Hester Ferguson, as his heirs at law.

Wherefore, your orators pray that they may be granted leave to file this bill of review and upon filing the same this court will reexamine the evidence that was introduced at the former hearing in connection with this map and will find the facts to be as claimed by defendants a decree that the defendants and their grantees are the owners of the lands that were conveyed to them, and will find that the boundary line between North Carolina and Tennessee is as claimed by them, and for such other and further relief as your orators may be entitled to, and to that end and that they may have the relief prayed for, that this court will direct its subpœna to issue directed to the original complainant, and direct that service may be made upon him by publication or by copy of the
356 writ, and this bill of review, or upon the attorneys of the original complainant, as to this court may seem proper and just, directing that the said complainant answer this bill of review and abide the order of the court thereon in accordance with the rules and practice of this court in such cases.

C. B. MATTHEWS,
Solicitor and Counsel for Complainants.

STATE OF OHIO,
County of Cuyahoga, ss:

Having been first duly sworn, says that the facts stated in the foregoing bill of review are true.

WILLIAM R. HOPKINS.

Subscribed in my presence and sworn to before me this 21st day of September, 1906.

[SEAL.]

A. H. FIEBACH,
Notary Public.

STATE OF TENNESSEE,
Department of State:

I, Jno. W. Morton, Secretary of the State of Tennessee, do certify that the annexed is a true copy of the plat of the state line between North Carolina and Tennessee from the Georgia line to the Big Pigeon river, the original of which is now of record at my office.

In testimony whereof, I have hereunto subscribed my official signature; and, by order of the governor, affixed the great seal of the state of Tennessee, at the department in the city of Nashville, this 21st day of March, A. D., 1906.

[SEAL.]

JNO. W. MORTON,
Secretary of State.

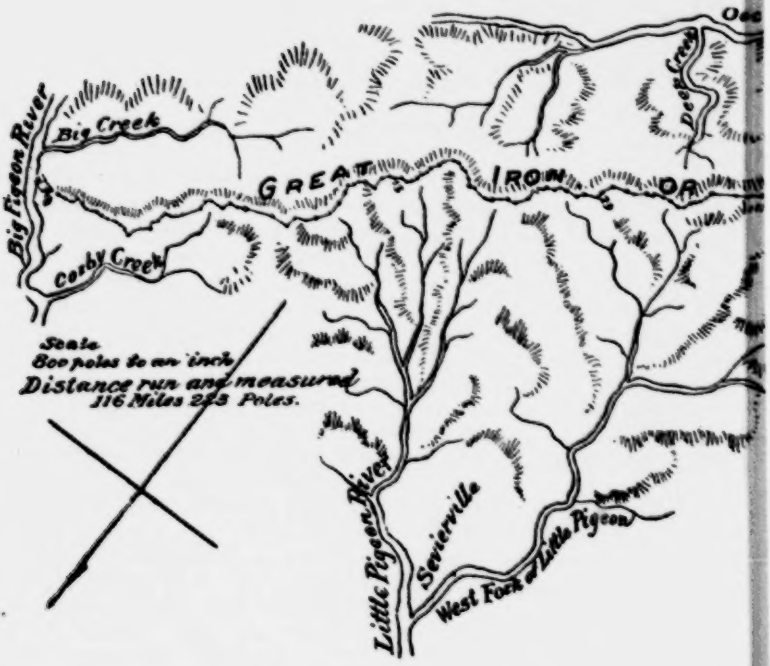
Fee of state for this certificate, $2.00, pd.

JNO. W. MORTON,
Secretary of State.
GOODLOE, *Ch. Clerk.*

Circuit Court of the United States, Eastern District of Tennessee, Northern Division. David W. Belding, et al., Complainants, vs. Charles Hebard, Defendant. Bill of Review.

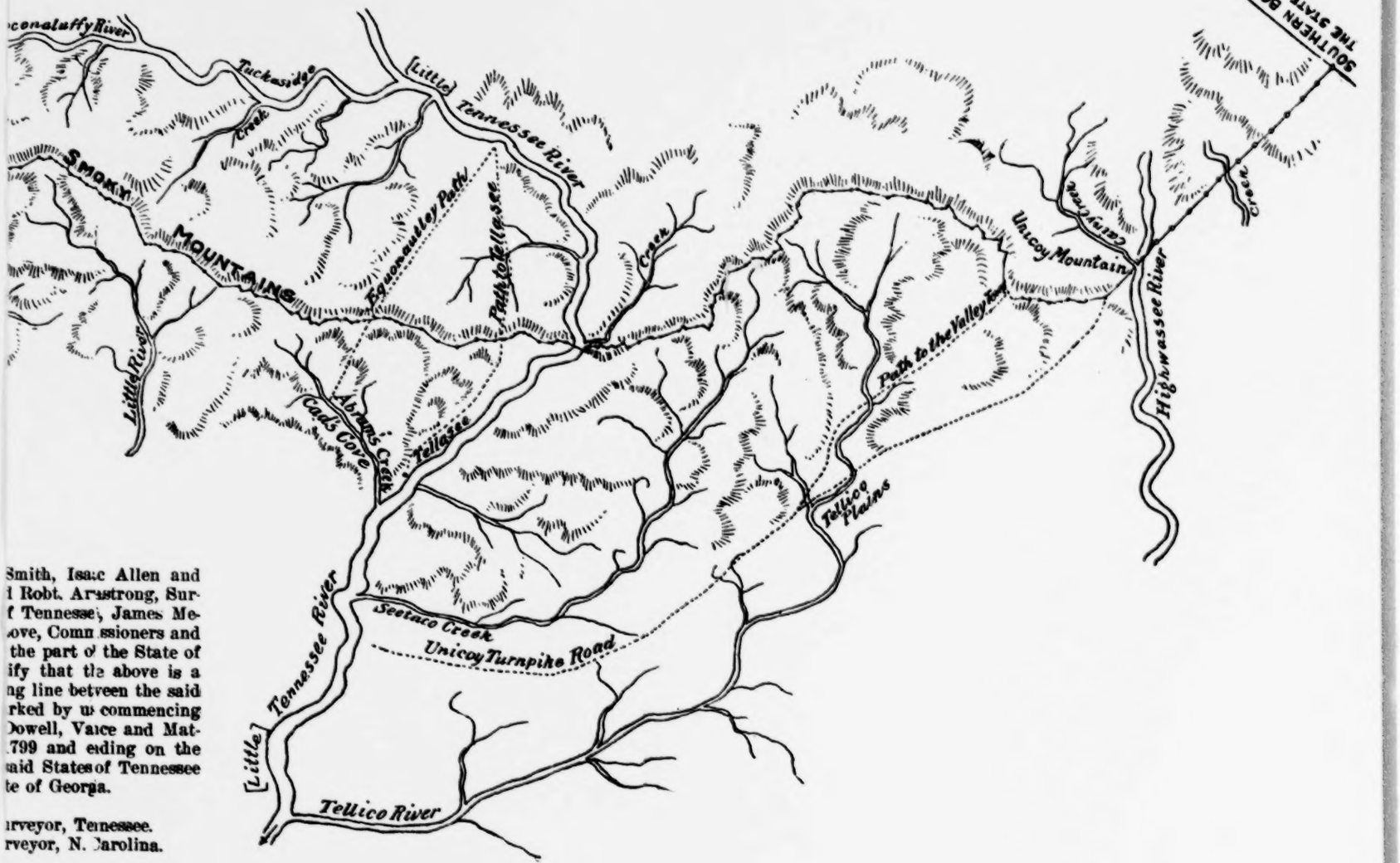
(Here follows diagram marked page 356*a*.)

356a



The undersigned, Alexander Smi
Simeon Perry, Commissioners, and R
veyor, on the part of the State of T
bane, Montfort Stokes and Robt. Love
William Davenport, Surveyor, on the
North Carolina, Do Hereby Certify
true and correct plat of the dividing l
States as settled and run and marke
on the dividing line run by Mc Dow
thews in the year of our Lord 179
boundary line which divides the said
and North Carolina from the State of
August A. D. 1821.

Robt. Armstrong, Surv
Wm. Davenport, Surve
A. Smith,
Isaac Allen,
Simeon Perry,
Commissione
James Mebane,
M. Stokes,
R. Love,



Smith, Isaac Allen and
l Robt. Armstrong, Sur-
f Tennessee, James Me-
ove, Commissioners and
the part of the State of
ify that the above is a
ng line between the said
rked by us commencing
Dowell, Vance and Mat-
799 and ending on the
said States of Tennessee
te of Georgia.

rveyor, Tennessee.
rveyor, N. Carolina.

ry,
sioners of Tennessee.
ane,

Circuit Court of the United States in and for the Eastern District of Tennessee, Northern Division.

DAVID W. BELDING, MILO M. BELDING, ALVA N. BELDING, HENRY STIX, NATHAN STIX, DAVID M. HYMAN et al., Complainants,
vs.
CHARLES HEBARD, Defendant.

Amendment to the Bill of Review.

Now comes the complainants and by leave of court first had and obtained state that since the preparation and filing of
357 the original bill of review herein, it has been ascertained that Charles Hebard, original defendant departed this life on or about the 11th day of June, 1897, leaving a last will and testament which has been admitted to Probate and record in the county of Baraga, State of Michigan, and that Mary C. Hebard, Charles S. Hebard, Julia E. Hebard, Mary E. Hebard, and Daniel L. Hebard are his sole heirs at law and devisees, and that Charles L. Hebard and Daniel L. Hebard above named are the executors named in said will who qualified and took upon themselves the execution thereof, and they are hereby made parties of this bill of review in place of the original Charles Hebard.

Wherefore the complainants pray that process of subpœna may issue against the said Mary C. Hebard, Charles S. Hebard, Julia E. Hebard, Mary E. Hebard and Daniel L. Hebard, individually and against the said Charles L. Hebard and Daniel L. Hebard as executors, and the prayer for relief contained in the original bill of review is reiterated against them in place of the said Charles Hebard named as the original defendant.

Circuit Court of the United States in and for the Eastern District of Tennessee, Northern Division. David W. Belding, et al., Complainants, vs. Charles Hebard, Defendant. Amendment to the Bill of Review. Filed Jan. 17, 1907. Frank O. Loveland, Clerk.

Affidavit of F. P. Axely.

Circuit Court of the United States in and for the Eastern District of Tennessee, Northern Division.

DAVID W. BELDING, MILO M. BELDING, ALVAH N. BELDING, HENRY STIX, Nathan Stix, David M. Hyman, Eugenia H. Bragg, Marion B. Laws and Caleb S. Bragg, a Minor, by Eugenia H. Bragg, Heirs at Law of Mary Bragg, Henry Cooper and Emily Cooper, Heirs at Law of R. L. Cooper, W. N. Cooper, T. J. Cooper, Amanda Bryson, Mary Jackson and Hester Ferguson, Heirs at Law of J. W. Cooper, and Robert N. Archer, Complainants,

vs.

CHARLES HEBARD, Defendant.

STATE OF NORTH CAROLINA,
Cherokee County, ss:

F. P. Axley, having been first duly sworn, says that J. W. Cooper and Robert L. Cooper who formerly lived in Murphy, North Carolina, and who were defendants in the original case in which
358 this bill of review was sought to be filed, are both dead, and that the interest in said lands which was held by the said J. W. Cooper, at his death passed to and vested in his children W. N. Cooper, T. J. Cooper, Amanda Bryson, Mary Jackson, Hester Ferguson and R. L. Cooper, and the interest held by the said Robert L. Cooper whatever it was, and whatever he obtained from the said J. W. Cooper who was his father at the death of the said Robert L. Cooper, passed to and vested in his children Harry and Emily Cooper.

But all of the said interests have since been conveyed to one William R. Hopkins as trustee for the Santeetla Company.

F. P. AXLEY.

Subscribed in my presence and sworn to before me this 22nd day of September, 1906.

[SEAL.] L. E. BAYLESS,
Notary Public.

My commission expires Oct. 25, 1907.

Notary fee 25 cents.

Circuit Court of the United States, Eastern District of Tennessee, Northern Division. David W. Belding, et al., Complainants, vs. Charles Hebard, Defendant. Affidavit of F. P. Axley.

Affidavit of William R. Hopkins.

Circuit Court of the United States in and for the Eastern District of Tennessee, Northern Division.

DAVID W. BELDING, MILO M. BELDING, ALVAH N. BELDING, HENRY Stix, Nathan Stix, David M. Hyman, Heirs at Law of Mary Bragg, Heirs at Law of J. W. Cooper, Heirs at Law of Robert L. Cooper, and Robert N. Archer, Complainants,

vs.

CHARLES HEBARD, Defendant.

STATE OF OHIO,
County of Cuyahoga, ss:

William R. Hopkins of lawful age having been first duly sworn, says that he is connection with Edward I. Leighton, Fred W. Bruch, and John Matthews, of Cleveland, Ohio, and George Reeves, of Alliance, Ohio, became the purchasers of all of the lands claimed by the defendants in the original case in which this bill of review is sought to be filed on or about the 9th day of June, 1903, and subsequently during the year 1904, this affiant purchased and there were conveyed to him all the interests of J. W. Cooper, R. L. Cooper and Mary Bragg in the said property as trustees for the said leighton, Bruch, Matthews and Reeves.

359 That said purchases were made for full value and included not only the interests of all of said defendants in the original case, in said disputed lands, but a large acreage in other lands in Graham County, North Carolina. And no one of said grantees knew of the discovery of the map at Nashville showing the state line between the States of Tennessee and North Carolina, that was run in 1821 by the commissioners until July 20, 1906, and have had no communication whatever directly or indirectly or by hearsay until that date.

WILLIAM R. HOPKINS.

Sworn to in my presence and subscribed before me this 19th day of September, 1906.

[SEAL.]

R. MAX SOLYMON,
Notary Public.

Circuit Court of the United States, Eastern District of Tennessee, Northern Division. David W. Belding, et al., Plaintiff, vs. Charles Hebard, et al., Defendants. Affidavit of William R. Hopkins.

Affidavit of M. E. Cozard.

Circuit Court of the United States in and for the Eastern District of Tennessee, Northern Division.

DAVID W. BELDING, MILO M. BELDING, ALVAH N. BELDING, HENRY Stix, Nathan Stix, David M. Hyman, Heirs at Law of Mary Bragg, Heirs at Law of R. L. Cooper, Heirs at Law of J. W. Cooper, and R. N. Archer, *Archer,* Complainants,

vs.

CHARLES HEBARD, Defendant.

M. E. Cozard of lawful age having been first duly sworn says that he is the M. E. Cozard who is mentioned in the bill of review sought to be filed in this case, and that for over six years last past, he has resided at Andrews, Cherokee County, in the State of North Carolina, and while there has acted as agent for W. R. Hopkins and others, owners of the "Belding lands," and that the duties of his said agency have been the surveying, examination of the titles, and the safe-guarding of said Company lands.

That during said period of time he had become acquainted with the lands which were in dispute between Charles Hebard and the defendants in the original case in which it is now sought to file a bill of review, the principal question that was involved in said dispute in this case — to-wit the exact location of the state line between the States of Tennessee and North Carolina at the points where said disputed lands abutted on said state line, and he knew that
360 the contention depended upon whether the lands claimed by the original defendants were in North Carolina or Tennessee, and he knew also by hearsay, some of the principal facts connected with the course of that litigation. He knew that the cause had been referred to a master who had found that the location of said line was as claimed by the original complainant in that case, Charles Hebard, and that said report had been confirmed by the Circuit Court of the United States in and for the eastern district of Tennessee, Northern Division, and he knew also that the great difficulty in that case was that the field notes, map and report of the commissioners appointed by the states of Tennessee and North Carolina respectively in pursuance of session acts of the two states to locate the said state line and who in the year 1821 did locate the said state line which location was confirmed, were lost and that so far as any knowledge was concerned were destroyed. This affiant also knew that said case was appealed to the Circuit Court of Appeals for the 6th Circuit, where on appeal the decree of the Circuit Court was affirmed. That in all of said hearings and proceedings it was assumed from the evidence that had been introduced before the master, that all papers and records showing proceedings of said commissioners were not in existence.

That in the latter part of February, 1906, this affiant for the first time, heard a rumor that the map made by said commissioners in 1821 and which was the result of the work of said commissioners

in running and locating said state line had been discovered in Nashville. That immediately and with due diligence he set about ascertaining whether said map in fact had been found, and wrote to a friend in Knoxville, Tenn., asking him to ascertain the fact, and get him a copy of it. But this friend did not send him a copy and he instituted inquires through Gen. Theodore F. Davidson, an attorney of Asheville, in the State of North Carolina, who wrote to a friend of his in Nashville to ascertain the fact, and obtained a copy, and on the 26th day of March, 1906, this affiant received a certified copy of said map. That between the last of February and the first of May this affiant made two trips to Raleigh, the capital of the State of North Carolina, to ascertain if the counterpart of said map was in existence. That each of said trips consumed about 1 week of time and this affiant also immediately instituted inquiries at Nashville and searched to ascertain if possible, whether the field notes and written report of the commissioners for the running of said
361 boundary line if any such were ever made, were in existence.

But his inquiries at Raleigh and at Nashville were not successful in finding or ascertaining the existence of the field notes or any written report. And after the most diligent search both at Raleigh and Nashville, no paper could be found other than the map before mentioned which was found at Nashville.

That this affiant is informed and believes that the legislature of Tennessee had passed an act or resolution directing the clearing out of the rubbish in the cellar of the State House, and the attaches of the State House in carrying out said resolution, had some time during the year 1905, but just when this affiant is not informed, found the said map among a lot of loose papers in a barrel in the cellar or basement of said State House.

But this affiant never heard thereof, until in the manner and at the dates mentioned above.

That the said map shows that the said state line crossed the Little Tennessee River near and slightly below the mouth of Slick Rock Creek as contended for by the defendants herein, and that it includes all of the lands, and more than were claimed by the said defendants.

That the certified copy of the plat attached to the bill of review sought to be filed herein is the certified copy that was obtained on the 26th day of March by this affiant. That the said state line is indicated thereon by a hand, commencing at or near the Big Pigeon River, and ending in the upper right corner of said plat at the southern boundary of the State of Tennessee as marked thereon and that where said line crosses the Little Tennessee River in the immediate vicinity of the mouth of a creek, that creek is the Slick Rock Creek mentioned in the record of the Hebard case, and the said map shows that the true state line as located is west from the point where it was claimed by the said Hebard that the state line crossed said Tennessee River, and includes all the lands in dispute and shows that the same are in the State of North Carolina.

That while said suit was in progress, the original defendants in the case for a valuable consideration parted with and sold all of their interests in the said lands in dispute to certain persons W. R. Hopkins, E. J. Leighton, Fred Bruch, John Matthews, Geo. Reeves & B. P. Bole.

That since the decree in the original case, R. L. Cooper and J. W. Cooper have departed this life.

M. E. COZAD.

362 Subscribed in my presence and sworn to before me this 21st day of September, 1906.

[SEAL.] D. S. RUSSELL,
Notary Public.

My commission expires Oct. 14, 1906.

Circuit Court of the United States, Eastern District of Tennessee, Northern Division. David W. Belding, et al., Complainants, vs. Charles Hebard, Defendant. Affidavit of M. E. Cozad.

Affidavit of R. T. Quarles.

STATES OF TENNESSEE,
County of Davidson:

Personally appeared before me, J. Knox Hume, a Notary Public for said County, Robert T. Quarles, who made oath as follows:

That the Department of Archives and history was established by the Legislature of Tennessee in 1904, and I was soon after appointed Archivist of the State of Tennessee. In the prosecution of the cataloguing and arranging of the papers pertaining to my office, among others, I found the papers relating to the survey of the State line between North Carolina and Tennessee, consisting of two maps and an agreement between the Governors of the State-, together with considerable correspondence relating to running the line and appointing Commissioners, etc.

Two maps were found showing the survey made in 1799 from the Virginia line to the Big Pigeon River in Tennessee, the other, from the Big Pigeon River to the Georgia line surveyed in 1821, crossing the Tennessee River between said two points.

These are the original maps made by the Commissioners appointed by the respective States to run and locate the line between Tennessee and North Carolina. Said maps and papers are now on file in my office, at Nashville, and open to inspection. They were discovered by me in the basement of the Capitol at Nashville. The map from the Big Pigeon River to the Georgia line was in a barrel of disinfectant and seed cotton, where it had been perhaps for years, and lost sight of entirely, until discovered by me. They cannot be taken from my office, but I can furnish certified copies to any one desiring the same.

I found the field notes of the survey made in 1799, signed up by all the Commissioners, but I failed to find the field note for the sur-

vey made in 1821. However, the map of the survey of 1821 is signed by the Commissioners and surveyors of the respective States.

363 My object in making the search in the rubbish at the Capitol was to collect all important papers and documents that properly belong to my office. This was purely a voluntary act on my part in the discharge of my official duty, and the finding of said maps and papers was a mere accident, as they were buried in rubbish as aforesaid.

R. T. QUARLES.

Subscribed and sworn to before me on this 18th day of September, 1906.

[SEAL.]

J. K. HUME,
Notary Public.

Circuit Court of the United States, Eastern District of Tennessee, Northern Division. David W. Belding and others, complainants, vs. Charles Hebard, defendant. Affidavit on Bill of Review.

Affidavit of Lawrence J. Gallagher.

The Circuit Court of the United States in and for the Eastern District of Tennessee, Northern Division.

No. 1651.

DAVID W. BELDING, MILO M. BELDING, ALVAH N. BELDING, HENRY STIX, David H. Hyman, Heirs at Law of Mary Bragg, Heir at Law of R. L. Cooper, Heirs at Law of J. W. Cooper and Robert N. Archer, Complainants,

vs.

CHARLES HEBARD, Defendant.

STATE OF MICHIGAN,
County of Marquette, ss:

Lawrence J. Gallagher, having been first duly sworn says that he has for upwards of seventeen years last past resided in Baraga, Baraga County, Michigan; that recently deponent removed from said Baraga to Marquette, in said County of Marquette; that deponent was, during said time, well acquainted with Charles Hebard of Pequaming, in said County of Baraga, (said Pequaming being but a few miles from said Baraga) who, as deponent is informed and believes, was complainant in the original bill of complaint filed in this case; that said Charles Hebard died on or about the 11th day of June, 1897, leaving a last will and testament, which was duly admitted to probate and record in said County of Baraga, and that Mary C. Hebard, Charles S. Hebard, Julia E. Hebard, Mary E. Hebard and Daniel L. Hebard are his sole heirs at law and are in and by said will his sole devisees, and Charles Hebard and Daniel

L. Hebard above named are the executors named in said will who qualified and took upon themselves the execution thereof.

LAWRENCE J. GALLAGHER.

364 Subscribed and sworn to before me this 29th day of December, A. D. 1906.

[SEAL.] HARRY C. DAVIS,
Notary Public, Marquette County,
State of Michigan.

My commission expires May 16th, 1908.

No. 1651. Affidavit. Filed Jan. 17, 1907, Frank O. Loveland, Clerk.

Affidavit of L. C. Black.

Circuit Court of the United States in and for the Eastern District of Tennessee, Northern Division.

DAVID W. BELDING, MILO M. BELDING, ALVAH N. BELDING, HENRY STIX, Nathan Stix, David M. Hyman, Heirs at Law of Mary Bragg, Heir at Law of R. L. Cooper, Heirs at Law of J. W. Cooper and Robert N. Archer, Complainants,

vs.

CHARLES HEBARD, Defendant.

STATE OF OHIO,
County of Hamilton, ss:

L. C. Black having been first duly sworn states that Mary A. Bragg who was a defendant in the original suit in which it is sought to file this bill of review departed this life on or about the 8th day of April, 1902, leaving as her only heirs at law, Mr. C. C. Bragg, a son, and Ross A. Bragg, and Anabel Bragg Leaman, her grandchildren who were children and sole heirs at law of Charles F. Bragg a deceased son of the said Mary Bragg who predeceased her. That by reason of a family settlement during the life time of the said Mary A. Bragg, all of the interest of the said Mary A. Bragg in the North Carolina property became the property of the said C. C. Bragg her son, and that he died on or about the eighteenth day of November, 1905, leaving a widow, Mrs. Eugenia H. Bragg, a daughter Mrs. Marion B. Laws, and Caleb S. Bragg, a minor son.

L. C. BLACK.

Subscribed in my presence and sworn to before me this — day of September, 1906.

[SEAL.] ROBERT L. BLACK,
Notary Public in and for Hamilton Co., Ohio.

40 cents paid Notary.

C. B. MATTHEWS, *Attorney.*

No. 1651. Circuit Court of the United States, Eastern District of Tennessee, Northern Division. David W. Belding, et al., Complainants, vs. Charles Hebard, Defendant. Affidavit of L. C. Black. Filed Jan. 17, 1907, Frank O. Loveland, Clerk.

365 United States Circuit Court of Appeals for the Sixth Circuit.

And afterwards, to-wit, on the 10th day of April, A. D. 1907, a petition to intervene and exhibits were filed in said cause clothed in the words and figures as follows, to-wit:

In the United States Circuit Court of Appeals for the Sixth Circuit.

CHARLES HEBARD
vs.
D. W. BELDING et al.

To the Honorable the Judges of said Court:

The Petition of the Smoky Mountain Land, Lumber and Improvement Company respectfully represents

That it is a corporation organized under the laws of the State of Delaware.

That in the above styled cause of Charles Hebard vs. D. W. Belding, et al., on the — day of September, 1906, William R. Hopkins, Edwin L. Layton, Fred'k W. Bruch, Geo. Reeves and John Matthews, filed their petition for leave to file a bill of review, alleging that they are now the owners of the land in litigation in the original cause of Hebard vs. Belding, et al., by purchase from L. W. Belding, et al., through proper chain of title.

Alleging further the discovery of new and material evidence in the original cause, which they insist would change the result of the litigation, and asking leave to file bill of review. No further steps have been taken since petition was filed.

Your petitioner, Smoky Mountain Land, Lumber and Improvement Company, comes and says to the court that after the determination of the above styled suit of Hebard vs. Belding, et al., by final decree in this court pronounced in July, 1900, it has become the owners of the land decreed to the complainant Hebard by said final decree. That after the final determination of said suit, complainant thereon, Charles Hebard, conveyed said land to P. C. Blaisdell, et al., and that P. C. Blaisdell, et al., conveyed said lands to your petitioner, Smoky Mountain Land, Lumber and Improvement Company, which still owns the land. See deeds herewith filed.

Your petitioner further says that both of said conveyances, viz., Charles Hebard to Blaisdell, et al., and Blaisdell, et al., to Smoky Mountain Land Lumber and Improvement Company, were subsequent to the final decree of this court.

Your petitioner prays to be allowed to file its petition in this

cause, and that it be permitted to become a party to petition
366 of Wm. R. Hopkins, et al., to the end that it may move the Court for a dismissal of the petition of Wm. R. Hopkins, et al., for bill of review.

And to that end Smoky Mountain Land, Lumber and Improvement Company offers to enter its appearance to said petition, and for leave to enter proper motions for that purpose. On March 28th 1907, notice by mail was given C. B. Matthews, Att'y for Hopkins and others that this application would be made. See copy hereto attached.

(Signed) McCROSKEY & PEACE,
Solicitors for Smoky Mountain Land, Lumber and Improvement Company.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

J. Newton Peck, being duly sworn according to law, says that he is the Treasurer and Acting Secretary of the Smoky Mountain Land, Lumber and Improvement Company, petitioner above named, that as such Treasurer and Acting Secretary he is cognizant of the facts set forth in the above petition and that the same are true and correct.

(Signed) J. NEWTON PECK.

Sworn and subscribed to before me this second day of April, 1907.

(Signed) ANNA H. HARE,
Notary Public.

Commission Expires March 12th, 1911.

I herewith certify that I am not a Stockholder, Director or Clerk in the Corporation for which I hereby act as Notary Public.

T. E. H. McCROSKEY.
T. W. PEACE.

Law Office of McCroskey & Peace, Attorneys at Law.

MADISONVILLE, TENN., *March* 28, 1907.

C. B. Matthews, Esq., Cincinnati, Ohio.

DEAR SIR: On September 28th, 1906, you wrote me that on the 25th inst. you had filed a petition on behalf of the defendants in the former case of Hebard vs. Belding et als., which suit was brought and disposed of in the United States Circuit Court, Eastern District of Tennessee, and Northern Division, for leave to file a bill of review, grounded on the newly discovered evidence of the map of the original survey of 1821, signed by the commissioner, showing the true state line between the states of North Carolina and Tennessee, and which at the time of the original trial, was lost and was supposed not to be in existence. You further wrote that you would for-
367 ward, as soon as you could have printed copies made, copies of the petition, bill and affidavits filed.

Since the reception of said letter, we have had no further communication from you in regard to this matter, nor have we received copies of petition bill or affidavits, but we were informed by the Clerk of the United States Circuit Court of Appeals at Cincinnati that a petition had been filed in his office.

Your petition is a menace and a cloud upon the rights of the present owners of the property and they desire that definite action be taken in the matter by your clients. To that end, therefore, and representing the Smoky Mountain Land, Lumber and Improvement Company, a corporation organized under the laws of Delaware, and which now has title to said lands, I will, on Tuesday, the 9th day of April, 1907, before the United States Circuit Court of Appeals at Cincinnati, Ohio, move the court that the petitioners be required to take definite and active steps in said proceeding, or that their petition will be dismissed.

Yours very truly,

McCROSKEY & PEACE.

Copy.

This indenture, made the twenty-eighth day of January, in the year of our Lord one thousand, nine hundred and one, between F. L. Andrews and Mary W. Andrews, his wife, L. B. Seibert and Sue A. Seibert, his wife, H. H. Cobb and Emma Louise Cobb, his wife, F. A. Raymond and Maryette Raymond, his wife, S. A. Holbrook and Phoebe E. Holbrook, his wife, P. C. Blaisdell and Cordelia Blaisdell, his wife, parties of the first part,

To The Smoky Mountain Land, Lumber & Improvement Co., a corporation incorporated under the laws of the state of Delaware, with its principal office in the city of Wilmington, County of New Castle, in said State, of the second part, Witnesseth:

That the said parties of the first part, for and in consideration of the sum of One Dollar, lawful money of the United States of America, unto them well and truly paid by the said party of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have remised, released and quit-claimed, and by these presents do remise, release and*d* forever quit-claim unto the said party of the second part its successors and assigns, all their right, title, claim and interest in and to the following described real estate, to-wit:

Containing Forty-one Thousand (41000) acres, more or less, situated in the seventeenth (17) and twentieth (20) civil districts of
368 Monroe County, Tennessee, in the Ocoee Land District, being same tracts of land purchased by Charles Hebard from J. H. Simonson, John Rhinesmith, Wm. Fleming's heirs, Mrs. Amelia Burgess and husband, Callaway heirs, Mrs. Mary E. Hopkins and husband, T. E. H. and H. M. McCroskey, Geo. P. Wetmore and perhaps from others, the same covered by original grants from said state and by mesne conveyances, and set out by sections and quarter sections and other boundaries as follows:

Ocoee Land District, 6th Range, East of Basis Line, Second (2)

fractional township north, southeast and southwest quarters of s
tion 34, containing 320 acres, under grant No. 4607; southeast a
northwest quarters of section 33, containing three hundred a
twenty (320) acres, under grant No. 4608; southwest and southea
quarters of section 35, containing 320 acres, under grant No. 461
sections 2 and 11 containing 1280 acres, under grant 6398; all
fractional sections 1 and 12; under grant No. 6399; all of sections
and 10 under grant No. 6400; all of sections 20 and 21, under gra
No. 6401; all of sections 30 and 31, and northwest and southwest a
southeast quarters of section 32, containing 1760 acres, under gra
No. 6402; all of sections 17 and 19, and the northeast, southwe
and northwest quarters of section 18, containing 1760 acres, unde
grant 6403; all of sections 27, 28 and 29, under grant No. 6404; a
of sections 15 and 22, under grant No. 6405; all of sections 7 and
under grant No. 6406; all of fractional sections 14 and 23 unde
grant No. 6407; northwest and southwest quarters of fractional sec
tion 26, northeast and southwest quarters of section 33; northeas
and northwest quarters of section 34; northwest fractional quarte
of section 35, under grant No. 6419.

Ocoee Land District, 6th Range, East of Basis Line first (1) frac
tional township south, and southeast and southwest quarters of sec
tion 11, under grant No 4609; northeast and northwest quarters
of section 11, under grant No. 4610; northwest and northeast quar
ters of section 10, under grant No. 4611; Northeast and southwest
quarters of section 10, under grant No. 4612; northeast and south
east quarters of section 4, under grant No. 4613; southeast and
southwest quarters of section 3, under grant No. 4614; northwest
and northeast quarters of section 3, under grant No. 4615; north
west and northeast quarters of section 2, under grant No. 4616;
southeast and southwest quarters of section 2, under grant No. 4617;
northwest and southwest quarters, and a fraction of the northeast
and southeast quarters of section 1; northwest and southwest quarters
and fractions of southeast and northeast quarters of section
369 12, and northwest and southwest fractional quarters of section
13, under grant No. 6408; all of sections 5 and 6, and north
west and southwest quarters of section 4, under grant No. 6409; all
of sections 14 and 15 under grant No. 6410; and all of sections 8 and
9 under grant No. 6411;

Ocoee Land District, 5th Range, East of Basis Line, First (1)
Fractional township North and Southeast quarter of section 14,
under grant No. 5096; northeast, southeast and southwest fractional
quarters of section 12; all of section 13; northeast fractional and
southwest quarters of section 14 under grant No. 6412; northeast,
southeast and southwest quarters of section 35 and all of section
36 under grant No. 6413; sections 24 and 25, and the northwest
fractional and southeast fractional and the northeast quarter of
section 26 under grant No. 6414; northwest fractional quarter of sec
tion 14, southeast fractional quarter of section 15, northeast, south
east, northwest fractional and southwest fractional quarter of section
22; all of section 23, and northeast fractional quarter of section 27,
under grant No. 6416.

Ocoee Land District 5th Range, East of Basis Line, second (2) fractional township North, being all of section 1 and the southeast fractional, southwest fractional, and northeast and northwest quarters of section 2, under grant No. 6415.

Ocoee Land District Ranges 5 and 6 East of Basis Line, southeast quarter of section 18, fractional township 2, North, Range 6, and northwest quarter of section 35, fractional township 1, North and Range 5, under grant No. 8977.

Ocoee Land District, Range 6, East of Basis Line First (1) fractional township south, sections 19, 20, 21, 22, and 23 and northwest and southwest quarters of section 25, under grants numbered 6130, 6129, 6127, 6126, 5475 & 6125 containing thirty-five hundred and twenty (3520) acres, more or less and known as the Callaway tract.

Ocoee Land District, Range 6, East of Basis Line, First (1) fractional township south, and sections 26, 27 and 28 and southeast, southwest and northwest quarters of section 36, containing 2400 acres, more or less, and known as the Cooke or Hopkins lands.

Fractional Township 2, Range 6, North, East of Basis Line, and being northeast fractional quarter of section 23, northeast fractional quarter of section 35 and south half of fractional section 36, and northwest forty (40) acres of southwest quarter of section 6, known as the Geo. P. Wetmore tract.

370 Also Five Thousand (5000) acres, more or less, lying in 17th civil district of Monroe County, Tennessee, beginning in the center of Little Tennessee River, opposite the mouth of Slick-rock Creek; thence up the center of said river with its meanders when reduced to a straight line, south 68 degrees east 162 poles to a point in said river bearing south 2 degrees East from a spruce pine and a rock corner on the North bank of Tennessee river, the southeast corner of what is known as the Sanford tract in Blount County, Tennessee; thence south with the state line to stake and pointers and sweet gum tree on south bank of said river at foot of ridge forming the eastern divide and boundary of the waters of Slick-rock creek; thence up the leading ridge, giving approximately the bearings, the line running with the main crest of the ridge leading up to Hangover Mountain, being state line between Tennessee and North Carolina, and as follows: South 31 west 11 poles; south 51 west 2 1-2 poles; south 65 west 18 poles; south 72 west 14 poles to a stake on point of ridge; south 86 west 7 poles to a point on ridge; south 19 west 5 poles to blazed pine; south 53 1-4 west 12 poles to a point on ridge; south 63 west 11 poles to a point on ridge; south 85 3-4 west 11 1-2 poles to a chestnut; north 81 3-4 west 8 poles; south 69 1-2 west 21 3-4 poles to a chestnut; south 9 1-2 west 21 poles to a black oak; south 40 1-4 west 14 poles; south 62 west 4 1-2 poles to a hickory; south 3 1-2 east 5 9-25 poles; south 58 west 15 1-5 poles; south 10 west 15 17-25 poles to a dead tree; south 82 2-3 west 10 poles; south 12 west 15 1-4 poles to a pine; south 2 west 12 poles; passing a depression at 2 poles, to a point; south 29 west 3 4-5 poles; south 45 east 8 poles; south 30 east 22 poles, passing a depression at 10 poles, to a point at turn; south 7 1-2 west 8 poles; south 45 1-2 west 7 poles; south 68 west 10 9-25 to a small

black oak; north 86 3-4 west 3 7-25 poles to a point near a stone corner; south 28 3-4 west 16 1-5 poles, passing Sourwood Gap at 14 poles to small sourwood; south 15 1-4 west 17 3-5 poles to a black oak; south 35 east 6 6-25 poles to a point at turn; south 47 west 12 18-25 poles to a black oak; south 76 1-2 west 20 1-10 poles, passing an oak at 2 poles, to a chestnut oak; south 2 3-4 west 20 poles; south 15 east 9 poles; south 28 west 12 2-25 poles; south 46 west 4 22-25 poles; south 15 west 12 poles to a stake in Slick-rock Creek Gap; thence on Southwestwardly continuing with the state line on the leading ridge forming the eastern watershed of Slick-rock Creek and dividing the waters of Slick-rock Creek from those of Cheowah, including all lands on the waters of Slick-rock Creek to the
371 point in the state line between North Carolina and Tennessee, where the lands conveyed to Charles Hebard by deed of Fleming, Simonson and Rhinesmith, join to said state with the said Hebard land to the beginning, being same land conveyed by T. E. H. McCroskey and H. M. McCroskey to said Charles Hebard.

It is not intended herein to convey section 16 of the school land, which is located in second (2) fractional township north, Range 6, Ocoee District, East of Basis Line, nor forty-five (45) acres heretofore conveyed by the said Charles Hebard to W. P. Stratton, which is situated on Sassafras Mountain, and beginning at common corner of sections 20, 21, 28 and 29, first (1) fractional township south, Range 6, Ocoee District, east of basis line, and the same are hereby expressly excluded from the foregoing boundaries.

All the above described lands lie contiguous and in one body and are bounded on north by lands of Wetmore and Stephanson heirs; on the east by the state line between Tennessee and North Carolina; on the south by Wetmore and Stephanson heirs, W. R. Reynolds and others; and on the west by Wetmore and Stephanson heirs, the White Oak Flat lands, and the boundary line between the Ocoee and Hiawassee Land Districts.

The equitable title to all of the above described lands being in the parties of the first part by contract of purchase between themselves and Charles Hebard of the city of Philadelphia, in the form of an option, which said contract bears date July 16th, 1900, and in which it is set forth that the said Charles Hebard and wife have upon the date of said agreement executed to the said first parties, a deed with clause of special warranty, giving a description of the property contracted to be conveyed, and which deed was upon the same day deposited with Drexel & Company, Bankers of Philadelphia, to be by them held in escrow until final payment should be made.

Together with all and singular the tenements, hereditaments and appurtenances to the same belonging, or in anywise appertaining, and in reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate right, title, interest, property, claim and demand whatsoever both in law and equity, of the said parties of the first part, of, in, to or out of the said premises, and every part and parcel thereof.

To have and to hold the said premises, with all and singular the

appurtenances, unto the said party of the second part, its
372 successors and assigns, to and for the only proper use and behoof of the said party of the second part, its successors and assigns forever.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

Sealed and delivered in the presence of,

P. C. BLAISDELL. [SEAL.]
SARAH G. BLAISDELL. [SEAL.]
L. B. SEIBERT. [SEAL.]
SUE A. SEIBERT. [SEAL.]
H. H. COBB. [SEAL.]
EMMA LOUISE COBB. [SEAL.]
F. L. ANDREWS. [SEAL.]
MARY W. ANDREWS. [SEAL.]
F. A. RAYMOND. [SEAL.]
MARYETTE RAYMOND. [SEAL.]
S. A. HOLBROOK. [SEAL.]
PHEBE E. HOLBROOK. [SEAL.]
WALTER BLAISDELL. [SEAL.]
CORDELIA BLAISDELL. [SEAL.]

STATE OF PENNSYLVANIA,
County of Potter:

On the 7th day of February in the year of our Lord one thousand nine hundred and one, before me, the subscriber a Notary Public, came the above named L. B. Seibert and Sue A. Seibert, his wife, with whom I am personally acquainted, and they acknowledged the above indenture to be their act and deed, and desired the same might be recorded as such; and the said Sue A. Seibert, being of full age, and, separate and apart from her husband, by me examined, and the full contents of said indenture being first by me made known to her declared, upon such separate examination, that she did voluntarily and of her own free will and accord, sign, seal and as her act and deed, deliver the said indenture without any coercion or compulsion of her said husband.

Witness my hand and Notarial seal.

MILTON J. POTTER,
Notary Public.

STATE OF PENNSYLVANIA,
County of Potter:

On the 7th day of February, in the year of our Lord One thousand nine hundred and one, before me, the subscriber, a Notary Public, came the above named H. H. Cobb and Emma Louise Cobb, his wife, with whom I am personally acquainted, and they acknowledged the above indenture to be their act and deed, and desired the same might be recorded as such; and the said Emma Louise Cobb, being of full age and separate and apart from her husband, by me examined, and the full contents of said indenture being first
373 by me made known to her, declared, upon such separate examination, that she did voluntarily and of her own free will

and accord, sign, seal and as her act and deed, deliver the said indenture without any coercion or compulsion of her said husband.

Witness my hand and Notarial seal.

MILTON J. POTTER,
Notary Public.

STATE OF PENNSYLVANIA,
County of Potter:

On the 7th day of February, in the year of our Lord one thousand nine hundred and one, before me, the subscriber, a Notary Public, came the above named F. A. Raymond and Maryette Raymond, his wife, with whom I am personally acquainted, and they acknowledged the above indenture to be their act and deed, and desired the same might be recorded as such; and the said Maryette Raymond, being of full age, and separate and apart from her husband, by me examined, and the full contents of said indenture being first by me made known to her, declared, upon such separate examination, that she did voluntarily and of her own free will and accord, sign, seal and as her act and deed, deliver the said indenture without any coercion or compulsion of her said husband.

Witness my hand and Notarial seal.

MILTON J. POTTER,
Notary Public.

STATE OF PENNSYLVANIA,
County of McKean:

On the 9th day of February in the year of our Lord one thousand nine hundred and one, before me, the subscriber, a Notary Public in and for said county, came the above named S. A. Holbrook and Phoebe E. Holbrook, his wife, with whom I am personally acquainted, and they acknowledged the above indenture to be their act and deed, and desired the same might be recorded as such; and the said Phoebe E. Holbrook, being of full age and, separate and apart from her husband by me examined, and the full contents of said indenture being first by me made known to her, declared upon such separate examination that she did voluntarily and of her own free will and accord, sign, seal and as her act and deed, deliver the said indenture without any coercion or compulsion of her said husband.

Witness my hand and Notarial seal.

MOSES SULLIVAN,
Notary Public.

STATE OF PENNSYLVANIA,
County of Pennsylvania:

On the 11th day of February in the year of our Lord one thousand nine hundred and one, before me, the subscriber, D. H. Jark, a Notary Public, came the above named P. C. Blaisdell and
374 Sarah G. Blaisdell, his wife, with whom I am personally acquainted, and they acknowledged the above indenture to be their act and deed, and desired the same might be recorded as

such; and the said Sarah G. Blaisdell, being of full age, and separate and apart from her husband, by me examined, and the full contents of said indenture being first by me made known to her, declared, upon such separate examination that she did voluntarily and of her own free will and accord, sign, seal and as her act and deed, deliver the said indenture without any coercion or compulsion of her said husband.

Witness my hand and notarial seal.

D. H. JARK,
Notary Public.

STATE OF NEW YORK,
County of Kings, City of New York:

On the 1st day of April in the year of our Lord one thousand nine hundred and one, before me, the subscriber, George Eckstein, came the above named Walter Blaisdell and Cordelia Blaisdell, his wife, with whom I am personally acquainted, and they acknowledged the above indenture to be their act and deed, and desired the same might be recorded as such; and the said Cordelia Blaisdell, being of full age and separate and apart from her husband by me examined, and the full contents of said indenture being first by me made known to her, declared, upon such examination, that she did voluntarily and of her own free will and accord, sign, seal and as her act and deed, deliver the said indenture without any coercion or compulsion of her said husband.

Witness my hand and seal.

GEORGE ECKSTEIN,
Commissioner of Deeds.

STATE OF NEW YORK:
County of Kings:

I, Peter P. Huberty, Clerk of the County of Kings, and also Clerk of the Supreme Court for said County (said Court being a Court of record), do hereby certify that Mr. George Eckstein, whose name is subscribed to the Certificate of Proof of acknowledgement of the annexed instrument, and thereon written, was at the time of taking such proof or acknowledgement, a Commissioner of Deeds in and for the City of New York, residing in the Borough of Brooklyn in said County, commissioned and sworn and duly authorized to taking the same, and further, that I am well acquainted with the handwriting of such Commissioner, and verily believe the signature to the said certificate of proof or acknowledgement is genuine, and that the same is executed and acknowledged according to the laws of the State of New York.

375 In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court this 2nd day of April, 1901.

PETER P. HUBERTY, *Clerk.*

STATE OF PENNSYLVANIA,
County of Potter:

On the 7th day of February in the year of our Lord one thousand nine hundred and one, before me, the subscriber, a Notary Public,

came the above named F. L. Andrews and Mary W. Andrews, his wife, with whom I am personally acquainted, and they acknowledged the above indenture to be their act and deed, and desired the same might be recorded as such; and the said Mary W. Andrews, being of full age, and separate and apart from her husband, by me examined, and the full contents of said indenture being first by me made known to her, declared, upon such separate examination, that she did, voluntarily and of her own free will and accord, sign, seal and as her act and deed, deliver the said indenture without any coercion or compulsion of her said husband.

Witness my hand and notarial seal.

MILTON J. POTTER,
Notary Public.

STATE OF TENNESSEE,
Monroe County:

I, J. F. Allison, Register of said County, do hereby certify that the foregoing Deed together with the certificate of Probate, was received in my office for registration at 2 o'clock P. M. the 18th day of December, 1903, and was duly noted in Note Book No. "C," page 94, and recorded in Deed Book No. 8, page 399 et seq.

Witness my hand, at office, Madisonville, this the 22nd day of December, 1903.

J. F. ALLISON, *Register.*

STATE OF TENNESSEE,
County of Monroe:

I, J. F. Allison, Register of said County, do hereby certify that the foregoing is true and perfect copy of deed and certificates thereto attached as the same appear of record in my office.

This the 5th day of April, 1907.

J. F. ALLISON.

This indenture made and entered into on this 16th day of July, 1900, by and between Charles Hebard of Pequaming, Baraga County, Michigan, party of the first part, and Mary C., his wife and P. C. Blaisdell, W. F. Blaisdell, L. B. Seibert, H. H. Cobb, F. L. Andrews, F. A. Raymond and S. A. Holbrook, parties of the second part.

Witnesseth:

376 That the party of the first part, for and in consideration of the sum of Two Hundred and thirty-three thousand and Five Hundred Dollars, hereby bargains, sells, transfers and conveys to the parties of the second part, all his right, title, claim and interest in and to the following described real estate, to-wit:

Containing Forty-one thousand (41,000) acres, more or less, situated in the seventeenth (17) and twentieth (20) civil districts of Monroe County, Tennessee, in the Ocoee Land District, being the same tracts of land purchased by the party of the first part from J. H. Simonson, John Rhinesmith, Wm. Fleming's heirs, Mrs. Amelia Burgess and husband, Callaway heirs, Mrs. Mary E. Hopkins and husband, T. E. H. and H. M. McCroskey, Geo. P. Wetmore

and perhaps from others, the same covered by original grants from said state and by mesne conveyances, and set out by sections and quarter sections and other boundaries as follows:

Ocoee Land District 6th Range, East of Basis Line, second (2) fractional township north, southeast and southwest quarters of section 34 containing 320 acres, under Grant No. 4607; southeast and northwest quarters of section 33, containing three hundred and twenty (320) acres, under grant No. 4608; southwest and southeast quarters of section 35 containing 320 acres, under grant No. 4618; sections 2 and 11 containing 1,280 acres, under grant No. 6398; all of fractional sections 1 and 12, under grant No. 6399; all of sections 9 and 10, under grant No. 6400; all of sections 20 and 21, under grant No. 6401; all of sections 30 and 31, and northwest and southwest and southeast quarters of section 32, containing 1,760 acres, under grant No. 6402; all of sections 17 and 19 and the northeast, southwest and northwest quarters of section 18, containing 1,760 acres, under grant No. 6403; all of sections 27, 28 and 29 under grant No. 6404; all of sections 15 and 22 under grant No. 6405; all of sections 7 and 8, under grant No. 6406; all of fractional sections 14 and 23, under grant No. 6407; northwest and southwest quarters of fractional section 26; northeast and southwest quarters of section 33; northeast and northwest quarters of section 34; northwest fractional quarter of section 35 under grant No. 6419.

Ocoee Land District, 6th Range, east of basis line, first fractional township south and southeast and southwest quarters of section 11, under grant No. 4609; northeast and northwest quarters of section 11 under grant No. 4610; northwest and northeast quarters of section 10, under grant No. 4611; southeast and southwest quarters
377 of section 10, under grant No. 4612; northeast and southeast quarters of section 4, under grant No. 4613; southeast and southwest quarters of section 3, under grant No. 4614; northwest and northeast quarters of section 3, under grant No. 4615; northwest and northeast quarters of section 2 under grant No. 4616; southeast and southwest quarters of section 2, under grant No. 4617; northwest and southwest quarters, and a fraction of the northeast and southeast quarters of section 1; northwest and southwest quarters, and fractions of southeast and northeast quarters of section 12; and northwest and southwest fractional quarters of section 13, under grant No. 6408; all of sections 5 and 6, and northwest and southwest quarters of section 4, under grant No. 6409; all of sections 14 and 15 under grant No. 6410; and all of sections 8 and 9, under grant No. 6411;

Ocoee Land District, 5th Range, East of Basis Line, first fractional township north, and southeast quarter of section 14, under grant 5096, northeast, southeast and southwest fractional quarters of section 12; all of section 13; and northeast fractional and southwest quarter of section 14; under grant No. 6412; northeast, southeast and southwest quarters of section 35; and all of section 36, under grant No. 6413; sections 24 and 25, and the northwest fractional and southeast fractional and the northeast quarter of section

26, under grant No. 6414; northwest fractional quarter of section 14, southeast fractional quarter of section 15; northeast, southeast, northwest fractional and southwest fractional quarter of section 22; all of section 23 and northeast fractional quarter of section 27, under grant No. 6416.

Ocoee Land District, 5th Range, East of Basis Line, second fractional township north, being all of section 1, and the southeast fractional, southwest fractional and northeast and northwest quarters of section 2, under grant No. 6415;

Ocoee Land District, Ranges 5 and 6, East of Basis Line, southeast quarter of section 18; fractional township 2 north, range 6, and northwest quarter of section 35, fractional township 1, north and range 5, under grant No. 8977;

Ocoee Land District, Range 6, East of Basis Line first fractional township south, sections 19, 20, 21, 22 and 23, and northwest and southwest quarters of section 25, under grants numbered 6130, 6129, 6128, 6127, 6126, 5475, and 6125, containing thirty-five hundred and twenty (3520) acres, more or less, and known as the Callaway tract;

Ocoee Land District, Range 6, East of Basis Line, first fractional township south, and sections 26, 27 and 28 and southeast, southwest and northwest quarters of section 36, containing 2,400 acres, more or less, and known as the Cooke or Hopkins lands;

Fractional Township 2, Range 6, north, East of Basis Line, and being northeast fractional quarter of section 23, northeast fractional quarter of section 35, and south half of fractional section 36, and northwest forty (40) acres of southwest quarter of section 6, being lands purchased from Geo. P. Wetmore;

Also Five Thousand (5,000) acres, more or less, lying in 17th Civil District of Monroe County, Tennessee, beginning in the center of Little Tennessee River opposite the mouth of Slick Rock Creek; thence up the center of said river with its meanders when reduced to a straight line, south 68 degrees, east 162 poles to a point in said river bearing south 2 degrees east from a spruce pine and a rock corner on the north bank of Tennessee River, the southeast corner of what is known as the Sanford tract in Blount County, Tennessee; thence south with the State line to stake and pointers and sweet gum tree on south bank of said river at foot of ridge forming the eastern divide and boundary of the waters of Slick Rock Creek; thence up the leading ridge, giving approximately the bearings, the line running with the main crest of the ridge leading up to Hangover Mountain, being state line between Tennessee and North Carolina, and as follows: South 31 west 11 poles; south 51 west 2½ poles; south 65 west 18 poles; south 72 west 14 poles to a stake on point of ridge; south 86 west 7 poles to a point on ridge; south 19 west 5 poles to blazed pine; south 53¼ west 12 poles to a point on ridge; south 63 west 11 poles to a point on ridge; south 85¾ west 11½ poles to a chestnut; north 81¾ west 8 poles; south 69½ west 21¾ poles to a chestnut; south 9½ west 21 poles to a black oak; south 40¼ west 14 poles; south 62 west 4½ poles to a hickory; south

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3½ east 5 9-25 poles; south 58 west 15 1-5 poles; south 10 west 15 17-25 poles to a dead tree; south 82 2-3 west 10 poles; south 12 west 15¼ poles to a pine; south 2 west 12 poles, passing a depression at 2 poles to a point; south 29 west 3 4-5 poles; south 45 east 8 poles; south 30 east 22 poles, passing a depression at 10 poles, to a point at turn; south 7½ west 8 poles; south 45½ west 7 poles; south 68 west 10 9-25 poles to a small black oak; north 86¾ west 3 7-25 poles to a point near a stone corner; south 28¾ west 16 1-5 poles, passing sourwood gap at 14 poles to small sourwood; south 15 1-4 west 17 3-5 poles to a black oak; south 35 east 6 6-25 poles to a point at turn; south 47 west 12 18-25 poles to a black oak;
379 south 76½ west 20 1-10 poles, passing an oak at 2 poles, to a chestnut oak; south 2¾ west 20 poles; south 15 east 8 poles; south 28 west 12 2-25 poles; south 46 west 4 22-25 poles; south 15 west 12 poles to a stake in Slick Rock Creek Gap; thence on southwestwardly, continuing with the state line on the leading ridge forming the eastern watershed of Slick Rock Creek, and dividing the waters of Slick Rock Creek from those of Cheowah, including all lands on the waters of Slick Rock Creek to the point in the state line between North Carolina and Tennessee, where the lands conveyed to Charles Hebard by deeds of Fleming, Simonson, Rhinesmith join to said state line; thence with the said Hebard land to the beginning, being same land conveyed by T. E. H. McCroskey and H. M. McCroskey to the said Charles Hebard.

It is not intended herein to convey section 16 of the school land, which is located in second (2) fractional township north, Range 6, Ocoee District, East of Basis Line, nor forty-five (45) acres heretofore conveyed by the said Charles Hebard to W. P. Stratton, which is situated on Sassafras Mountain and beginning at common corner of sections 20, 21, 28 and 29, first (1) fractional township south, Range 6, Ocoee District, East of Basis Line and the same are hereby expressly excluded from the foregoing boundaries.

All the above described lands lie contiguous and in one body, and are bounded on north by lands of Wetmore and Stephenson heirs; on the east by the state line between Tennessee and North Carolina; on the south by Wetmore and Stephenson heirs, W. R. Reynolds and others; and on the west by Wetmore and Stephenson heirs, the White Oak Flats Lands and the boundary line between the Ocoee and Hiwassee Land Districts.

The title to all the above described lands being in the party of the first part, he doth hereby warrant the title to the same to the parties of the second part, their heirs or assigns, against the legal claims of all persons claiming by, through or under him, but no further or otherwise.

CHARLES HEBARD. [SEAL.]
MARY C. HEBARD. [SEAL.]

Witnesses to the execution of foregoing deed:
JULIA HEBARD.
H. C. TUXBURY.

STATE OF NEW YORK,
County of New York:

Personally appeared before me, H. C. Tuxbury a Notary Public, the above named Charles Hebard and Mary C., his wife, with whom I am personally acquainted, who in due form acknowledged
380 the above indenture to be their act and deed and desired that the same be recorded as such. And the said Mary C. Hebard, being of full age, and by me examined separate and apart from her husband, and the contents of the foregoing indenture first fully made known to her, declared that she did voluntarily and of her own free will and accord, seal, and as her act and deed deliver the same, without any coercion or compulsion of her said husband.

In testimony whereof, I have hereunto set my hand and seal, this 18th day of July one thousand nine hundred (1900).

HENRY CHASE TUXBURY,
Notary Public.

STATE OF TENNESSEE,
Monroe County:

I, J. F. Allison, Register of said County, do hereby certify that the foregoing deed, together with the certificate of probate, was received in my office for registration at 2 o'clock P. M. on the 18th day of December, 1903, and was duly noted in Note Book No. "C," page 94 and recorded in Deed Book No. 8, page 394 et seq.

Witness my hand, at office in Madisonville, this 19th day of December, 1903.

J. F. ALLISON, *Register.*

STATE OF TENNESSEE,
County of Monroe:

I, J. F. Allison, Register of said County, do hereby certify that the foregoing is true and perfect copy of deed and certificates thereto attached, as the same appear of record in my office.

[SEAL.]

J. F. ALLISON.

This 5th day of April, 1907.

And afterwards to-wit on April 10th, 1907, motion to dismiss petition was filed which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1651.

W. R. HOPKINS et al.
vs.
CHARLES HEBARD.

Motion to Dismiss Petition for Bill of Review.

Defendant, Smoky Mountain Land, Lumber & Improvement Company, comes by attorney and moves the Court to dismiss the

petition for leave to file bill of review in the case of Charles Hebard vs. D. W. Belding, et al., and said petition being filed by W. R. Hopkins, et al.;

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1st.

Because it appears from the petition for bill of review that the parties complainant and who are making the application are not parties nor privies in interest to the parties to said cause of Charles Hebard vs. D. W. Belding et al. while it does appear from said petition that the parties making the application are assignees.

2nd.

Because the bill of review tendered with the petition shows upon its face that D. W. Belding and others defendants to the original suit of Charles Hebard vs. D. W. Belding et al. who are seeking to file bill of review now have no interest in the subject matter in litigation in the original cause having sold and conveyed their interest to petitioner, W. R. Hopkins. The petition for leave to file bill of review is by W. R. Hopkins et al., while the bill of review is by other and different parties.

3rd.

The petition for bill of review nor bill of review tendered do not show when the final decree was pronounced in this Court so that the Court may adjudge whether the said application comes in time.
The final decree was pronounced in this Court July 13th, 1900.

4th.

Because said petition for bill of review is not presented within the time required by law.

T. E. H. McCROSKEY,
Att'y for Smoky Mt. Lumber & Imp. Co.

And afterwards to-wit on April 10th, 1907, an order granting leave to intervene was entered in said cause in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1651.

WILLIAM R. HOPKINS & Others, Petitioners,
vs.
CHARLES HEBARD.

This cause came on for hearing upon the record and was argued and at said hearing Mr. T. E. H. McCroskey, Attorney and Solicitor for the Smoky Mountain Land, Lumber & Improvement Co., appeared in open Court on behalf of said last named Company and

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asked to be made a party to these proceedings with leave to file a motion to deny the petition for leave to file said bill of review; because the applicants are not parties to the original case; because
382 complainants in the bill of review presented have no present interest in the lands described and in controversy; because said petition does not show the date when the final decree sought to be reviewed was entered; because the bill of review is not presented in time and is barred by lapse of time.

Leave to file said motion is hereby granted.

And on the same day to-wit on April 10, 1907, an entry was made upon the Journal in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

WILLIAM R. HOPKINS et al., Petitioners,
vs.
CHARLES HEBARD.

Before Lurton, Severens and Richards, C. JJ.

This cause coming on to be heard is argued on behalf of the petitioners by Mr. C. B. Matthews and Mr. E. P. McQueen and on behalf of the respondent by Mr. T. E. H. McCroskey and is submitted to the Court.

And afterwards to-wit on April 13th, 1907, an order granting leave to file bill was entered in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

WILLIAM R. HOPKINS et al., Petitioners,
vs.
CHARLES HEBARD.

On consideration of the petition for leave to file bill of review herein and upon arguments of counsel thereupon had, as well in support as against the same by Mr. C. B. Matthews and Mr. E. P. McQueen on behalf of the petitioners and by Mr. T. E. H. McCroskey on behalf of the Smoky Mountain Land, Lumber & Improvement Company, it is now hereby ordered by the Court that permission be, and the same is hereby granted the petitioners to apply to the Circuit Court of the United States for the Eastern District of Tennessee for leave to file such bill as counsel may be advised.

And afterwards towit on May 8th, 1907, a motion to limit time, etc., was filed clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

383

No. 1651.

WILLIAM R. HOPKINS et al.
vs.
CHARLES HEBARD.

In this cause defendant Charles Hebard moves the Court to amend the decree heretofore on the 13th day of April, 1907, entered in said cause, granting petitioner permission to apply to the Circuit Court of the United States for the Eastern District of Tennessee, for leave to file such bill as counsel may be advised.

The amendment hereby prayed is that a limited time be fixed by ths Court within which said application may be made.

I consent to a limit of ninety days from this date.

C. B. MATTHEWS,
Solicitors & Counsel for Petitioners.

Cin'ti May 8th, 1907.

And on the same day to-wit on May 8th, 1907, an amendment to decree was made which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

WILLIAM R. HOPKINS et al.
vs.
CHARLES HEBARD.

In this cause by consent of parties it is ordered by the Court that the decree heretofore entered on April 13, 1907, granting petitioners permission to apply to the Circuit Court of the United States for the Eastern District of Tennessee for leave to file such bill as counsel may be advised, be amended by limiting the time within which such application may be made to ninety days from and after May 8th, 1907.

And afterwards to-wit on May 17, 1907, an opinion was filed in said cause clothed in the words and figures as follows:

Opinion.

United States Circuit Court of Appeals, Sixth Circuit.

No. 1651.

WILLIAM R. HOPKINS et al.
vs.
CHARLES HEBARD.

Petition for Leave to File Bill of Review.

Submitted ——; Decided ——.

Before Lurton, Severens and Richards, Circuit Judges.

384 *Per Curiam:*

This is an application for leave to apply to the Circuit Court for the Eastern District of Tennessee for permission to file in that court a bill to review a final decree of that court, which, upon appeal, was affirmed by this court, in a cause styled David W. Belding et al., v. Charles Hebard. Without deciding any question which may be involved in the application for leave to file such a bill, this court for reasons satisfactory now consent that the petitioners may apply directly to said Circuit Court, which court will grant or refuse permission as it may be advised.

Board of Councilmen, City of Frankfort v. Deposit Bank, 124 F. R. 18.

Filed May 17, 1907. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of William R. Hopkins et al. vs. Charles Hebard, No. 1651, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 30th day of July, A. D. 1907.

[SEAL.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Filed Aug. 6, 1907. D. L. Snodgrass, Clerk, by W. L. Edington, Deputy Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. —.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, Fred W. Bruch, George Reeves, and John Matthews, Petitioners and Complainants,

vs.

CHARLES HEBARD, Defendant.

Entry in the Matter of Petition to File Bill of Review.

No. 1651.

The complainants having filed a motion in this cause, which motion is worded as follows: "Now come William R. Hopkins, Benjamin P. Bole, Edward I. Leighton, Fred W. Bruch, George Reeves and John Matthews, Complainants in the Bill of Review
385 herein in the name of David W. Belding, M. M. Belding, A. N. Belding, Henry Stix, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg and R. N. Archer, and move the Court to permit them to use the original record on file in this Court, and brought into this Court on appeal from the original decree in the case of Charles Hebard vs. David W. Belding, et al., numbered 783 on the docket of this Court; for the purpose of attaching same and making it a part of the record of the appeal from the Bill of Review filed in the Circuit Court of the United States, Northern Division of the Eastern District of Tennessee, for the purpose of saving the expense and delay in re-copying and sending up a new transcript of said original record."

On consideration of said motion by the Court, said motion is hereby granted, and it is ordered that the original record in the case of Charles Hebard vs. David W. Belding, and others, numbered 783 on the docket of this Court be and considered a part of the transcript upon the appeal taken from the finding of the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee, upon the Bill of Review filed in said original case of Charles Hebard vs. David W. Belding, and others, numbered 1056 on the docket of said last mentioned Court, and upon the certification of the transcript of the evidence and proceedings, entries and other papers filed on said Bill of Review, by the Clerk of said last mentioned Court, that the said transcript filed in the original case, and now in this Court, shall be attached to and be made a part of the transcript upon appeal from the finding and judgment upon said Bill of Review, and printed therewith by the Clerk of this Court, as the record for consideration upon the appeal from the finding and judgment of the Court on the aforesaid Bill of Review.

Solicitor for Complainants in the Bill of Review is authorized to send a certified copy of this entry to the Clerk of the Court at Knoxville, Tennessee, for his guidance.

United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of order entered November 12, 1909, in the case of William R. Hopkins, et al. vs. Charles Hebard, No. —, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

386 In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 12th day of November, A. D. 1909.

[SEAL.] FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

United States Circuit Court of Appeals for the Sixth Circuit. William R. Hopkins et al. vs. Charles Hebard. Certificate for Copy of Order of Nov. 12, 1909. Filed Nov. 13, '09. D. L. Snodgrass, Clerk, by C. A. Hill, D. C.

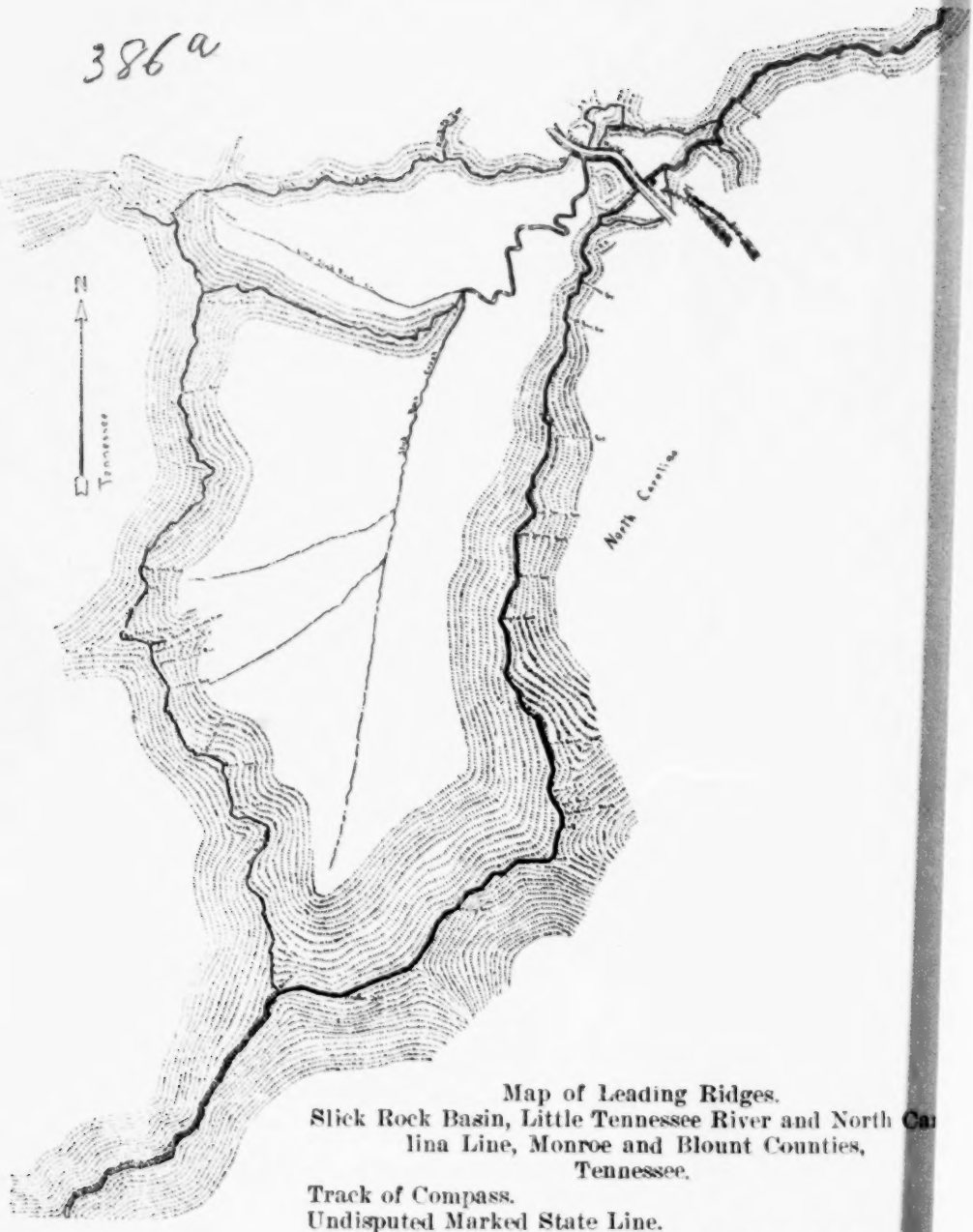
STATE OF TENNESSEE,
Monroe County:

Before me, S. Y. Minnis, a Notary Public in and for the County and State aforesaid, personally appeared O. W. Muller, who makes oath as follows:

I, O. W. Muller, am a citizen of Monroe County, Tennessee and have been a surveyor of lands for forty years or more, and was one of the surveyors in litigation over the State line at Slick Rock Creek in case of Charles Hebard vs. D. W. Belding et als. in the United States Circuit Court at Knoxville, Tennessee. That about the first of March 1905 at the request of Charles Seymour, an attorney at Knoxville, Tennessee, he, the said Muller, went to Nashville for the purpose of investigating the rumor of a newly discovered map showing location of the State line between North Carolina and Tennessee, and on investigation at Nashville, he found the purported map, and on the 3rd day of March 1905 he obtained for the benefit of Charles Seymour, a certified copy of said map which he turned over to said Seymour; that on the 5th day of March 1905 the Knoxville Journal & Tribune, a daily newspaper published in the city of Knoxville, Tennessee, published a description of said map, its discovery etc. and also a sketch outlining the plat of said newly discovered map; that affiant kept a copy of said paper showing said publication and he herewith files as exhibit "A" to this affidavit, the page of said paper giving a history and plat of said map.

O. W. MULLER.

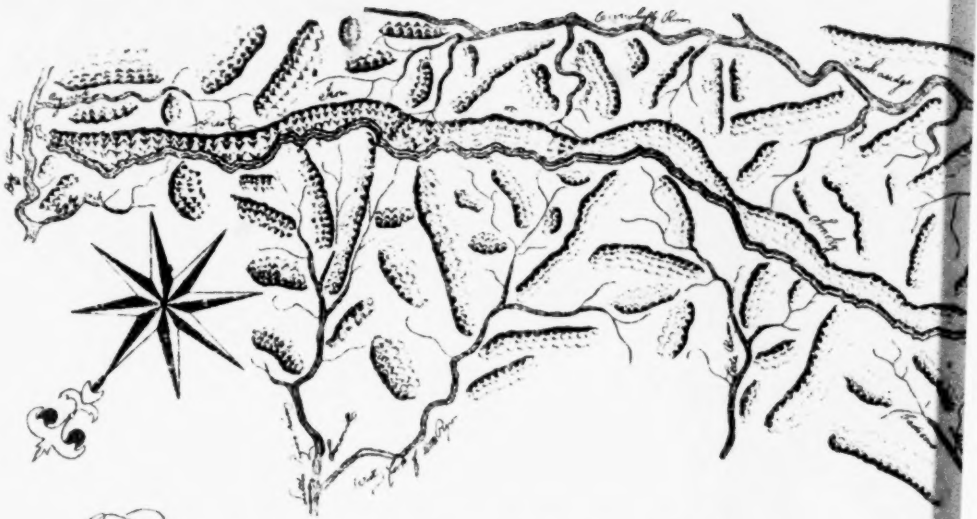
386a



Map of Leading Ridges.
Slick Rock Basin, Little Tennessee River and North Carolina Line, Monroe and Blount Counties, Tennessee.

Track of Compass.
Undisputed Marked State Line.
Exhibit "A" to Deposition of W. D. Hale.

386 b



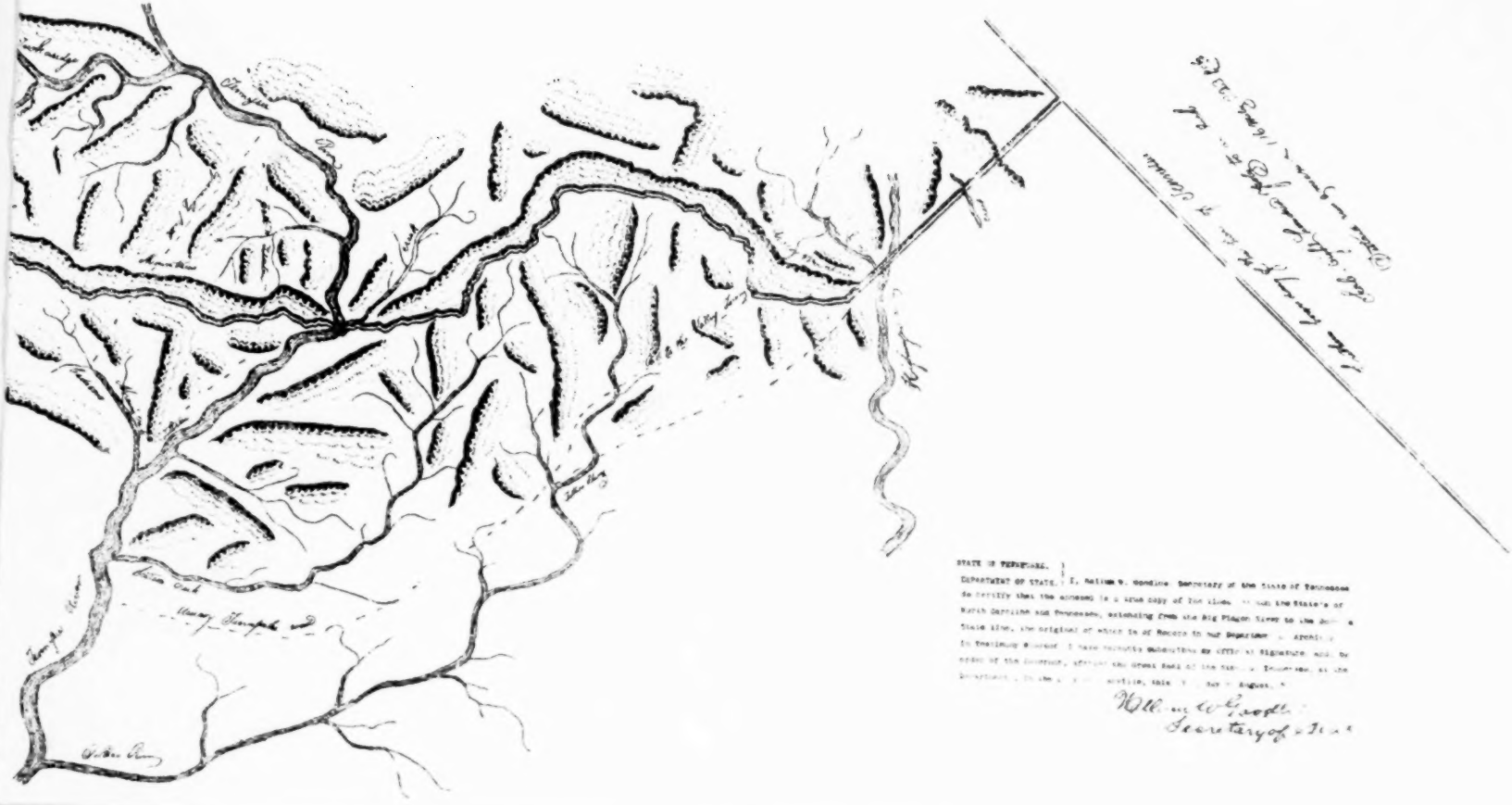
The Undersigned Abram Smith Esqr. Alexr. Gillon and Lewis Pray Commissioners and Robert Armstrong Surveyor on the part of the State of Georgia have met the Honble. Robt. Rutledge Thos. Lynch Esqrs. and Wm. Dewees Esqr. Commissioners on the part of the State of North Carolina to clearly Ascertain that the true Line and Corner Point of the Dividing Lines between the said States as altho' the same is marked by Mr. Comans map to the Southward have been by Mr Tonyn's Survey and Returns in the year of our Lord 1769 and Extending on the Boundaries which divide the said States of Georgia and South Carolina from the Mouth of Savannah

Robert Armstrong Surr. Georgia

Wm. Dewees Junr. Surr. Carolina

Abram Smith } Commrs. of Georgia
Lewis Pray }

James Jackson } Commrs. of
 } South Carolina

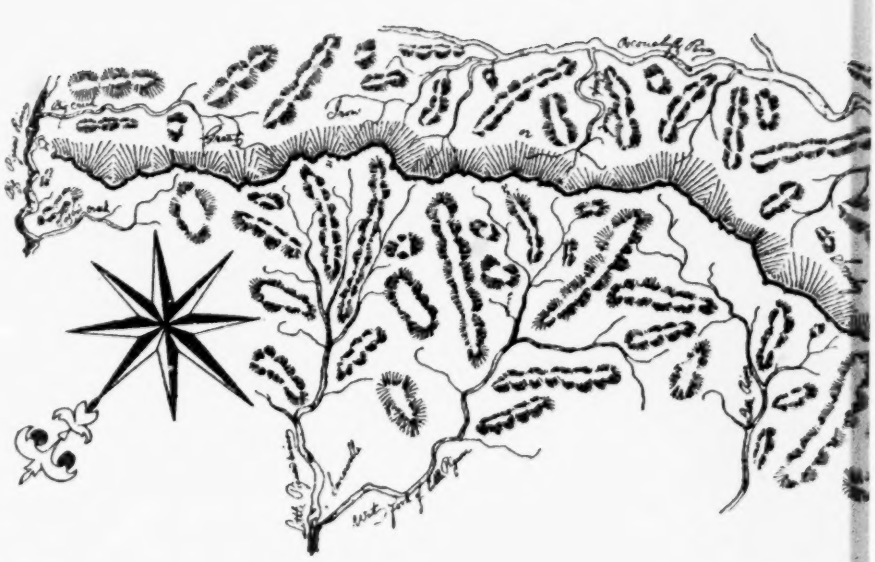


STATE OF TENNESSEE,
DEPARTMENT OF STATE.

I, William R. Goodloe, Secretary of the State of Tennessee do certify that the annexed is a true copy of the plan [illegible] run the State's of North Carolina and Tennessee, extending from the Big Pigeon River to the [illegible] State line, the original of which is of Record in our Department [illegible] In testimony whereof I have hereunto subscribed my official signature, and [illegible] seal of the Department, affixed the Great Seal of the State [illegible] Department, in the [illegible] Nashville, this [illegible] day of August, A

William R. Goodloe
Secretary of State

386 d



We the undersigned Alexander Outlaw, James Allen and Lemuel Riggs Com.rs appointed and Robert Armstrong Henry Ir. on the part of the State of Tennessee James Robinson Montfort Stokes and Robert Love Com.rs appointed and William Davenport Surveyor on the part of the State of North Carolina, Do Certify that the above is a true and correct plat of the dividing Line between the said States as Settled run and marked by us. Commencing on the dividing Line run by M.Dowall, James and Matthews in the year of our Lord 1799 and ending on the 35.th day Inst. which day the said States of Tennessee and North Carolina form the S.E. Corner of Georgia

Surveyed 1821

Robert Armstrong Com.r Tennessee

W.m Davenport Com.r N.Carolina

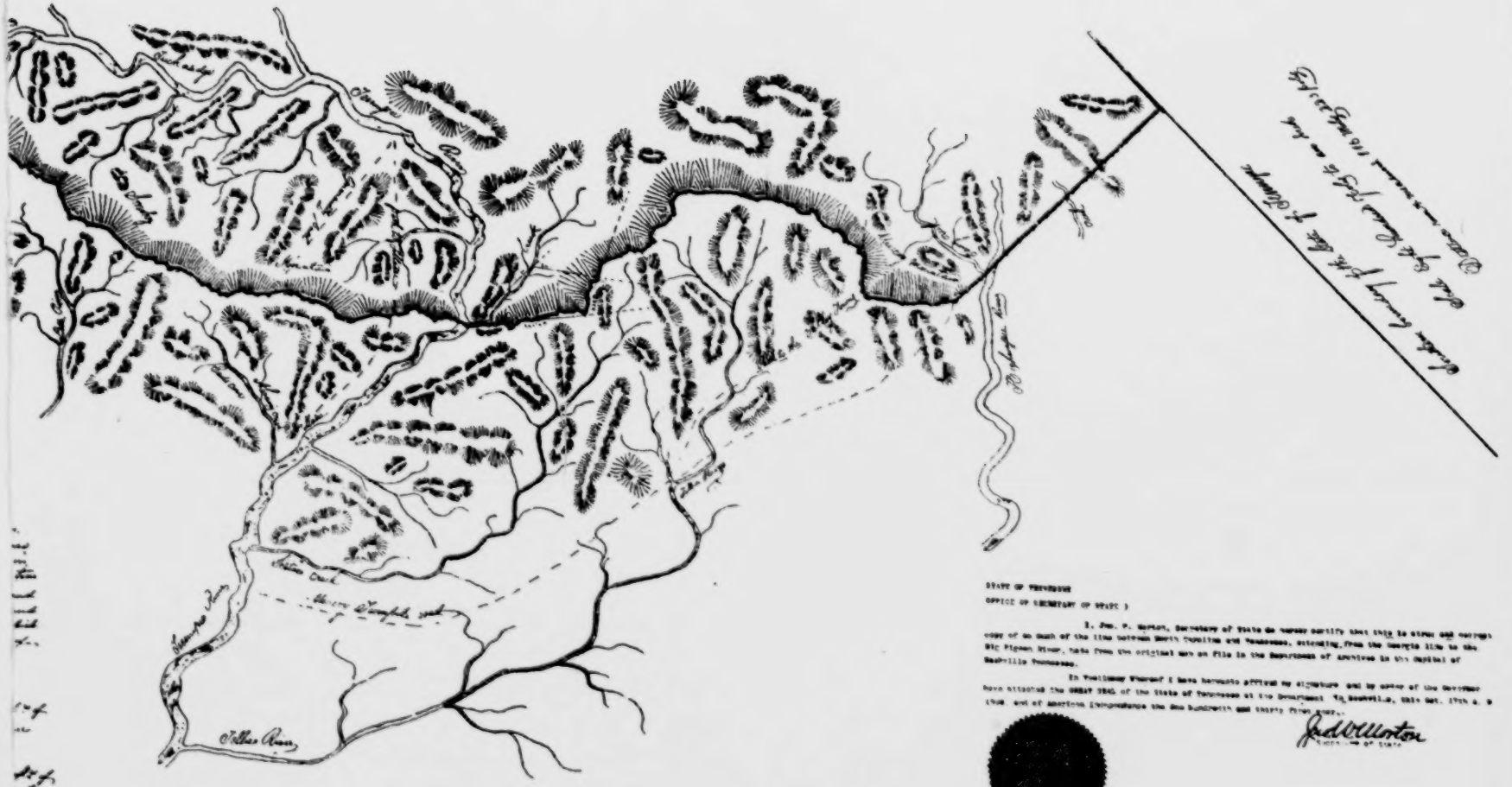
Wm Allen Com.r of Tennessee

Lemuel Riggs

James McLung Com.r of N.Carolina

Copied from the Original Survey in the State Archives at Nashville June October 14.th 1900

Wm M. Caldwell



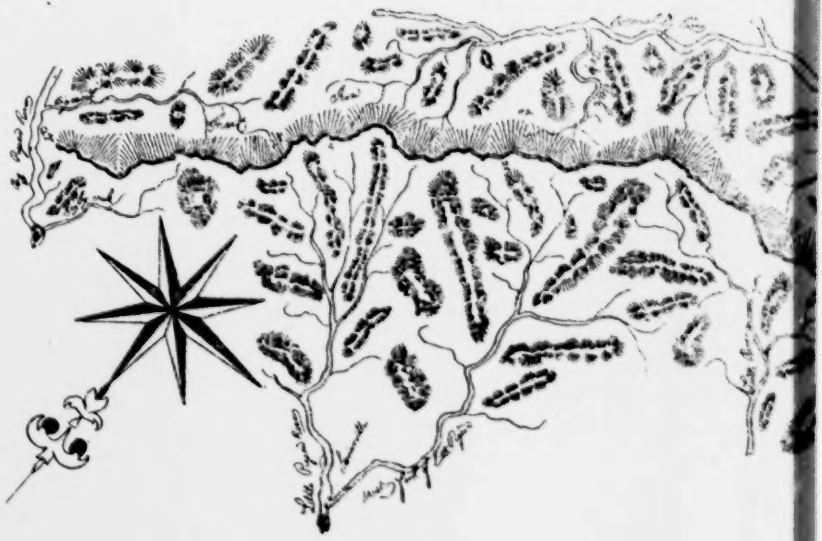
STATE OF TENNESSEE
OFFICE OF SECRETARY OF STATE)

I, Joe. C. Carr, Secretary of State do hereby certify that this is a true and correct copy of so much of the line between North Carolina and Tennessee, extending from the Georgia line to the Big Pigeon River, taken from the original map on file in the Department of Archives in the Capitol at Nashville Tennessee.

In Testimony Whereof I have hereunto affixed my signature and in virtue of the Statutes have attached the GREAT SEAL of the State of Tennessee at the Department in Nashville, this 9th day of October A.D. 1959 and of American Independence the One Hundredth and Eighty Third year.

Joe C. Carr
Secretary of State

386 2



We Commissioners Abraham de Peyster, Isaac Allen and Simeon Cary Surveyors and Robert Armstrong Surveyor on the part of the State of Tennessee James Nelson Benjamin Wells and Robert Love Surveyors and William Davenport Surveyor on the part of the State of North Carolina Do hereby certify that the above is a true and correct plat of the dividing line between the said States as settled run and marked by us commencing on the dividing line run by McDowell Brown and Northcut in the year of our Lord 1799 and ending on the Boundary line which divides the said States of Tennessee and North Carolina from the State of Georgia

Given under our hands this 13th day of May 1821

Robert Armstrong Surv.r Tennessee

Isaac Allen Surveyor of Tennessee

Simeon Cary

W.m Davenport Surv.r N.Carolina

James Nelson Surveyor of N.Carolina

Robert Love

Exam.d from the Original on the archives of the State House in Nashville Tennessee January 14th 1918

Edwin McGuire
Asst and Deputy Surv.r

STATE OF GEORGIA

DEPARTMENT OF STATE

I, JNO. W. NORTON, Secretary of the State of Georgia, do certify that the annexed is a true copy of

In Testimony Whereof, I have hereunto subscribed my official signature, and caused the Seal of the State of Georgia to be affixed at the Department of State, in the City of Atlanta, this the [illegible] day of [illegible] A. D. 1910.

Secretary of State.

386 f

JOURNAL AND TRIBUNE: KNOXVILLE, TENN., SUNDAY, MARCH 5, 1905.

ct Prescription Service

s KUHLMAN'S Crowning Achievement

WRIGHT'S BREATH GOLD TABLETS, 25c.

DUFFY'S PURE MALT WHISKEY KEEPS YOU WELL, $1.

SCHENK'S CATARRH, TWO SIZES, PER BOTTLE

DR. HOFF'S CONSUMPTION CURE, 50c.

HILL'S CASCARA QUININE TONIC, 25c.

LAXATIVE BROMO QUININE TABLETS STILL CUT TO 20c.

KUHLMAN'S MENTHOL INHALER, 25c. CUT TO 15c.

KUMMEL, SCHNEIDER SUPPLY, "TREATISE IT," 50c.

Rexall "Grip" Pills, 20c.
A Guaranteed Cure

Every REXALL preparation and other's specials GUARANTEE of money back, and these Pills will quickly break up the worst case of Grip and Influenza and like a new broom.

Laughlin's Fountain Pens.
"The Pen That's Known."
All Styles, $1 to $8.50

These are the Fountain Pens that never disappoint. They write when you want them to and never work over time, leaving no ink on your clothes and fingers. The Dollar ones are satisfactory, the higher priced ones are more elaborately finished.

Nail Nippers, 50c.
A Notable Manicure Department

We have a new Nail Nipper which is proving very popular with our clientele so that we have decided to put in an entire line. We are also showing Nail Polishers, Chamois, Emery Sticks, Orange Wood Sticks, Scissors, Files, Emery, and complete manicure sets as low as Two Dollars.

Atomizer Treatment
Quickly Cures Spring Colds

Don't be weary of with a cold in the head just get one of our good Atomizers and use it quick. We have them for nearly everything and for all. Only the best makes, such as your Physician specifies.



LOWNEY'S Chocolate Bonbons

Fresh Shipments
Constantly Arriving
10c to $3

From Kuhlman's Magic Fountain
Flows Any Desired Drink

Our Fountain serves as best as can be made and you may name [illegible]

Carry Fresh Fruits in Season

Shoe Dressings
For Spring Footwear

[illegible] Dressings in the Shades of Tan, Russet, Patent Leather, Dyeing and Polishing Sponges, Powders, Liquids and Pastes for [illegible] that will preserve and beautify your shoes. We have a full line of Shoe Dressings in the city, and SELL [illegible]

Kuhlman's Rubber Gloves
Are Worth More Than Their Prices

At ordinary Drug Stores you buy Rubber Goods of uncertain quality but at Kuhlman's you really get better value than you pay for.

Hot Water Bottles ..... 50c to $2.00
Fountain Syringes ..... 50c to $4.00
Marvel Whirling Spray Syringe $4.50 CUT to $3.00

Rubber Household Goods, $1.
Save the Hands

These Rubber Gloves come in many sizes, in black, white and red Rubber. They enable you to do your own household work without ruining your hands. We have [illegible] pairs of these [illegible] which we are offering [illegible] Dollar.

Bath Cabinets
Purify the System
And Prepare You for Spring

At the end of a long, disagreeable winter such as we have just had, the system should be thoroughly cleansed from any impurities and Kuhlman's Thermal Bath Cabinets delightfully accomplish that purpose. These are [illegible] Cabinets being [illegible] and should really [illegible] The Ten Dollar ones have a hood for steaming the face.

[illegible] to $6 Style Cut to $3.00

RENALL "57" HAIR TONIC, GROWS HAIR, 25c.

PONT'S HYGIENIC HAIR-TONIC,

LANZILLI'S VIOLET DE PARME, 75c. SIZE, 44c.

COLGATE'S VIOLET TOILET WATER, $1 SIZE, 74c. 50c SIZE, 37c.

FREEMAN'S MEDICATED FACE POWDER, [illegible] 25c.

TO DRIVE AWAY FLIES,

HEAD REMEDY, HAIR TONIC,

[illegible] SEA KELP, HAIR TONIC,

[illegible] PEARS' SOAP,

MARINELLO OUTFIT,

Nail Nippers, 50c.
A Notable Manicure Department

Atomizer Treatment
Quickly Cures Spring Colds

Chocolate Bonbons
Fresh Shipments
Constantly Arriving
10c To $3

From Kuhlman's Magic Fountain
Flows Any Desired Drink

Rubber Household Goods, $1.
Save the Hands

Both Cabinets
Purify the System
And Prepare You for Spring

KUHLMAN'S THE CUT RATE DRUG STORES

VALUABLE RECORDS LOST FOR FORTY YEARS

Have Recently Been Unearthed in the Rubbish Rooms of the Capitol at Nashville—Old Map of the Greatest Importance to State Line Affected.

THE XXth CENTURY SEWING MACHINE

SINGER "66"

Sold Only at Singer Store
510 Prince St.
Knoxville, Tenn.

Sworn to and subscribed before me on this the 7th day of September, 1907.

[SEAL.]

S. Y. MINNIS.
O. W. MULLER.

"Ex. A" to Dep'n of O. W. Muller. R. S. C. Hutchinson, Notary Public.

No. 1056. Exhibit F. Affidavit of O. W. Muller. In re David W. Belding et al. vs. Charles Hebard. Filed Sep. 9, 1907. D. L. Snodgrass, Clerk, by W. L. Edington, Deputy Clerk. McCroskey & Peace, Attorneys at Law, Madisonville, Tennessee.

(Here follow diagrams marked pages 386*a* to 386*h*.)

387 *Motion in the Matter of Bill of Review Herein.*

And afterwards towit on November 10, 1909, a motion in the matter of bill of review herein was filed which is in the words and figures as follows:

United States Circuit Court of Appeals, Sixth Circuit.

No. 1651.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, Fred W. Bruch, George Reeves, and John Matthews, Petitioners and Complainants,

vs.

CHARLES HEBARD, Defendant.

Now come William R. Hopkins; Benjamin P. Bole; Edward I. Leighton; Fred W. Bruch; George Reeves and John Matthews, complainants in the bill of review herein in the name of David W. Belding, M. M. Belding, A. N. Belding, Henry Stix, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg and R. N. Archer, and move the court to permit them to use the original record on file in this court, and brought into this court on appeal from the original decree in the case of Charles Hebard vs. David W. Belding, et al., numbered 783 on the docket of this court; for the purpose of attaching same and making it a part of the record of the appeal from the bill of review filed in the Circuit Court of the United States, Northern Division of the Eastern District of Tennessee, for the purpose of saving the expense and delay in re-copying and sending up a new transcript of said original record.

C. B. MATTHEWS,
Attorney for Petitioners and Complainants.

388 *Order.*

And afterwards towit on November 12, 1909, an order was entered in said cause which reads and is as follows:

United States Circuit Court of Appeals, Sixth Circuit.

No. 2031.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, Fred W. Bruch, George Reeves, and John Matthews, Petitioners and Complainants,

vs.

CHARLES HEBARD, Defendant.

The complainants having filed a motion in this cause, which motion is worded as follows: "Now come William R. Hopkins, Ben-

jamin P. Bole, Edward I. Leighton, Fred W. Bruch, George Reeves and John Matthews, complainants in the Bill of Review herein in the name of David W. Belding, M. M. Belding, A. N. Belding, Henry Stix, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg and R. N. Archer, and move the court to permit them to use the original record on file in this court, and brought into this court on appeal from the original decree in the case of Charles Hebard vs. David W. Belding et al., numbered 783 on the docket of this court; for the purpose of attaching same and making it a part of the record of the appeal from the Bill of Review filed in the Circuit Court of the United States, Northern Division of the Eastern District of Tennessee, for the purpose of saving the expense and delay in recopying and sending up a new transcript of said original record."

On consideration of said motion by the court, said motion is hereby granted, and it is ordered that the original record in the case of Charles Hebard vs. David W. Belding and others, numbered 783 on the docket of this court be and — considered a part of the transcript upon the appeal taken from the finding of the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee, upon the Bill of Review filed in said original case of Charles Hebard vs. David W. Belding, and others, numbered 1056 on the docket of said last mentioned court, and
389 upon the certification of the transcript of the evidence and proceedings, entries and other papers filed on said Bill of Review, by the clerk of said last mentioned court, that the said transcript filed in the original case and now in this court, shall be attached to and be made a part of the transcript upon appeal from the finding and judgment upon said Bill of Review and printed therewith by the clerk of this court, as the record for consideration upon the appeal from the finding and judgment of the court on the aforesaid Bill of Review.

Solicitor for complainants in the Bill of Review is authorized to send a certified copy of this entry to the clerk of the court at Knoxville, Tennessee, for his guidance.

On Appeal on Bill of Review.

Motion.

And afterwards towit on January 8, 1910, a motion was filed in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals, Sixth Circuit.

No. 2031.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, Fred W. Bruch, George Reeves, and John Matthews, Appellants,

vs.

CHARLES HEBARD, Appellee.

Now come the appellants and suggest a diminution of the record and order to attach to it the citation order of this court heretofore made in the case and also map prepared by the witness D. B. Burns, spoken of in the record as "Exhibit B" and "Exhibit B-2" and to dispense with the printing of the record of the original case of Charles Hebard vs. D. W. Belding and others, in which decree was entered in this court July 13th, 1900, and authorize the using of the record already printed and on file in this court.

C. B. MATTHEWS,
Solicitor for Petitioners and Complainants.

390 *Order.*

And afterwards towit on January 15, 1910, an order was entered in said cause which reads and is as follows:

United States Circuit Court of Appeals, Sixth Circuit.

No. 2031.

WILLIAM R. HOPKINS et al., Appellants,

vs.

CHARLES HEBARD, Appellee.

This cause came on for hearing upon the motion of the appellant suggesting diminution of the record in order to have the clerk of the court below attach to the transcript of the record the citation and certain maps, which were parts of the record sent with the transcript of record to this court, but unattached; and also to direct the clerk of this court, in printing the record in this case, to print only the transcript sent up on the bill of review.

Now, said motion is granted, and it is hereby ordered, opposing counsel consenting thereto, that said citation and maps be attached by the clerk of this court to the transcript herein, and

It is further ordered that the record in the original appeal, to-wit: in case No. 783, entitled D. W. Belding et al., vs. Charles Hebard, made a part of this record by a former order of this court, be not re-printed but that eight printed copies thereof be filed with the clerk of this court, said copies having been printed for use in the

United States Supreme Court in the State of North Carolina against the State of Tennessee.

391 And afterwards towit on June 15, 1910, an entry was made in said cause which reads and is as follows:

United States Circuit Court of Appeals, Sixth Circuit.

No. 2031.

WILLIAM R. HOPKINS et al.
vs.
CHARLES HEBARD.

Before Warrington, Knappen, C. J. J., and Cochran, D. J.

This cause is argued in part by Mr. W. R. Hopkins for the appellants and is continued until tomorrow for further argument.

And afterwards towit on June 16, 1910, an order of continuance was entered in said cause which is in words and figures as follows:

United States Circuit Court of Appeals, Sixth Circuit.

No. 2031.

WILLIAM R. HOPKINS et al.
vs.
CHARLES HEBARD.

This cause is continued and set for hearing as the second case for the October Session, 1910.

392 And afterwards towit on October 4th, 1910, an entry was made in said cause which reads and is as follows:

United States Circuit Court of Appeals, Sixth Circuit.

No. 2031.

WILLIAM R. HOPKINS et al.
vs.
CHARLES HEBARD.

Before Severens and Knappen, C. J. J., and Cochran, D. J.

This cause is argued in part by Mr. C. B. Matthews for the appellants and by Mr. William A. Stone for the appellee and is continued until tomorrow for further argument.

And afterwards towit on October 5th, 1910, an entry was made in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals, Sixth Circuit.

No. 2031.

WILLIAM R. HOPKINS et al.
vs.
CHARLES HEBARD.

This cause is further argued by Mr. William A. Stone and Mr. John F. Shields for the appellee and by Mr. C. B. Matthews for the appellants and is submitted to the court.

393 *Petition.*

And afterwards towit on January 27, 1911, a petition to remit the record was filed which reads and is as follows:

United States Circuit Court of Appeals, Sixth Circuit.

In Equity. No. 2031.

D. W. BELDING, M. M. BELDING, A. N. BELDING, HENRY STIX, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg, and R. N. Archer, Plaintiffs,

vs.

CHARLES HEBARD, Defendant.

Bill of Review.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, Fred W. Bruch, George Reeves, and John Matthews, Complainants,

vs.

CHARLES HEBARD, Defendant.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Sitting at Cincinnati:

Your petitioners, William R. Hopkins, Benjamin P. Bole, Edward I. Leighton, Fred W. Bruch, George Reeves and John Matthews, state that this case has been argued and submitted to this court and is now under consideration. That since the original hearing of this case on appeal in this court, there was discovered under peculiar circumstances, a map of the original survey of the state line between the states of Tennessee and North Carolina and a report of the joint commissioners who were deputed to locate and mark said line, which were supposed to be not in existence at the time

of the original hearing. These documents were discovered in
394 Nashville, and it appears in this case from the evidence that all documents connected with said original survey, which were deposited and filed in the capitol at Raleigh, North Carolina, were probably destroyed by the fire which occurred in the capitol at Raleigh in about 1835, and after the most diligent search no paper connected with the same could be discovered. It further appeared herein that the field notes of the surveyors who surveyed said line in connection with the joint commissioners in 1821, could nowhere be found.

Your petitioners state that on the 10th day of November, 1910, and since this cause on bill of review was argued and submitted to the court, the book of notes of that original survey was found by one Edmund Jones, Jr., a great grandson of William Davenport—who was one of the surveyors of the said party of 1821—in a secret drawer of an old sideboard formerly belonging to the said William Davenport, and which has ever since remained at his old home in Caldwell County, State of North Carolina, and in the possession of his family—labeled on the outside front page thereof, as follows:—"W. Davenport's Field Book, July 18th, 1821," and your petitioners are informed and believe that said field notes can be properly identified and authenticated, and will throw valuable light upon the point in controversy herein, towit:—the true location of the state line at the contested points between the said two states. That your petitioners only discovered the existence and whereabouts of these notes on or about the — day of — after a diligent search for the descendants if any, of each of the surveyors engaged in said survey of 1821.

Wherefore, your petitioners pray that this court will remit the record herein to the United States Circuit Court at Knoxville, Tennessee, and permit your petitioners to apply to said court for leave to file, properly identify and authenticate said notes, and thereupon certify to this court the said petition and notes as part of the record herein, for consideration by this court, along with the other evidence in the case on appeal.

WILLIAM R. HOKPINS,
BENJAMIN P. BOLE,
EDWARD I. LEIGHTON,
FRED W. BRUCH,
GEORGE REEVES,
JOHN MATTHEWS,
Appellants,
By C. B. MATTHEWS,
As Solicitor.

395 As solicitor for the appellants herein, and of counsel, I certify that this petition is not filed for delay, and that I believe the facts therein stated to be true.

C. B. MATTHEWS,
Solicitor of Appellants.

THE UNITED STATES OF AMERICA,
Western District of North Carolina, ss:

M. E. Cozad, having been first duly sworn, states that he is and has been for some years the agent of the appellants herein, within the state of North Carolina, in relation to their lands, and that he has seen the field notes mentioned in this petition; and is acquainted by information from the family of the said William Davenport,—who are not in any way interested in this cause and are said to be reliable and truthful people,—with the facts connected with the finding of said notes, including the date and place as mentioned above, and that he has every reason to believe that the statements in this petition are true.

M. E. COZAD.

Subscribed in my presence, and sworn to before me, this 26 day of January, 1911.

[SEAL.]

W. S. HYAMS,
Clerk U. S. Cir. Court,
By M. L. RAISON,
Deputy.

Bill in Equity.

And afterwards towit on February 2, 1911, an answer protest and brief were filed in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals, Sixth Circuit.

In Equity. No. 1651.

D. W. BELDING et al., WILLIAM R. HOPKINS et al.,
vs.
CHARLES HEBARD.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, sitting at Cincinnati:

396 Your respondents file this, their answer, protest and brief to the petition of William R. Hopkins, et al., filed January 27th, 1911, in the above entitled case, alleging that on the 10th day of November, 1910, the book of notes of the original survey was found by one, Edmund Jones, Jr., a great grandson of William Davenport, who was one of the surveyors of the said party of 1821, in a secret drawer of an old sideboard formerly belonging to the said William Davenport, labeled on the outside front page thereof, "W. Davenport's Field Book, July 18th, 1821," and that said field notes can be properly identified and authenticated, and will throw valuable light upon the point in controversy herein, towit, the true location of the state line at the contested points between the said two states, and praying that your Honors will remit the record herein to the

United States Circuit Court at Knoxville, Tennessee, and permit the petitioners to apply to said court for leave to file, properly identify and authenticate said notes, and thereupon certify to this court the said petition and notes as part of the record herein, for consideration by this court, along with the other evidence in the case on appeal, and in answer and protest to said petition, your respondent- say:

First. That the original decree of the Circuit Court of the United States for the Eastern District of Tennessee was affirmed by this Court on appeal, July 13th, 1900, which decree declared the title to the land in dispute to be vested in Charles Hebard and the claim of title of Belding et al. was declared void.

Subsequent to this decree by mesne conveyance, the Smoky Mountain Land, Lumber & Improvement Company, the respondent herein, purchased said land from Charles Hebard, and entered into possession of said land.

Second. That subsequent to the purchase of the respondents, and the recording of their deed in the county where the land lies, the petitioners herein purchased the title of Belding et al.

Third. That between December, 1903, and February, 1904, an alleged map of the Commissioners of Tennessee and North Carolina, together with their report, was found among waste in the capitol at Nashville, Tennessee.

Fourth. That on September 25th, 1906, the petitioners presented their petition in this court, alleging the discovery of said map alone, and praying the court to grant leave to file a Bill of Review on the ground of the after discovered evidence contained on the map.

This court referred said petition to the United States Circuit
397 Court of the Eastern District of Tennessee, which court granted permission to file the Bill of Review, and said Bill of Review was filed, December 17th, 1907, after being withheld for a long and unreasonable time by the petitioner before filing it in the said Circuit Court.

Fifth. The respondents promptly filed their answer, and in the taking of testimony every possible delay was made by the petitioners, and about two years elapsed before the testimony was completed.

Sixth. That in August, 1909, the testimony taken on the Bill of Review came up for argument before Judge McCall of the Circuit Court of the Eastern District of Tennessee, at Knoxville, whereupon the petitioners made an application for a continuance, alleging as a reason that a suit had been brought in the United States Supreme Court by the State of North Carolina against the State of Tennessee to determine the boundary line between the states in controversy between the parties in this suit, and the application for continuance was fully argued by counsel upon both sides, the respondents alleging that the location of the said line between the states in the Supreme Court of the United States could not affect the titles or equities of the parties in this suit, and that at most it would be the location of a line for jurisdictional purposes between the states, and that it would make no difference to the parties in this suit whether in the suit between the states the land was finally found to be in one

state or the other; and after full consideration, Judge McCall decided that the case must proceed when it was submitted to him on briefs.

Seventh. Judge McCall rendered his decision promptly, only taking nearly or quite a month to consider the case, dismissing the Bill of Review.

Eighth. That thereupon the petitioners removed the case into this court by appeal, and at the argument in June, 1910, the petitioners again made an application to postpone the consideration of this case until after the decision in the suit of North Carolina against Tennessee, and the application for postponement was fully heard and refused by this court, and the argument proceeded until it was found by one of the Judges, Judge Warrington, that he had been consulted as counsel for some of the parties in the case, and he refused to hear the case any further, and it was postponed until October 4th, 1910, when it came up for argument and was argued in this court.

Ninth. That at every occasion and at every opportunity the petitioners have delayed, postponed and hindered the progress
398 of this case, and have done everything in their power to postpone its decision and adjudication, and as a result of their unusual and unjustifiable efforts to postpone and delay this case, many years have elapsed since the respondent purchased and obtained a deed for the property and entered into possession of it; and during all this time the respondents could not take the risk of cutting timber upon the property while the title to it was questioned, and while they have had possession they have simply been compelled to pay taxes without enjoying the fruits of possession of their property, and the said decree of this court; and such proceedings *is* on the part of the petitioners, contrary to justice and equity.

Tenth. That the petitioners now come into this court and allege the discovery by a great grandson of William Davenport, one of the surveyors of the Commission of 1821, of the Book of Notes of that original survey, in a secret drawer of an old sideboard formerly belonging to the said William Davenp-rt, labeled on the outside front page, "W. Davenport's Field Book, July 18th, 1821," and with that information and belief that said field notes can be properly identified and authenticated, and will throw valuable light upon the point in controversy, to-wit, the true location of the state line at the contested point between the said two states.

This petition does not allege that the said Book of Notes contained the survey of the line adopted by the Commission, and for that reason is not valuable and relevant when taken into consideration with the evidence and findings of Judge Lurton of this court, that the commission ran tentative lines up Slick Rock Creek, in all probability which were afterwards abandoned, and the Hangover Range route adopted.

It will be remembered that the testimony in this case shows marked trees on the Slick Rock Route, claimed to be the line by petitioners, which the court found to have been abandoned as a line when the commission discovered that it was not on the highest range called for by the Cession Act, and a mere paper or book of notes of one of the surveyors locating a survey on Slick Rock Creek,

if such book does locate a survey on Slick Rock Creek, which is not alleged, would carry no additional weight to the testimony already given by the petitioners as to the marked trees on Slick Rock Creek.

Eleventh. If the alleged Book of Notes of Surveyor Davenport does locate a line on Slick Rock Creek in confirmation of the theory of the petitioners, it would be an absolute contradiction of the report of the Commissioners, who recite that after crossing the Ten-
399 nessee river they go from thence to the main ridge and along the extreme height thereof, and such book would only confirm what Judge Lurton has already found to probably be the case, that the Commissioners went up Slick Rock Creek marking trees, and then abandoned it in favor of the Hangover route.

Twelfth. That neither the Commissioners' report nor the map make any reference to nor call for Field Notes, nor is there any evidence that any were filed, nor do they create the presumption, if such field notes exist, that the Commissioners did not afterwards change their line in accordance with the Cession Act and in accordance with their report. The said alleged field notes at most, are the memoranda of the surveyor for North Carolina, and are not necessarily a survey of the line adopted by the Commission, and reported upon.

Thirteenth. That the statement in the petition that they will throw valuable light upon the point in controversy, is vague, uncertain and indefinite, and does not allege that they will even sustain or corroborate the theory of the petitioners.

Fourteenth. That the controversy here is whether the Circuit Court erred in dismissing the Bill of Review, and if the alleged discovery of the said Book of Notes should be considered by this court of sufficient merit and warrant to grant the prayer of the petition, another discovery of a new line tree or the field notes of a Tennessee surveyor, or anything else that might be made three months or three years afterwards, could be dragged into this case and set up as a reason for a review of it, and the changing of the decree.

Fifteen-. That the notes described in the petition would not have been relevant testimony on the original trial of this case for the reason that they are not the notes of the Commission nor any member of it, but the notes of the surveyor of North Carolina, employed by the Commission to accompany the Commissioners, and for the further reason that they are not mentioned in the report of the Commission, or the map, and there is no evidence, and can be none, that they were ever adopted by the Commission, or accepted by the Commission. They are nothing more than the private memoranda of one of the employees of the Commission, and there is no evidence, and none offered, and it is not proposed to offer any, that anybody connected with this Commission ever had any knowledge of these notes, but the surveyor who is alleged to have made them; and for the further reason that if they do describe a line
400 on Slick Rock Creek it is entirely contradicted by the map and by the report of the Commission.

Sixteenth. That if these notes were relevant and do corroborate

the theory of the petitioners they should have been produced on the original trial of this case, and this petition (which, for the purpose of this consideration, must be considered as a petition for a Bill of Review on other evidence than that described in the former petition) does not set up the essential requisite of a petition for a Bill of Review. It does not allege the fact that effort was made at the original trial to find the field notes of the surveyors.

Seventeenth. If the alleged field notes described in the petition do corroborate the theory of the petitioners as to the location of the line, they would at most be cumulative evidence only, and not such controlling evidence as must be set up in a petition for a Bill of Review, or a petition of this character on after discovered evidence.

Eighteenth. The respondents respectfully submit the authorities collated in their brief of argument filed in this case October 4th, 1910, to be found on pages from ten to thirty-six inclusive, in support of the statements herein made.

Nineteenth. There is no sufficient reason set up in the petition for granting its prayer, and if there was corroborative evidence of petitioners' theory as to the line located by the Commission of 1821, contained in these alleged field notes, this court ought not after this long delay to grant the prayer of this petition, and further disturb a title purchased in good faith on a decree of this court on the challenge of petitioners who bought against such decree, a void title, with a speculative law suit in contemplation, amounting to nothing more than a gamble in litigation.

Respectfully submitted,

THE SMOKY MOUNTAIN LAND, LUMBER & IMPROVEMENT CO.
PECK, SHIELDS & CLARK,
T. E. H. McCROSKEY,
WILLIAM A. STONE,
Solicitors.

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

Personally appeared before me, a Notary in and for said County and State, William A. Stone, who being duly sworn according to law says that he is Attorney and Agent for the respondents, the Smoky Mountain Land, Lumber & Improvement Company, in this
401 case, and the persons affected thereby, and that such facts as here set up in the above answer, protest and brief are true to the best of his knowledge and belief.

WILLIAM A. STONE.

Sworn to and subscribed before this 1st day of February, 1911.
[SEAL.] ALICE M. GODFREY,
Notary Public.

My commission expires Jan. 19th, 1913.

Motion to Dismiss.

And afterwards towit on Febraury 7, 1911, a motion to dismiss petition was filed which reads and is as follows:

United States Circuit Court of Appeals, Sixth Circuit.

In Equity. No. 1651.

D. W. BELDING, M. M. BELDING, A. N. BELDING, HENRY STIX, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg, and R. N. Archer, Plaintiffs,

vs.

CHARLES HEBARD, Defendant.

Comes defendant and moves court to dismiss petition filed in this cause for the following reasons:

1st. Because it is sought to have this court consider and pass upon evidence which has not been considered and passed upon by the lower courts.

2nd. There is no sufficient ground stated for Bill of Review or hearing; only the opinion of petitioners that the field notes can be properly identified and will throw valuable light on the point in controversy. A properly authenticated copy of said field notes is not exhibited nor is their substance given so that the court can judge of their materiality.

Respectfully submitted,

E. E. H. McCROSKEY,
F. F. SHIELDS,
WILLIAM A. STONE,
Att'ys for Respondents.

402 And afterward on the same day, to-wit, February 7th, 1911, an entry was made upon the journal in said cause which is in the words and figures as follows:

United States Circuit Court of Appeals, Sixth Circuit.

No. 2031.

WILLIAM R. HOPKINS et al.
vs.
CHARLES HEBARD.

Before Severens and Knappen, JJ.

Motion to remit the record to the court below with leave to apply to that court to introduce further evidence in this cause is argued by Mr. C. Bentley Matthews in favor of the motion and by Mr. Wm. A. Stone contra and is submitted to the court.

403 *Statement of C. B. Matthews, Solicitor.*

And afterwards towit on February 8th, 1911, statement of C. B. Matthews, Solicitor, was filed clothed in the words and figures as follows:

United States Circuit Court of Appeals, Sixth Circuit.

In Equity. No. 2031.

D. W. BELDING, M. M. BELDING, A. N. BELDING, HENRY STIX, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg, and R. N. Archer, Plaintiffs,

vs.

CHARLES HEBARD, Defendant.

Bill of Review.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, Fred W. Bruch, George Reeves, and John Matthews, Complainants,

vs.

CHARLES HEBARD, Defendant.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Sitting at Cincinnati:

C. B. Matthews, Solicitor for William R. Hopkins, Benjamin P. Bole, Edward I. Leighton, Fred W. Bruch, George Reeves and John Matthews, makes the following professional statement: That while he has no personal knowledge about the matters set out in the petition, he is informed by persons who are acquainted with some of the facts, and who obtained the balance of the facts from members of the family of William Davenport, that the said William Davenport, who lived and died in Caldwell County, in the
404 State of North Carolina, was the same William Davenport whose name purports to be signed as surveyor to the map of that portion of the state line between Tennessee and North Carolina, made in the year 1821, running from Pigeon River on the North East to the Georgia line on the South West, which map is the same map that was filed with the Commissioners' Report of such survey in the archives of the State of Tennessee at Nashville, and presumably also in the archives of the State of North Carolina at Raleigh. That in the original hearing of this case, neither the map, the report of the Commissioners nor the field notes of the surveyors, were found, and such fact was noticed in the original decision in the case of Belding vs. Hebard, in the 103rd Federal Reporter, by his Honor, Judge Lurton. That afterwards, the report and map were found under circumstances detailed in the proceedings upon Bill of Review herein, at Nashville, but the proof shows that after a most diligent

search no such papers could be found at Raleigh, and that they had probably been destroyed in a fire which consumed the state house at Raleigh in about the year 1835.

That during the year 1910 efforts were made to discover the whereabouts of any descendants of the said Davenport or the said Armstrong, who were two surveyors of said line in 1821, and after a most diligent search—aided by persons accidentally discovered, who were either remotely related to or acquainted with the family of said Davenport—there were discovered certain lineal descendants of that Davenport, and search was made by them; and on the 20th day of November, 1910—after this case was submitted to this court upon Bill of Review—in a secret drawer in an old secretary, which had always been in possession of the Davenport family at their homestead where the said William Davenport died, a copy of his field notes of the survey was discovered, and while they are not all in his handwriting portions of them are, and the balance in the handwriting of his wife, and both of these handwritings can be identified; and the subscriber is informed and believes that the title on the outside page of the notes is in the handwriting of the original Davenport, the surveyor, and there are people who can testify that the wife of said Davenport was in the habit of doing a good deal of writing for him.

I am informed, and believe, further, that it can be shown that these notes—such as they are—have always been in the
405 custody of the said Davenport, the original surveyor, and his immediate descendants, and are now there, and that the custody and identification thereof will be as strong as papers of that ancient date can be proven to be.

I herewith file a copy of said field notes, marked "Exhibit A" and call the attention of the court to the fact that the point in dispute in this case commences at the 64th mile circle, from one-half to seven-tenths of a mile North East of the Tennessee River, and the question is, whether it goes from that point directly across the river to Hangover, or to the mouth of Slick Rock Creek; and I particularly call attention to the 8th page, just above where it says August 15th, to the following:—

"South 75 West 320 Crossing Tennessee River to a large white pine So. side of the river at the mouth of a large creek 65th mile.

(August 15th.)

South 80 Up said creek."

and the balance of that page; and on page 9, to the courses and distances to the 69th and 70th mile, respectively, and the following words:

"Maple on the East side of said Creek 69th mile"

"Burch on the West bank of said Creek 70th mile"

and the figures, date and state line tree of the 71st mile, and also of the 72nd mile, and these words:—

"White oak 72 mile on a ridge between the aforesaid Creek and Citici Creek"

and to say that the Citici Creek and it headwaters are West of Slick Rock Creek, and come close to the Fodderstack Range, on to which we have claimed—after going up Slick Rock Creek—the state line goes, and there is no other range between what is called there "the Creek" Citici, than the Fodderstack Range, and the spur running up from the creek to it; and the angle first mentioned 75 degrees and the distance 320 poles—just a mile—corresponds to the straight line drawn on the map of 1821, which our engineer Burns testified ran South by 74-25′ West one mile, to the mouth of Slick Rock Creek.

As this is an application only for leave to apply to the court below to permit us to file these notes, and make proof by deposition as to the custody and identification thereof, we refrain at this time from taking such testimony for this court, but we ask instructions as to whether this court desires such testimony to be taken herein.

Appellants' solicitor in this case was informed of the finding of said notes for the first time when in Knoxville, Tennessee,
406 on or about the 3rd day of January, 1911, and immediately started a messenger to get a copy thereof; and he is informed and believes that nobody interested in this case knew of them or their existence until December 24th, 1910.

C. B. MATTHEWS,
Solicitor for Appellants.

EXHIBIT "A."

The following and every part thereof, is a true, complete and exact copy of the book of field notes, made by William Davenport, the Surveyor for the State of North Carolina, when the state line was run between North Carolina and Tennessee in the summer of the year 1821. The book of notes was found by Edmund Jones, Jr., on the 10th day of November, 1910, in a secret drawer of an old sideboard, formerly belonging to William Davenport; at his old home in Caldwell County. Both the home and the old sideboard are at present the property of his grandson William Davenport Jones, who, together with Mrs. Emma H. Gilley, was present when the book of field notes was discovered. Edmund Jones, Jr., is a great grandson of William Davenport. The notes are contained in a book six and a half inches long by four inches wide and are written on unruled paper. The book is stitched together with coarse thread, with heavy brown paper backs, and is in a perfect state of preservation. On the outside front page is written:

"W Davenport's
Field Book.
July 18th 1821."

"July the 19th 1821 Began at Cattalucha track to run the line between the State of North Carolina & Tennessee Marked a rock there on North Carolina side N. C. 1821 and on the other side T, E, N 1821—and runs with the line that J. M. Dowel M. Matthews & D. Vance run in the year 1799 and runs with said line about 2 miles and a half to where they stopped.

South 88 W 6 poles—Hickory
No 42 W 12 Do —Chestnut
South 64 W 14 Do Chestnut
South 50 Do 16 Do Bo
Do 64 W 27 Do —Pine
West 30 Do Chs't

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South 65 W 38 Do B. Gum
S 18 W 23 Poles
X S 30 W 60 Poles
X N 60 W 60 P
X S 75 W 100 P
X S 60 W 80 P
X West 80 P Chestnut 2nd M
X West 40 P
X S 75 W 30 P
X S 85 W 40 P
X S 50 W 50 P
X S 80 W 40 P
X N 80 W 50 P
X S 60 W 20 P
X N 80 W 50 P Maple 3rd M
X N 80 W 60 P
S 50 W 70 P to the top of the Smoky Mountains at a spring on the extreme height of the Mountain
X S 50 W 20 P
X S 30 W 80 P
X South 90 P burch 4th M
X S 20 E 40 P
X S 30 W 100 P
X S 15 W 120 P
X S 70 W 60 P red oak 5th M
X S 80 W 70 P
X S 30 W 100 P
X S 25 W 80 P to red oak in a low gap lay by on Sunday and Monday and set out tuesday morning
X South (30 W 70 Burch at 6 miles
due So 80
" 35 W 60
" 70 W 180 Spruce pine at 7 miles
X South 30 W 100
due West 100
X South 40 W 120 Spruce pine at 8 miles
X S 70 W 320 Spruce pine at 9 Miles
X S 80 W 228
X due South 40
X South 10 W 52 fir or balsom pine at 10 miles
X " 10 W 40 P
X " 65 W 80 P
X " 60 W 60 P

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X " 35 W 140 P Fir or balsom pine at 11 Miles.
X " 30 East 154 P
X due South 166 P Balsom pine at 12 Miles at the top
X South 160 P at top of main Smokey or Iron Mountain
X South 20 East 80 P on a high Mt. head of big (unintelligible) from the point to the (cannot be deciphered)
X South 40 west 80 P Bush at 13 Miles
X " 10 West 80 P
X " 55 West 80 P
X due West 80
X South 60 West 80 Spruce pine at 14 Miles on a high point of Smokey Mts
X due South 160 low gap
X South 30 West 80
X " 70 West 80 Burch at 15 miles
X South 40 West 80
X " 80 West 80
X " 35 West 80
X " 25 West 80 to a Burch & MT China tree at 16 miles in a low gap between East fork of Little Pigeon and Ocono Lufty River
X South 10 West 80
X " 25 West 60
X due South 40
X South 20 West 140 Spruce pine at 17 miles
South X 30 West 40
" 50 West 120
X " 75 West 80
due West 80 Fir or balsom at 18 miles
X South 80 West 40
X North 70 West 120
X North 45 West 160 Spruce pine at 19 miles
X South 60 West 40
due X West 220
North X 70 West 60 Spruce pine at 20 miles at the top of an extreme high pinacle in view of Sevensville
South X 50 West 260
" 70 W 60 Burch on high point at 21 miles
South X 85 W 40
" X 30 W 180
" X 10 East 100 Spruce pine at 22 miles

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X South 25 West 94 to Porter's Gap, from Porter's Gap
South 15 East 20 (30th July 1821)
" 50 West 60
30 West 60
70 W 86 Spruce pine at 23rd mile

South 30 W 80
80 W 40 to the Indian Spring waters of Lufty
80 W 40
60 W 160 Burch 24th mile
South 20 W 80
60 W 180
due South 60 Spruce pine at 25th mile
North 65 West 60 Spruce pine 25 mile, august the 1st 1821.

Balsom pine 29th mile the above corner is against the head of the west fork of Pigeon River near an old Indian Camp (aug the 2nd 1821—) which is at a low Gap at the head of Big Creek of Tennessee and if there ever is a wagon road through the Big Smokies Mountain it must go through this Gap.

5th of August 1821
South 20 West 160
South 70 West 160 Spruce pine and Burch 26th mile
South 55 West 100
40 West 160
West 60 Balsom pine 27th mile (Aug 6th 1821)
South 75 West 40
10 W 40
70 Wt 100
80 Wt 140 Beach 28th mile at the head of the South fork Lufty
West 160
South 45 Wt 80
30 Wt 80 Beach 29th mile Indian path at the head of deep or
South 20 Wt 80
50 Wt 60
15 Wt 80
30 Wt 100 Spruce pine 30th mile
South 55 Wt 320 Wild Cherry tree 31st mile (aug 7th
South 50 West 160 to Meiges (?) post
40 West 160 Balsom pine 32nd mile head of Little Rive
South 25 West 320 Balsom pine 33rd mile
South 75 West 100

410

South 40 West 120
80 West 100 Balsom pine 34th mile in view of Bears town
West 120
South 75 West 100
North 70 West 100 Spruce pine 35th mile
South 75 West 160
West 160 Buckeye 36th mile, in rich beech flat Aug 8th 1821
South 80 West 80
60 West 120

North 75 West 120 Mount China 37th mile.
West 160
South 50 West 40
due West 120 Beach 38th mile
South 70 West 180
North 60 West 140 Cherry tree 39th mile
North 60 West 320 Cherry three 40th mile
" 70 West 160
South 45 West 80
" 70 West 80 Beach 41st mile
South 70 West 80
10th of August 1821
due West 80
South 60 West 160 Beach 42nd mile
North 65 West 100
South 45 West 160
due West 60 Spanish oak 43rd mile
North 65 West 80
Due West 240 Beach 44th mile
South 80 West 320 Beach 45th mile head of West fork of Little River.
South 55 West 40
South 80 West 280 Beach 46th mile.
North 55 West 60
South 50 West 140
North 80 West 120 Beach 47th mile
South 55 West 160 (August 11th 1821
" 70 West 160 Buck eye 48th mile
Due West 320 Burch 49th mile, at head of Abrums Creek
South 40 West 100
North 70 West 120
South 50 West 100 Red oak 50th mile
Due West 80
South 30 West 40

411

" 10 West 100
" 10 West 100 Cucumber tree 51st mile
South 40 West 200
" 75 West 60
40 West 60 Chestnut tree 52nd mile. Notes compared to this place
South 75 West 120
35 West 100
60 West 100 White oak 53rd mile
South 35 West 200 (August 13th 1821
50 West 120 Red oak 54th mile at Equonutty path to Cades Cove
South 60 West 100
70 West 120
due West 100 Red oak 55th mile

South 60 West 320 Red oak 56th mile
due West 320 to the top of the bald spot in sight of Tellessee Old Town 57th mile
South 65 West 320 Red oak 58th mile in the edge of the second bald spot
South 25 West 320 Red oak 59th mile
South 45 West 160
25 West 160 Hickory 60th mile in a low Gap at the path from equinotty to Tellessee
South 20 West 60
50 West 100
South 20 West 100 Red oak 61st mile
South 20 West 60
South 60
South 50 West 100
due West 100 Locust 62nd mile
South 75 West 220
55 West 100 Red oak 63rd mile
South 30 West 40
45 West 80
35 West 80
60 West 120 Large White oak 64th mile
South 75 West 320 Crossing Tennessee River to a large white pine So side of the River at the mouth of a large Creek 65th Mile
(August 15th)
South 80 Up said Creek
40 West 80
70 West 40
South 60

412

due West 60 Spruce pine 66th Mile
South 65 West 80
20 West 60
70 West 40
20 West 140 Burch 67th Mile at Cheogee path
due West 140 (August 16th 1821
South 15 West 180 Sycamore 68th Mile
South 30 West 180
due West 20
South 35 West 120 Maple on East side of said Creek 69th Mile
South 30 West 320 Burch on West bank of said Creek 70th Mile
South 40
10 West 60 August 17th 1821
due West 60
South 30 West 200 Pine 71st Mile
South 35 West 80
80 West 160
30 West 80 White oak 72nd Mile on a ridge between the aforesaid Creek and Citici Creek

South 30 East 200
60 East 120 Red oak 73rd Mile
South 100
45 East 100
10 West 120 Maple 74th Mile
South 25 East 160
10 East 160 Beach 75th Mile Main Mountain
South 25 West 320 Spanish oak 76th Mile in a low Gap
South 25 West 100 (August 18th 1821
South 60
55 West 160 Red oak 77th Mile
South 20 West 40
70 West 80
South 40
L 45 East 160 Maple 78th Mile
South 15 West 100
70 East 100
30 East 120 Beach 79th Mile
South 20 West 260
10 East 60 Beach 80th Mile
South 100
60 East 220 Red oak 81st Mile
413
South 15 East 200
25 West 80
40 West 40 Beach 82nd Mile
South 40 West 40
50 West 160
40 West 120 Red oak 83rd Mile
South 40 West 320 Locust 84th Mile
South 40 West 120 (August 19th 1821
60 West 200 Chestnut oak 85th Mile
South 80 West 320 Holly tree 86th Mile near the head of Middle Fork of Tellico River
South 20 West 80
65 West 240 Red oak 87th Mile
South 80 West X 320 Red oak 88th Mile
South 80 West 100
North 80 West 60 (August 20th 1821
South 50 West 120
10 West 40 Hickory 89th Mile at the head of Beaver dam Creek
South 10 West 100
due West 100
North 60 West 120 White oak 90th Mile
due West 140
South 70 West 180 White oak 91st Mile
South 15 West 100
North 80 West 160
South 45 West 60 Red oak 92nd Mile
South 55 West 280

North 45 West 40 Red oak 93rd Mile to the trading path leading from the Valley Towns to the overhill settlements
North 45 West 80
South 80 West 120
North 25 West 120 White oak 94th Mile on said path
North 40 West 320 White oak 95th Mile on said path
North 40 West 50
70 West 50
South 45 West 80 (August 21st 1821
70 West 40
North 80 West 80
South 70 West 20 White oak 96th Mile on the top of Unicoy mountain
South 50 West 200
30 West 120 Red oak 97th Mile

414

South 40 West 160
60 West 160 Chestnut tree 98th Mile
South 60 West 200
XX
XX 40 West 120 Chestnut tree 99th Mile
South 45 West 220
20 West 100 White oak 99th Mile
South 60 West 200
40 West 120 Chestnut tree 100th Mile
South X 40 West 320 To a hickory on rock at a wagon road the 101st Mile "at the end of the Unicoy mountain

The next paragraph in the field notes evidently written at the same time and with the same pen and ink is as follows)—"Thence South 15 miles & 220 poles to post oak on the Georgie line at 23 poles West of the 72nd Mile from the Nickijack old town on the Tennessee River."

This appears to have been the end of the original field notes, but in a different ink the field notes which follow are given all in Colonel Davenport's handwriting. After the word Mile after the 101st the field notes go on as follows, "at the end of the Unicoy mountain and runs South 320 poles to a White oak tree 102 Miles (August 22 1821"

South 320 poles—to a pine 103 mile King Branch

South 252 poles to a Spruce pine on the bank of the Highawassee River below the mouth of Cane Creek and runs up the bed of said River upwards of a mile to a Maple on the south side marked Ixdra then the same course South 53 poles to a holly the 105 m aug 23rd

South 320 P Spanish oak 106th Mile.
South 320 poles to Post oak 107 Mile.
South 320 poles to a Spanish oak 108th Mile.
South 320 poles Post oak 109th mile.

South 320 poles crossing a creek to a white oak 110th Mile.
South 320 poles to a black oak 111th Mile.
South 320 to a Red oak 112th mile crossing a mountain

August 24th

South 320 poles to an oak 113th mile.
South 320 poles to a white oak 114th mile
415 South 320 poles to a Black Gum 115th mile.
South 320 poles to a post oak 116th Mile.
South 320 poles to a post on the Georgia line 23 poles West of the 72 mile on said line.

In the back of the book of field notes are the following entries:

"Co Mebane paid at Hill's for General Stokes.....87½
ferage and turnpike.....25
at upper turnpike.....50
at Asheville.....75
at Davdson.....37½

on next page

"Col Mebane paid W. D. expense from Knoxville home
Paid at Hill's.....87½
Paid at Nelson's.....75 cents
ferage &c.....25
at upper turnpike.....50
at Asheville.....75
at Davdson's.....37½

3.50"

On lower side of the page the following "37½ cents paid at Forbays by Gen'l Stokes for me Liet Col Maben $4."

On the outside of the last page of the cover is the following:

"Severe County election 18 (other two figures indistinct) for Govr Correll 492 Ward 38
For Congress Cocke 477
For Senate Gillespie 264 Lowery 241
Representative 498"

416 *Reply to Statement of C. B. Mathews, Solicitor.*

United States Circuit Court of Appeals, Sixth Circuit.

In Equity. No. 1651.

D. W. BELDING, M. M. BELDING, A. N. BELDING, HENRY STIX, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg, and R. N. Archer, Plaintiffs,

vs.

CHARLES HEBARD, Defendant.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, Fred W. Bruch, George Reeves, and John Matthews, Complainants,

vs.

CHARLES HEBARD, Defendant.

Bill of Review.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, sitting at Cincinnati:

Replying to the so-called statement filed by C. B. Matthews, Esq., Solicitor for Complainants, William A. Stone, Solicitor for the Defendant, says:

That said statement is irrelevant, irregular, uncalled for and not proper to be filed.

That the "field notes of the Surveyors," which are referred to in the original decision in the case of Belding vs. Hebard, 103rd Federal Reporter by his Honor Judge Lurton, were the presumed field notes of the Surveyors adopted and supposedly filed by the Commissioners.

That there is no evidence whatever that any field notes were ever filed, as neither the alleged map nor report refer to said notes, nor do either the Acts of the respective States adopting the Commissioners' report, refer to said field notes.

417 The alleged field notes referred to by Mr. Matthews are admitted by him at most to be but the private memoranda of William Davenport, the surveyor for the State of North Carolina in the employ of the Commissioners of 1821.

That it is no where alleged by the complainants in any of the papers filed, that any effort was made ever to find the private and personal memoranda of either the surveyor of North Carolina or the surveyor of Tennessee in the original case, nor in the Bill of Review case until long after the evidence had been closed.

That even this private memoranda of the alleged field notes of William Davenport is admitted by complainants to not be the original, since they are largely, if not wholly, in the handwriting of his wife.

That the said memoranda or notations are not legal evidence and could not have been admitted if offered in the original case.

And further that the attorneys for the defendant strongly object and protest against the continued efforts of complainants through their attorney, said C. B. Matthews, to file papers and hold open this case, and to injure and annoy the defendants in their long continued endeavor to protect the title to these lands, which this court decreed July 13, 1900, was in their predecessor, Charles Hebard.

WILLIAM A. STONE,
Solicitor for Defendant.

And afterwards towit on February 14, 1911, an entry was made in said cause which reads and is as follows:

United States Circuit Court of Appeals, Sixth Circuit.

WILLIAM R. HOPKINS et al.
vs.
CHARLES HEBARD.

This cause coming on to be heard upon a motion to remit the record to the court below for the purpose of applying to that court for leave to introduce additional evidence.

It is now here ordered that the motion stand over with leave to complainants' counsel to file within twenty days affidavits with respect to the authenticity of the field notes, and with leave to defendant's counsel to file within twenty days thereafter counter-affidavits.

418 *Notice to Take Depositions.*

And afterwards on March 6, 1911, the deposition of D. B. Burns was filed which is in the words and figures as follows:

United States Circuit Court of Appeals, Sixth Circuit.

In Equity. No. 2031.

D. W. BELDING, M. M. BELDING, A. N. BELDING, HENRY STIX, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg, and R. N. Archer, Plaintiffs,

vs.

CHARLES HEBARD, Defendant.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, Fred W. Bruch, George Reeves, and John Matthews, Complainants,

vs.

CHARLES HEBARD, Defendant.

Bill of Review.

The appellees in the above styled action will take notice that on the 27th day of February, 1911, (Monday) the appellants in said

action will take the deposition of D. B. Burns, to be used as evidence on petition to remit the record for further proof, at the office of Theodore F. Davidson (firm of Bourne, Parker & Morrison) at Asheville, in the County of Buncombe, State of North Carolina; between the hours of eight o'clock A. M., and six o'clock P. M. of said day, and the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

C. B. MATTHEWS,
Attorney for Appellants.

419 *Deposition of D. B. Burns.*

In the Circuit Court of Appeals, United States of America, Sixth Circuit.

In Equity. No. 2031.

D. W. BELDING, M. M. BELDING, A. N. BELDING, HENRY STIX, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg, and R. N. Archer, Plaintiffs,

vs.

CHARLES HEBARD, Defendant.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, Fred W. Bruch, George Reeves, and John Matthews, Complainants,

vs.

CHARLES HEBARD, Defendant.

Bill of Review.

The examination of witnesses beginning on the 27th day of February, 1911, on behalf of the appellants before me, G. A. Thomason, a Notary Public of the County of Buncombe and State of North Carolina, at the office of Theodore F. Davidson (Firm of Bourne, Parker and Morrison), at Asheville, in the County of Buncombe, and State of North Carolina in certain suits now pending in the Circuit Court of Appeals of the United States for the Sixth Circuit, wherein D. W. Belding, M. M. Belding, A. N. Belding, Henry Stix, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg and R. N. Archer are appellants, and Charles Hebard is appellee, and wherein William R. Hopkins, Benjamin P. Bole, Edward I. Leighton, Fred W. Bruch, George Reeves and John Matthews are appellants and Charles Hebard is appellee, commencing at three o'clock P. M. and ending at 5:30 o'clock P. M.

420 D. B. BURNS, a witness produced on behalf of the appellants, being first duly sworn, deposes and says as follows:

Examined by F. A. SONDLEY, Esq.:

Q. What is your name, age, residence and occupation?
A. D. B. Burns is my name; thirty-four years old. I reside in

Asheville, North Carolina. My occupation is a civil engineer.

Q. How long have you been engaged in the business of civil engineer?

A. I graduated at the University of West Virginia in the class of 1901. I have followed engineering continuously and no other line of work since that time, and I have been engaged in the land surveying for a greater portion of the time ever since I was about sixteen years old up until the time I entered college.

Q. What has been your experience, if any, in land surveying since you entered college?

A. I have spent possibly two or three years in land surveying since I entered college, not continuously but at different periods ever since my graduation and before.

Q. What has been your business during the remainder of the time since your graduation?

A. Well, I was either engaged in land surveying or railroad surveying ever since I graduated in the class of 1901. The first eleven or twelve months after my graduation I worked with the Niver Coal Company at Somerset County, Pennsylvania, in which I had charge of all the office work and making the calculations and drafting for a large coal field, embracing some two thousand acres. And after I resigned my position with them I went to Morgantown, West Virginia, and engaged in engineering, general engineering, with Professor R. L. Morris, and was with him for two or three years, and while with him I surveyed two or three different coal fields; the larger one was for the Cochran Coal & Coke Company that embraced about, somewhere between seven and fourteen thousand acres—I don't remember exactly. And I have surveyed numerous smaller coal fields, and a great deal of land, surveyed just a few tracts now and then. After I dissolved partnership with Prof. Morris
421 I work- for a short time with the Tide Water Railroad. I went from there to the Coal & Coke Railroad in West Virginia. I was with them on the construction work for about eight months. Then I went to the Baltimore & Ohio Railroad, and was engaged principally in preliminary and location surveys for about two and one-half years. I resigned my position with them and went to the Lake Shore and Michigan Southern Railroad, Cleveland, Ohio, in which I was engaged in drafting principally in masonry work for a belt line they were building around the city of Cleveland. I was with them about six months. I resigned my position and came South, and shortly after I came South I made a survey of the state line for Mr. M. E. Cozad and Mr. W. R. Hopkins, between the States of North Carolina and Tennessee in the disputed boundary, in the vicinity of Slick Rock Creek. Shortly after I completed the survey I have been engaged continuously on a large survey in Graham County, North Carolina, for Mr. M. E. Cozad, W. R. Hopkins and others and the Whiting Manufacturing Company jointly, and am still engaged with said companies.

Q. Have you had any experience in surveying mountain lands, and if so to what extent?

A. Yes, sir, the past two years I have been continually engaged in surveying mountain lands.

Q. You spoke of surveying in Graham County, North Carolina. How nearly is that county located as to its boundary on one side of the state of Tennessee?

A. One side of the county is the state line between North Carolina and Tennessee.

Q. Are you familiar with the portion of the state line between North Carolina and Tennessee in the vicinity of Slick Rock?

A. Yes, sir.

Q. Have you ever surveyed there in any view of the controversy in this suit?

A. Yes, sir.

Q. Where did you survey?

A. I commenced my survey at the point where the turnpike road crosses the Smoky Mountain on the north side of the Tennessee River.

Q. How far is that, please, sir?

A. About three and one-half miles north of the Tennessee River. I surveyed along the state line southwest to the Unicoi turnpike road, a distance of forty odd miles.

422 Q. Did you make any survey of the route as claimed by North Carolina for the location of the state line in that portion of the line which you said you surveyed? Did you make a survey of that part of it as claimed by North Carolina, that is in dispute, in other words?

A. Yes, sir.

Q. Did you make a survey of that portion of the country in what you understood to be the contention of the State of Tennessee?

A. I did.

Q. In this particular suit who maintains the location claimed by North Carolina, as you understand it, for this disputed part of the line——

A. I didn't quite get that question.

NOTARY: In this particular suit who maintains the location claimed by North Carolina, as you understand it, for this disputed part of the line——

Q. The appellants or the appellee in this case. The appellants, I will call your attention, are Hopkins and others.

A. Appellants.

Q. Do you know or understand whether or not the Tennessee contention is maintained by their opponents, the appellees?

A. I think so.

Q. The North Carolina contention that you have spoken of for this disputed line runs up what stream from the Tennessee River, and what course?

A. It runs a southwestwardly course up Slick Rock Creek for a distance of about five miles, and thence up the lead leading from Slick Rock Creek to the Big Fodder Stack, and thence along the Main Divide and the junction and so on.

Q. What is the Tennessee contention for that same portion of the line as you understand it?

A. The Tennessee contention, as I understand it, where the line comes to the river on the north side, they cross the Tennessee River at that point, and then go up a lead leading up over Hangover, Hayo and Stratton Bald to the Junction.

Q. How familiar are you with these two courses or routes?

A. Well, I am pretty familiar with them. I have been over both of them carefully.

Q. Do you know where Slick Rock Creek is?

423 A. Yes, sir.

Q. Do you know where the Cheoah River is?

A. Yes, sir.

Q. How do you know the location of Cheoah River?

A. I surveyed a line up Cheoah River from the mouth to the mouth of Big Snowbird, that is a distance of about twelve or fourteen miles, is my recollection. Then I have been all along the Cheoah River up to Robbinsville, and also up its different branches, Tallulah Creek and Snowbird.

Q. What is the extent of your familiarity with the intervening country between that and the ridge between Cheoah River and the ridge that has the state line upon it where there is no dispute, and in the vicinity of the state line where there is——

A. Well, I am familiar with all that country. I have been over the entire county. I don't suppose that there is very many places in Graham County that I have not been in.

Q. You say you have been in, what for—what purpose have you been in for?

A. For surveying.

Q. Did you ever see the map of the survey of 1821 discovered some years ago in the archives of the State of Tennessee?

A. Yes, sir.

Q. Did you have a copy of that with you at any time during your survey of the state line that you have spoken of which you made for Mr. Cozad, Mr. Hopkins and others?

A. Yes, sir, I had a certified copy of the original map of 1821 at the time that I went in there to make the survey.

Q. Are you familiar with its features—the features of that map of 1821?

A. Yes, sir.

Q. Did you ever see what purported to be a copy of the field notes of the survey of 1821?

A. Yes, sir.

Q. Made by William Davenport, one of the surveyors, in 1821?

A. Yes, sir.

Q. Have you the copy which you have seen or purported copy?

A. I have a copy which my wife made from a copy which purported to be made from the original notes, and I also saw the copy from which my wife made this copy that I have with me. I checked it very carefully with the copy—the original copy of it, and I say to the best of my ability it is an exact copy of the other.

424 Q. Will you please file that copy as an exhibit to your testimony and mark it Exhibit XX? (Filed and marked "Exhibit XX.")

A. I so file it.

Q. Did you make a diagram from those purported field notes of William Davenport of 1821?

A. Yes, sir, I made a plat from the field notes of 1821.

Q. Have you that plat of the line which you made from those field notes here?

A. Yes, sir.

Q. Will you please produce it as an exhibit to your testimony and mark it Exhibit YY?

A. Yes, sir, I will so produce it. (Filed and marked Exhibit YY.)

Q. How nearly does this Exhibit YY represent those calls on the purported copy of the alleged field notes of William Davenport?

A. I made this Exhibit YY by platting the courses and distances given in the copy of the notes that I had on a scale of eight hundred poles to the inch.

Q. Before you pass from that; is that the same scale as the map of 1821; if it is, I wish you would please state that to save that question?

A. It is the same scale as is given on the original plat of 1821. With possibly two exceptions it represents the courses and distances as were given in the original notes. There was two courses; one of them I believe between the 11th and 12th mile, and the other possibly between the 71st and 72nd miles, that I inserted a west for an east or vice versa, I don't remember which.

Q. Could you tell by this copy?

A. I can point them out by going through. With those two exceptions the Exhibit YY is made from the calls as contained in the copy of the notes that I had. My reason for making those two changes was because it harmonized with the original plat, and I thought that there might have been some error in copying the calls, and that the east had been used for a west or vice versa. I made no change in the figures, but just assumed that call east for west had been an error in copying the notes.

Q. The former of these occurred you said between the——

A. I think it was between the 11th and 12th miles.

Q. Is that in any disputed territory, or is the line undisputed between the two states at that point?

425 A. The line is undisputed there.

Q. Q. The second change that occurred between the 71st and 72nd mile is within, I believe, what is in controversy?

A. Yes, but it is the last call in the 71st mile. The copy that I have said South 30 West 80 poles to a white oak 72nd mile on the ridge between the aforesaid creek and Citico Creek, as it appears on the Exhibit YY, I platted it South 30 East.

Q. Now which way would correspond with the map of 1821, the way the copy of the notes which you had read, or the way you changed it to read as you have just said?

A. The way I changed it.

Q. The line at that point, I believe, runs along the top of a ridge?

A. Yes, sir.

Q. As called for in the original Cession Act. If you were not to make the change would it run with the top of the ridge there?

A. No, sir.

Q. Now I see that you have put down the Cheoah River in here; from what data did you put that down on Exhibit YY?

A. I made an actual survey of the Cheoah River for twelve or fourteen miles, and I put this Cheoah River on this plat from actual survey, or rather reduced that from a map which I platted by an actual survey, which amounts to the same thing.

Q. I see to a portion of the Tennessee River near the mouth, and at the mouth of Cheoah River is put down here, from what data did you plat that?

A. That was platted the same way from an actual survey.

Q. I see on here some waters marked Citico Creek. From what did you plat those in there. I will put it "the headwaters of that creek"?

A. I was governed in putting Citico Creek on there by the topographical map—the topographical map of the United States, and also from my knowledge of that country being along that ridge.

Q. Now, taking the shape of this line shown on plat Exhibit YY, at the point of controversy from the Tennessee River up to Junction, what would that shape or contour shown between the Tennessee River and Junction correspond with among the contentions; that of North Carolina and of the appellants in this case
426 on the one hand, or of Tennessee and appellees on the other?

A. It corresponds with the North Carolina contention almost exactly.

Q. What would be its shape in order to make it conform to the contention of Tennessee and of the appellees at that point or in that neighborhood?

A. At a distance of about seven miles from the Tennessee River gap there is a decided angle in a general direction to the left, and to follow the Tennessee contention at about the same distance it would show a decided angle in a general direction to the right.

Q. Going in what way in both cases?

A. In a southwesterly direction.

Q. At what point do these two contentions meet in going in a southwesterly course, and so that for a period there is no contention, or the boundary line is admitted?—Did you understand—after passing the Tennessee River?

A. At the junction is the place where——

Q. Could you indicate that on the Exhibit YY where the junction is?

A. Yes, sir.

Q. Please do so?

A. The junction is at the point 75th mile, which is marked on the plat.

Q. In the matter of distance, would either route, that claimed by North Carolina or Tennessee, make the junction at the 75th mile?

A. The route claimed by North Carolina makes it, I believe, the exact measured distance according to my survey was 9.97 miles.

Q. From what?

A. From the south bank of the Tennessee River to the junction, and the original plat and the notes from which I made exhibit YY show it to be ten miles, a difference of only 3-100 of a mile, while the Tennessee contention is about a mile and a half shorter.

Q. I see from those field notes that approaching the Tennessee River the call which crosses the river is South 75 West 320 poles crossing Tennessee River to a large white pine, south side of the river, at the mouth of a large creek 65th mile. Suppose you take a position approximately a mile from the Tennessee River and on the northern side at the point in the state line there undis-
427 puted, and follow that course, where would you reach the southern side of the Tennessee River?

A. It would take you very close to the mouth of Slick Rock Creek.

Q. Could you go upon that course and cross the Tennessee River at the point opposite where the marked line reaches the river?

A. No, sir.

Q. Could you take that course from that point mentioned and cross the Tennessee River at the mouth of Cheoah River?

A. No, sir; Cheoah River is in an easterly direction.

Q. Is there any other creek there that would meet the description of a large creek that you could cross at with that course?

A. No, sir.

Q. Other than Slick Rock Creek?

A. No, sir; Slick Rock Creek is the only creek that would take you anywhere near close to, and that course and distance would take you right almost exactly at the mouth of Slick Rock Creek, or possibly just a few hundred feet from the Tennessee River. It would land you on Slick Rock Creek. Slick Rock Creek is the only creek of any size coming into the Tennessee River from the south side in that neighborhood. The Cheoah River is the only other stream of any size that comes into the Tennessee River from that side. It is about a mile and a quarter from the point where the state line comes to the said river. It is an easterly course, while the course called for in the notes is a westerly course, South 75 west.

Q. Next call is South 80 up said creek. What stream could follow correctly at that neighborhood?

A. That follows Slick Rock Creek exactly, you might say.

Q. How would it be in regard to Cheoah River, if you were to start from its mouth and go up it 80 poles, as to the course you would follow. Could you take that and run South or not?

A. No, sir. The general trend of Cheoah River is about South 45. It is a southwesterly course, the general course of Cheoah River is.

Q. Then if you were to start from the mouth of the Cheoah River and run south would you be going from the river or with it?

428 A. You would be going away—further away from the river.

Q. In what direction would you be leaving it?

A. You would leave Cheoah River to your left.

Q. Suppose you were to assume however, that you should follow the Cheoah River from its mouth up it 80 poles, and then should take the next call of these alleged field notes, South 40 west 80 poles, would you follow the Cheoah River?

A. No, sir; you would go right away from Cheoah River, almost at right angles.

Q. Suppose you should, however, take the call 80 poles up the river from its mouth, and then 80 poles again up it, and from that point take the third of these calls, after passing the Tennessee River, I mean South 70 west 40 poles, would you follow the Cheoah River or not?

A. No, sir; you would go away from it.

Q. And suppose that you should assume though that the end of that call is on the Cheoah River, and was 200 poles from the mouth, the aggregate distance given for the three last calls, and then should take the next call, South 60 poles, would you be going up the Cheoah River or not?

A. No, sir; still go away from it.

Q. Suppose you then substitute the end of that line out in the Cheoah River, and then take the next line of these calls, due west 60 poles would you go with the river or not?

A. No, sir; you would leave it almost at right angles.

Q. Could you possibly follow these calls in this alleged copy of alleged field notes approximately so as to keep up the Cheoah River after you pass the Tennessee?

A. No, sir; the Cheoah River—the general course of the Cheoah River—the general trend of the Cheoah River is about at right angles of the courses and distances given in those notes.

Q. About how nearly will these notes follow the Slick Rock Creek for five miles from the Tennessee River from the 65th mile up to the 70th mile?

A. Well, they follow the general course of the creek exactly. Of course the courses shown in the field notes do not show you every little turn in Slick Rock Creek, but the general course of the calls for five miles after crossing the Tennessee River correspond exactly to the general course of Slick Rock Creek for five miles.

Q. I see that after the line, according to these alleged field notes, passes the Tennessee River at the 65th mile, it calls for the
429 67th mile, a birch at Cheogee path. What do you find there if you go up the Slick Rock Creek route?

A. The distance of two miles from the Tennessee River up Slick Rock Creek there is an old trail that crosses Slick Rock Creek coming through Slick Rock Gap and going there into the Tennessee country. I don't know what the name of the trail is. It is commonly called the Belding trail in that country as far as Slick Rock Creek, but I don't know the name of the trail; there is an old trail

in there. It crosses Slick Rock Creek at two miles and eleven feet according to my survey.

Q. Two miles and eleven feet from what? I did not get that.

A. From the Tennessee River, and I suppose that is the trail referred to in the notes as the Cheogee path.

Q. It is, as I understand you, at the same distance as the Cheogee path from the Tennessee River?

A. Yes, sir.

Q. Now, I notice at the end of the 69th mile as called for in these alleged notes, it says a maple on the east side of said creek. How would that correspond with the Slick Rock road or way for the state line to run?

A. It would correspond exactly.

Q. Could you make that course and distance take you to a point on Cheoah River anywhere starting from the Tennessee River at the mouth of Cheoah?

A. No, sir; if you would run the courses and distances from the mouth of Slick Rock Creek, it would follow the general course of Slick Rock Creek almost exactly and it would take you some five or six miles from the Cheoah River.

Q. Now I see the end of the 70th mile, according to these alleged field notes, is a birch on the west bank of said creek. How would that correspond with going up Slick Rock Creek?

A. It would correspond.

Q. How would it with going up Cheoah?

A. It would be going further away from Cheoah River all the time.

Q. The next mile called in the alleged notes is a pine, the 71st mile, and then the next is a white oak 72 mile on a ridge between the aforesaid creek and Citico Creek; where would the Slick Rock Creek route for this line place that 72nd mile?

430 A. It would place it just a little bit southwest of the Big Fodder Stack, possibly a quarter of a mile on the divide between Citico Creek and Slick Rock Creek.

Q. Suppose you were to take these calls of the alleged notes and start from the mouth of Cheoah River, and follow them from the 72nd mile, would you be on a ridge between the waters of Citico and Cheoah River?

A. No, sir, you would be, if you would follow them for five miles, and then leave Cheoah River, and try to get the nearest point on the divide between Citico Creek and Cheoah River, it would be five miles. Whereas, if you go up Slick Rock Creek you leave Slick Rock Creek at a distance of five miles from its mouth, you can get between the divide, Citico Creek and Slick Rock Creek, in two miles—less than two miles as spoken of in the field notes.

Q. Please indicate at what point on the map of 1821 that 72nd mile would be on the line shown there by describing the location of the 72nd mile on that map.

A. That would be at a point seven miles southwest from the Tennessee River up near to the point where the line makes a decided angle to the left, and which we believe to be a Big Fodder Stack.

Q. Where is Citico Creek?

A. Citico Creek is on the divide between the headwaters of Slick Rock Creek, or rather the ridge running from Little Fodder Stack to the Big Fodder Stack, and on to the Junction, or a little past the Junction or water shed; to your right would be Citico Creek.

Q. In what state are the waters of Citico Creek?

A. Tennessee.

Q. Now is there any other stream than Slick Rock Creek either that I have mentioned or not mentioned, that you could follow these calls which I have read to you and get on the ridge in the distances given, by the course given, to the ridge referred to being between Citico and said Creek?

A. No, sir, Slick Rock Creek is the only creek that will fit the description in the neighborhood where the state line comes to the Tennessee River on the North side, and where it is undisputed.

Q. How nearly do the headwaters of Citico lie to this line between the State of North Carolina and Tennessee, adopting the contention of the appellants for its location?

A. Well, they don't reach the water shed of Citico Creek
431 until they get to the junction. No part of the line claimed by Tennessee in the disputed section is on the waters of Citico Creek at all.

Q. How nearly would you pass to the headwaters of Citico Creek in going from Big Fodder Stack to the Junction along the line contended for by the appellants.

A. The land claimed by the appellants is, from the Big Fodder Stack to the Junction, is exactly on the water shed between Citico Creek and Slick Rock Creek.

Q. If you cross the Tennessee River there going southwardly with the state line at the point opposite the line as marked reaches that river, and used the courses and distances given thereafter in these alleged notes, state whether or not you could get up the Hang Over Ridge?

A. No, sir, you would get further away from the Hang Over Ridge?

Q. Suppose you were to cross at the mouth of Cheoah River, and follow those field notes thereafter, would you be able to go up the Hang Over Ridge?

A. No, sir, you might cross the Hang Over Ridge. I am positive about that. You could not follow along that.

Q. I see that these notes call for a tree on that creek mentioned just after crossing the Tennessee River, sometimes on one side of that creek and sometimes a tree on the other side of that creek, would it be practicable for surveyors or not in going up Slick Rock Creek to pass over the creek back and forth so as to make a tree sometimes on one side and sometimes on the other as a corner or line tree?

A. Yes, sir, it is convenient in a great many places to cross and recross the creek, and it is possible to cross and recross Slick Rock Creek by a surveyor.

Q. How practicable would that be up the Cheoah, if you started at its mouth for a distance of five miles?

A. You can't cross Cheoah River without a boat or raft. There are sometimes a few places possibly that you can wade it. But you couldn't cross it without getting wet. There are a few places you can cross it without a boat or raft.

Q. Could you on Slick Rock Creek in crossing it up five miles?

A. You can cross Slick Rock Creek on the rocks most any place.

Q. Much obliged.

432 Governor STONE: We want to enter this objection to the testimony of Burns as being unauthorized by the order of court, not in contemplation of it, and entirely irrelevant and immaterial to the order.

Cross-examination:

By Mr. T. E. H. McCROSKEY:

Q. Mr. Burns, I notice in your map that you have filed that you have Slick Rock Creek located. Did you locate that from the original map which you filed with your testimony when it was taken into the bill of review?

A. I just sketched the creek upon this map to the 70th mile, as stated in the field notes "thence on the west bank of said creek" and then the creek from there on to its head, and its various branches, I put them on as nearly as I could from surveys that I had made in that country to represent the head waters of Slick Rock Creek.

Q. You didn't make that sketch in there then with reference to any exact former survey of the creek that you had made?

A. For the first five miles, no, sir, the creek on there is just really sketched all the day.

Q. Oh, I see. So as a matter of fact you don't know whether it just exactly fits the creek or not?

A. Well, of course I compared the courses and distances after crossing the Tennessee River with the actual surveyed line and other plats, and that was the reason for sketching the creek to follow along the line as shown upon the plat Exhibit YY. And another reason because the language of the field notes said up said creek.

Q. The field notes say at the 75th mile, or rather it says "Beech, 75th mile, main mountain." From your knowledge of the country what did they mean when they said the "main mountain" at this point?

A. Well, the way I understand that language from my knowledge of the country, I would say that they called the main mountain after they reached the junction, they considered that expression "main mountain" that they followed along the main mountain after they reached the junction and I believe that they considered the various ridges leading down from that point both around by Fodder Stack and Little Fodder Stack, and also Hang Over and

Hayo, as ridges leading up to the main mountain; that would be my interpretation of it.

433 Q. It is the main mountain at that point?

A. Yes, sir.

Q. And running back to the Hang Over lead towards the Tennessee River is, for the first two or three miles, running northeast, much higher than the Fodder Stack lead, isn't it?

A. It is much higher until after you pass over Hang Over.

Q. Two or three miles?

A. Yes, it is about three miles, I would say.

Cross-examination.

By Gov. WM. A. STONE:

Q. Mr. Burns, this map which I suppose you have identified as Exhibit YY, shows the Tennessee River, and this is the supposed state line as indicated by the alleged field notes, is not it? (Indicating.)

A. Yes, sir.

Q. This little circle is a mile post, isn't it?

A. The first circle north of the river; yes, sir.

Q. How far is that from the river?

A. You mean in actual measured distance?

Q. Yes?

A. Well I never actually found the 64th mile tree on the ground, but on that plat it is exactly one mile.

Q. One mile?

A. Yes, sir.

Q. You did find this spruce pine on the bank of the river, on the north bank, didn't you?

A. That fore and aft tree?

Q. That fore and aft tree?

A. Yes, sir.

Q. How far is this line west of whatever it may be, southwest from that spruce pine force and aft tree, about?

A. Why that would be just a guess. I would say three or four hundred feet, possibly a little more or possibly a little less.

Q. The line from this mile tree runs southwest towards the river a little, does it?

A. South 75 West is the call there.

Q. Yes. The fore and aft tree is half a mile above the mouth of Slick Rock Creek is it?

A. Yes. Practically so, yes, sir.

434 Q. And a half a mile is something like 2600 feet more or less?

A. Yes, sir, 2640 feet.

Q. And when this line reaches the Tennessee River on the north side of the Tennessee River it is a half a mile southwest from the fore and aft tree, is it not? It is right opposite the mouth of Slick Rock Creek, isn't it?

A. I don't believe I quite catch——

Q. When this line strikes the river it strikes it right opposite the mouth of Slick Rock Creek, this line?

A. If you would actually run that line as called for in the field notes South 75 West.

Q. If you would run that line as the field notes call for it?

A. No, I think that would cross the Tennessee River before you get to the mouth of Slick Rock Creek. You see there is kind of a bend in there, and the course as given if you platted it now would take you three or four hundred feet up Slick Rock Creek.

Q. Three or four hundred feet, and it would still be about 220- or 2300 feet from that fore and aft tree, wouldn't it?

A. Well you mean the end of the mile? I don't remember.

Q. I mean where it strikes the river as located by these note-.

A. I would have to apply that on a map to see, but I believe it would cross the river not very far below that fore and aft spruce pine. There is a kind of a bend in the Tennessee River there, and the course given would cross the Tennessee River, and kind of follow along the Tennessee River a little piece, and then land in Slick Rock Creek possibly too, but four feet above its mouth.

Q. After you hit that large white oak 64th mile, then you run South 75 West to the Tennessee River, don't you? At least that is so from these field notes?

A. Yes, on the field notes, 64th mile; yes, sir.

Q. Does cross the river to a large white pine on the south side of the river, to the mouth of a large creek; that is what you call Slick Rock Creek, isn't it?

A. Yes, sir, I take that to mean Slick Rock Creek.

Q. And the pine is at the mouth of the creek?

A. Yes, sir.

Q. And you cross the river directly, do you? Doesn't that line cross it directly?

435 A. Well, of course that line calls for a direct straight line.

Q. As called for here—the line as called for in these field notes, crosses it directly.

A. Yes, sir, it is a direct line from 64.

Q. And it strikes the south side of the river immediately to the mouth of Slick Rock Creek, doesn't it?

A. Yes, sir, that is the language of the field notes.

Q. That is the language of the field notes, and that is half a mile southwest from that fore and aft tree?

A. The end of the mile is. Slick Rock Creek is; yes, sir, from the fore and aft tree. That is true.

Q. And this line strikes the river, coming down from the north side of the river, it strikes the river immediately on the other side, and directly across from the mouth of Slick Rock Creek, doesn't it, in the field notes?

A. Well, the field notes——

Q. They call for that, don't they?

A. They call for a large white pine at the mouth of——

Q. I will read it. "A large white oak 64th mile, crossing Ten-

nessee River to a large white pine at the south side of the river at the mouth of a large creek 65th mile?

A. Yes, sir.

Q. Now then you say they cross the river directly; how wide is the river there—at that point?

A. It is a little over 300 feet wide.

Q. Yes. And they struck the river on the north side immediately opposite the point where they reached this white pine on the south side, didn't they? where the line coming down struck the north side of the river, it struck it immediately opposite and across from Slick Rock Creek?

A. Well, I don't know whether it did or not. The language of the field notes gives one course and one distance from the 64th mile crossing the Tennessee River to a large white pine at the mouth of a large creek. Doesn't say as I understand it—As I understand it, doesn't say that it crosses directly opposite to the mouth of Slick Rock Creek, but just——

Q. It had only 300 feet to go in getting across the river, didn't it?

A. Well, the river is only about 325 feet is my recollection of it opposite the mouth of Slick Rock Creek.

436 Q. You mean to say that line made a variation. It was a straight line, wasn't it, according to this course?

A Well, if you want my opinion——

Q. I don't want your opinion. I want what these field notes call for.

A. Well, I have said a number of times that the field notes call for a straight course for the 64th mile, crossing Tennessee River to a large white pine south side of the river at the mouth of a large creek 65th mile.

Q. Now, then, where it struck the Tennessee River on the north side, how far is that going up the river from that fore and aft spruce pine tree?

A. Well, they marked—from the fore and aft tree to the mouth of Slick Rock Creek is about a half a mile. It is a little bit more from the way that they marked the line.

Q. I understand, sir. Then if that fore and aft tree on the north side of the Tennessee River, which we understand, all of us, as the spruce pine, marked fore and aft tree, is on the state line, it is not on this line laid down in the field notes?

A. Well, if you follow—confine yourself strictly to courses and distances?

Q. Yes.

A. You cannot follow the way they marked the line exactly at that point, as well as most every other point where the state line is not in dispute, and also in dispute.

Q. (Read the question.)

NOTARY: Then if that fore and aft tree on the north side of the Tennessee River, which we understand, all of —, as the spruce pine, marked fore and aft tree, is on the state line, it is not on this line laid down in the field notes?

A. Do you want me to answer it any further?

Q. I want you to answer it yes or no, if you can.

A. Well, I am not prepared to say exactly, but my impression is that the fore and aft hemlock tree, if you would confine yourself strictly to the course as given in the field notes, would be some two or three hundred feet to your left in going from the 64th mile tree to the 65th mile tree.

Q. How does it strike the river, half a mile west of the hemlock spruce pine, the fore and aft tree, in going that distance, that course, how is it possible?

A. I don't quite catch the meaning of your question.

Q. The fore and aft tree is admittedly, and admitted by
437 you, to be a half a mile up the river from the mouth of Slick Rock Creek?

A. Yes, sir.

Q. And the course which is run from the 64th to the 65th mile tree is South 75 West?

A. Yes, sir.

Q. Now you say that that line is two or three hundred feet, three hundred feet or more on the left, you mean west?

A. Yes, I mean the marked line is to the left of the course as given.

Q. Yes. Two or three hundred feet?

A. Yes, sir.

Q. How can that be possible in running that course if this fore and aft hemlock spruce is a half a mile above the river, where the field notes' line crosses the river?

A. It could only be possible in this way, that the commissioners in running the state line, they were not trying to show all the little winds of the ridge, and they just cited *to* prominent objects in running along the ridge, I think that they cited from one prominent peak to another. I know that there are a great many that do that kind of thing. They follow*ing* along the dividing ridge and the same was true when they reached this 64th mile they could see from that point to the mouth of Slick Rock Creek, and they took bearing direct to that point. Then in chaining and marking the line they followed off down that ridge to the marked fore and aft spruce pine, and also marked other little trees along the Tennessee River to the mouth of Slick Rock Creek.

Q. Would that line be South 75 West; is that correct?

A. The line as they marked it would be several different courses and distances, but if I was marking from the 64th to the 65th mile, confining yourself strictly to the course as given in the field notes, as also shown upon the plat, you couldn't follow the line exactly the way they marked it in that sense. The way that they marked the line on the ground doesn't exactly conform to the course as given in the field notes. I mean by that that to follow the marked line that you would have to insert shorter courses and distances, in order to be able to follow their marks.

Q. Mr. Burns, is it not a fact that for some miles or more or less there are marked trees coming down from the north side
438 of the river indicating a line until you get to this fore and aft spruce pine tree?

A. Yes, there is a number of marks along the Smoky Mountain ridge leading down to the Tennessee River.

Q. They are in line, on an alignment, with the fore and aft tree, the spruce pine?

A. Well, you follow a ridge, a well-defined ridge clear down to the Tennessee River, and it leads you right down to this fore and aft spruce pine.

Q. In your construction of what is known in this case as "the after discovered map" you locate the line as indicated by the after discovered map as running on both sides of Slick Rock Creek, do you, when there is——

A. Yes, sir.

Q. Do these field notes show a line running both sides of Slick Rock Creek according to the courses and distance laid down in the field notes?

A. On both sides of Slick Rock Creek, did you say?

Q. Yes?

A. Yes, the field notes call for trees, different mile trees, some of them are on one side of the creek and some of them are on the other, specified in the notes.

Q. Then the field notes call for trees some on one side and some on the other side of the creek, and some on the other?

A. Yes, sir.

Q. Then as a matter of fact——

Redirect examination.

By F. A. SONDLEY, Esq.:

Q. I believe you said, Mr. Burns, that the course of the surveyors was sometimes taken, in your opinion, from one point to the next highest point, but the marked line would follow the course of the ridge?

A. Yes, sir.

Q. That throws them sometimes off the line indicated by the compass a little?

A. A little bit; yes, sir.

Q. The marked line. Now if you were to start a mile before reaching the Tennessee River at that marked line, and undertake to go to the river by the marked trees would you go one single line or have to vary it?

A. To follow the marked line you would have to vary it.

439 Q. You were asked about the fore and aft spruce pine on the bank of the Tennessee River. Are there any marked trees on that same side of the river between that and the point opposite the mouth of Slick Rock Creek?

A. Yes, sir.

Q. What marks do they bear, state line or not?

A. State line marks.

Q. What age do they date back to?

A. 1821.

Q. How do you know?

A. I blocked one of the trees and counted it.

Q. Do you know citing from a prominent object and then surveying around the ridge, so as not to follow the exact line the compass indicates, the courses, in any other case than this?

A. It occurs all along.

Q. And with other surveys?

A. Yes, sir; in the places that I have gone.

Q. Now you were asked about a beech at what you call Junction. I want to ask you — it. There is a call, I believe, at the end of the 72nd mile for a white oak?

A. Yes, sir.

Q. That was just a little from Fodder Stack as you went southward?

A. Yes.

Q. Did you find any white oak there when you made the survey?

A. Yes, sir, my recollection is there was a large white oak, possibly a quarter of a mile from the Big Fodder Stack that I examined at the time that I was through there, and it showed some indications of a mile tree, but I was not positive about it, and did not make any note of the tree.

Q. Now you were asked on cross examination about going from the junction on the ridge that runs out toward Hang Over as far as Hayo, and you said it was higher I believe than if you were to start from the Junction going towards Big Fodder Stack?

A. Yes, sir.

Q. But if you were going to Hayo, which way would be the higher ridge, to go along up Hang Over or some other route?

A. The main ridge from Hayo would strike Cheoah River about five miles above its mouth forming the water shed between Santeetla and Deep Creek and some other small branches.

440 Q. Would it include Hang Over at all?

A. No, sir.

Q. I wish you would state whether or not that Hang Over is the highest peak in the neighborhood?

A. No, sir, the highest peak in that section of country is the Huckleberry Knob.

Q. Is it on the state line according to the contention of either party?

A. No, sir.

Recross-examination.

By T. E. H. McCroskey:

Q. Where is Huckleberry Knob towards the head of Tellico River?

A. No, Huckleberry Knob is right at the headwaters of Santeetla. The ridge leads out from the state line between Haw Knob and Laurel Top.

Q. That is on the waters of Tellico River however?

A. No, it doesn't come to the water shed of the Tellico River at all.

Q. It is nearer the head waters of Tellico than the head waters of Slick Rock Creek, is what I mean?

A. Well, it might be a little. It is about two or three, maybe four miles from the headwaters of Tellico River. Possibly a little further than from the headwaters of Slick Rock Creek.

Q. How far is Huckleberry Knob south of the junction of the Hang Over and Fodder Stack; is it seven or eight or ten miles?

A. You mean to follow around the ridge?

Q. Yes.

A. To reach the junction you would have to follow the state line until you would pass over Haw Knob, then there is a little knob between Haw and Laurel Top.

Q. Isn't that some eight or ten miles or further?

A. To follow around the ridge it must be eight or ten miles. Yes, but if you would go directly across it is very much nearer than that; four miles possibly.

Recross-examination.

By Gov. Stone:

Q. You say you found trees between that fore and aft tree on the north side of the Tennessee River to the mouth of Slick Rock Creek?

441 A. Yes, sir, I found marked trees between the fore and aft hemlock and the mouth of Slick Rock Creek.

Q. Which side?

A. On the north side of the river.

Q. You were sworn in this case before, Mr. Burns?

A. Yes, sir.

Q. Did you say anything about those trees in that testimony?

A. When I made the survey, as I stated in my former testimony, when I made the survey in the first place I didn't find any trees along the Tennessee River between that fore and aft hemlock and the point of the mouth of Slick Rock Creek that I was sure were trees, line trees, but I found some marked trees that I thought might be, but I was not sure, and didn't make a note of it, but afterwards I went back to that country and I made a more thorough examination and I found some marked trees in that section.

Q. How many?

A. I only examined from the hemlock trees about half way from there to the mouth of Slick Rock Creek to a point which is marked on my plat as tree No. 30.

Q. A quarter of a mile, isn't it?

A. Yes, sir, and I found two trees in that distance.

Q. On the bank of the river?

A. Yes, sir.

Q. How far from the edge of the water?

A. Well, they were standing right on the bank.

Q. Standing right on the bank?

A. Yes.

Q. The course of the river from there—you say the mouth of

Slick Rock Creek, or from the point where the fore and aft tree is, the course of the river to the mouth of Slick Rock Creek is what; what is its course?

A. Well, it is about west pretty close.

Q. About west?

A. Yes.

Q. And you found two trees on the north side of the Tennessee River right along on the bank of the river?

A. Yes, sir.

Q. And this fore and aft tree is on the bank of the river?

A. The fore and aft tree is about 100 feet from the bank of the river?

442 Q. How far were these trees from the bank of the river?

A. Well, these trees were, I suppose, six or seven feet. Possibly when the water is up it would reach the roots of the trees.

Q. How were they marked?

A. One marked as fore and aft.

Q. Well what side of the tree was it marked?

A. The fore and aft was marked up the river and down the river, but the fore and aft tree that I spoke of had been blocked a few weeks or months or so after I was there and blocked through the marks on the lower side of the tree, and blocked out and gone.

Q. That would indicate that line run down the river?

A. Yes, sir.

Q. Due west?

A. Well practically west. I don't know whether due west.

Q. That would indicate that if those marks indicated a state line, would indicate that when they came to that fore and aft tree one half a mile above Slick Rock Creek, they turned and went almost at right angles due west down the Tennessee River, is that right?

A. Well, of course; yes.

Q. Well, that is right or wrong. You can say yes or no to that Mr. Burns, those lines being marked one on the upper side and the other on the lower side indicate that they intended to register *is* going down the river; doesn't it?

A. Certainly so.

Q. Then that means that line ran right along the bank of the river?

A. Yes, sir.

Q. And coming from the mountain on the north side to the fore and aft spruce pine hemlock it would indicate that it took a sharp turn and down the river to the mouth of Slick Rock Creek, wouldn't it?

A. Well, there is a little short angle in there.

Q. Don't those marked trees indicate a ridge running down the river?

A. Yes, sir; the ridges that I spoke about, tree No. 30, according to my map, and the other one I found on the bank of the river.

443 Q. And they indicate a line running on the bank of the river?

A. Certainly so.

Q. And that would mean after striking the river on the north side at the fore and aft spruce pine tree they made almost a turn at right angles and went down the river.

A. Well, for a very short distance in there.

Q. For a half a mile?

A. You don't understand, Mr. Stone; that line comes down——

Q. I didn't ask you how that line comes down. I asked you what those trees that you found indicated. They indicated, you said, that the line went down the river; that its course was west?

A. Certainly so.

Q. And that is at right angles with the line that came to the fore and aft tree; isn't that so, pretty near?

A. Well, I would like to answer your question yes or no, but I can't do it.

Q. I don't see how?

A. Because the line back of that fore and aft hemlock tree for about two or three hundred feet, that much of the line it would be right angles, practically right angles with the marked line from the fore and aft tree down the Tennessee River to the mouth of Slick Rock Creek.

Q. Well, now, that fore and aft spruce pine hemlock tree is a mile, or half a mile, above the mouth of Slick Rock Creek, isn't it?

A. Yes, sir; practically so.

D. B. BURNS,
[SEAL.] By G. A. THOMASON,
Notary Public.

I, the above named G. A. Thomason, a Notary Public in and for the County of Buncombe and State of North Carolina, do hereby certify that pursuant to the annexed notice issued in the above mentioned cause wherein D. W. Belding, M. M. Belding, A. N. Belding, Henry Stix, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg and R. N. Archer are appellants, and Charles Hebard, is appellee, and in the above mentioned cause wherein William R. Hopkins, Benjamin P. Bole, Edward I. Leighton, Fred W. Bruch, George Reeves and John Matthews, are appellants and Charles Heb-
444 ard is appellee, I was attended at the office of the aforesaid Theodore F. Davidson (firm of Bourne, Parker & Morrison), at Asheville, in the County of Buncombe and State of North Carolina, between the hours of eight o'clock A. M. and six o'clock, P. M., on the 27th day of February, 1911, by F. A. Sondley of counsel for said appellants, and T. E. H. McCroskey, William A. Stone and John Franklin Shields, of counsel for said appellees; the aforesaid witness D. B. Burns, who was of sound mind and lawful age, was by me first carefully examined and cautioned, and duly sworn to testify the truth, the whole truth and nothing but the truth, and he thereupon testified as is above shown; and it was agreed by counsel for both appellants and appellees that evidence of the said witness, which was taken down stenographically by me, the said Notary Public, should be reduced to typewriting by me and signed by me in the

name of said D. B. Burns, and that such signing by me should have the same force and effect as if actually signed by the said D. B. Burns himself; the said deposition was taken at the place in the annexed notice specified, and at the time set forth, and was reduced to typewriting by me, and signed by me as above stated.

I further certify that the reason for taking said deposition was and is, and the fact was and is that said D. B. Burns, the witness as aforesaid, lives more than one hundred miles from the place where said suits are appointed by law to be tried in the Circuit Court of Appeals of the United States for the Sixth Circuit; that I am neither of counsel nor attorney to either parties to said suits, nor interested in the event of said causes, and that it being impracticable for me to deliver said deposition and exhibits thereto with my own hand into the Court for which they were taken, I have retained the same for the purpose of having it sealed up and directed with my own hand and speedily and safely transmitted to the said Court for which it was taken, and to remain under my seal until then and there opened, as

Witness my hand and Notarial Seal, this the 27th day of February, 1911.

[SEAL.] G. A. THOMASON,
Notary Public.

My commission expires on the 14th day of October, 1911. Notary's fees $18.00.

445 EXHIBIT XX.

The following, and every part thereof, is a true, complete and exact copy of the book of field notes, made by William Davenport, the Surveyor for the State of North Carolina, when the state line was run between North Carolina and Tennessee in the summer of the year 1821. The book of notes was found by Edmund Jones, Jr., on the 10th day of November 1910, in a secret drawer of an old sideboard, formerly belonging to William Davenport, at his old home in Caldwell County. Both the home and the old side board are at present the property of his Grandson William Davenport Jones, who, together with Mrs. Emma H. Gilley, was present when the book of field notes was discovered. Edmund Jones, Jr., is a great Grandson of William Davenport. The notes are contained in a book six and a half inches long by four inches wide and are written on unruled paper. The book is stitched together with course thread, with heavy brown paper backs, and is in a perfect state of preservation. On the outside front page is written:—

"W. Davenport's
Field Book
July 18th, 1821."

"July the 19th 1821 Began at the Cattalucha track to run the line between the State of North Carolina & Tennessee Marked a rock

there on North Carolina side N. C. 1821 and on the other side T, E, N, 1821—and runs with the line that J. M. Dowel M. Matthews & D. Vance run in the year 1799 and runs with said line about 2 miles and a half to where they stopped.

South	88	W	6	poles	—Hickory
No	42	W	12	Do	—Chestnut
South	64	W	14	Do	—Chestnut
South	50	Do.	16	Do	—Bo
Do	64	W	27	Do	—Pine
West			30	Do	Chs't
South	65	W	38	Do	B. Gum
S	18	W	23	Poles	
S	30	W.	60	Poles	
X N	60	W	60	P	
X S	75	W	100	P	
X S	60	W	80	P	
X West			80	P	Chestnut 2nd M
X West			40	P	

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X S	75	W	30	P	
X S	85	W	40	P	
X S	50	W	50	P	
X S	80	W	40	P	
X N	80	W	50	P	
X S	60	W	20	P	
X N	80	W	50	P	Maple 3rd M
X N	80	W	60	P	
S	50	W	10	P	to the top of the Smokey Mountains at a spring on the extreme height of the Mountain
X S	50	W	20	P	
X S	30	W	80	P	
X South			90	P	burch 4th M
X S	20	E	40	P	
X S	30	W	100	P	
X S	15	W	120	P	
X S	70	W	60	P	red oak 5th M
X S	80	W	70	P	
X S	30	W	100	P	
X S	25	W	80	P	to red oak in a low gap lay by on sunday and monday and set out tuesday morning
X South	(30	W	70		Burch at 6 miles
due So			80		
"	35	W	60		
"	70	W	180		Spruce pine at 7 miles
X South	30	W	100		
due West			100		
X South	40	W	120		Spruce pine at 8 miles
X S	70	W	320		Spruce pine at 9 Miles
X S	80	W	228		

X due South 40
X South 10 W 52 fir or balsom pine at 10 miles
X " 10 W 40 P
X " 65 W 80 P
X " 60 W 60 P
X " 35 W 140 P Fir or balsom pine at 11 miles
X " 30 East 154 P
X due South 166 P Balsom pine at 12 miles
X South 160 P at the top of the main Smokey or Iron Mountain
X South 20 East 80 P on a high MT head of big (unintelligible) from the point to (cannot be deciphered)
447
X South 40 West 80 P Bush at 13 Miles
X " 10 West 80 P
X " 55 West 80 P
X due West 80
X South 60 West 80 Spruce pine at 14 miles on a high point of Smokey Mts.
X due South 160 low Gap
X South 30 West 80
X " 70 West 80 Burch at 15 miles
X South 40 West 80
X " 80 West 80
X " 35 West 80
X " 25 West 80 to a Burch & MT China tree at 16 miles in a low gap between East fork of Little Pigeon and OCONO Lufty River
X South 10 West 80
X " 25 West 60
X due South 40
X South 20 West 140 Spruce pine at 17 miles
South X 30 West 40
" 50 West 120
X " 75 West 80
due West 80 Fir or balsom at 18 miles
X South 80 West 40
X North 70 West 120
X North 45 West 160 Spruce pine at 19 miles
X South 60 West 40
due X West 220
North X 70 West 60 Spruce pine at 20 miles at the top of an extreme high pinacle in view of Severeville
South X 50 West 260
" 70 W 60 Burch on high point 21 miles
South X 85 W 40
" X 30 W 180
" X 10 East 100 Spruce pine at 22 miles
X South 25 West 94 to Porter's Gap, from Porter's Gap
South 15 East 20 (30th July 1821)—

	"	50 West	60	
		30 West	60	
		70 W	86	Spruce pine at 23rd mile
South		30 W	80	

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		80 W	40	to the Indian Spring waters of Lufty
		80 W	40	
		60 W	160	Burch 24th mile
South		20 W	80	
		60 W	180	
due South			60	Spruce pine at 25th mile
North		65 West	60	Spruce pine 25 mile, august the 1st 1821 Balsom pine 29th mile the above corner is against the head of the west fork of Pigeon River near an old Indian Camp (aug the 2nd 1821)—which is at a low gap at the head of Big Creek of Tennessee and if there ever is a wagon road through the Big Smokies Mountain it must go through this Gap.

5th August 1821

South	20	West	160	
South	70	West	160	Spruce pine and Burch 26th mile
South	55	West	100	
	40	West	160	
—	—	West	60	Balsom pine 27th mile (Aug 6th 1821)
South	75	West	40	
	10	W	40	
	70	Wt	100	
	80	Wt	140	Beach 28th mile at the head of the South Wt fork Lufty
		West	160	
South	45	Wt	80	
	30	Wt	80	Beach 29th mile head Indian path at the head of deep or
South	20	Wt	80	
	50	Wt	60	
	15	Wt	80	
	30	Wt	100	Spruce pine 30th mile
South	55	Wt	320	Wild cherry tree 31st mile (Aug 7th
South	50	West	160	to Meiges (?) post
	40	West	160	Balsom pine 32nd mile head of Little River

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South	25	West	320	Balsom pine 33rd mile
South	75	West	100	
South	40	West	120	
	80	West	100	Balsom pine 34th mile in view of Bears town
		West	120	
South	75	West	100	
North	70	West	100	Spruce pine 35th mile

South 75 West 160
West 160 Buck eye 36th mile, in rich beech flat Aug 8th 1821
South 80 West 80
60 West 120
North 75 West 120 Mount China 37th mile
West 160
South 50 West 40
due West 120 Beach 38th mile
South 70 West 180
North 60 West 140 Cherry tree 39th mile
North 60 West 320 Cherry tree 40th mile
" 70 West 160
South 45 West 80
" 70 West 80 Beach 41st mile
South 70 West 80
10th of August 1821
due West 80
South 60 West 160 Beach 42nd mile
North 65 West 100
South 45 West 160
due West 60 Spanish oak 43rd mile
North 65 West 80
Due West 240 Beach 44th mile
South 80 West 320 Beach 45th mile head of the West fork of Little River.
South 55 West 40
South 80 West 280 Beach 46th mile
North 55 West 60
South 50 West 140
North 80 West 120 Beach 47th mile
South 55 West 160 (August 11th 1821
" 70 West 160 Buck eye 48th mile
Due West 320 Burch 49th mile, at the head of Abrums Creek
South 40 West 100
North 70 West 120

450

South 50 West 100 Red oak 50th mile
Due West 80
South 30 West 40
" 80 West 100
" 10 West 100 Cucumber tree 51st mile
South 40 West 200
" 75 West 60
40 West 60 Chestnut Tree 52nd mile Notes compared to this place
South 75 West 120
35 West 100
60 West 100 White oak 53rd mile
South 35 West 200 (August 13th 1821

50 West 120 Red oak 54th mile at Equonutty path to Cades Cove
South 60 West 100
70 West 120
due West 100 Red oak 55th mile
South 60 West 320 Red oak 56th mile
due West 320 To the top of the bald spot in sight of Tellessee Old Town 57th mile
South 65 West 320 Red oak 58th mile in the edge of the second bald spot
South 25 West 320 Red oak 59th mile
South 45 West 160
25 West 160 Hickory 60th mile in a low Gap at the path from equinotty to Tellesee
South 20 West 60
50 West 100
South 20 West 100 Red oak 61st mile
South 20 West 60
South 60
South 50 West 100
due West 100 Locust 62nd mile
South 75 West 220
55 West 100 Red oak 63rd mile
South 30 West 40
45 West 80
15 West 80
60 West 120 Large White oak 64th mile
South 75 West 320 Crossing Tennessee River to a large White pine So side of the River at the mouth of a large Creek 65th mile

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August 15th)
South 80 Up said Creek
40 West 80
70 West 40
South 60
due West 60 Spruce pine 66th mile
South 65 West 80
20 West 60
70 West 40
20 West 140 Burch 67th mile at Cheogee path
due West 140 (August 16th 1821
South 15 West 180 Sycamore 68th Mile
South 30 West 180
due West 20
South 35 West 120 Maple on the East side of said Creek 69th Mile
South 30 West 320 Burch on West bank of said Creek 70th Mile
South 40
10 West 60 August 17th 1821
due West 60
South 30 West 200 Pine 71st Mile

South 35 West 80
80 West 160
30 West 80 White oak 72 Mile on a ridge between the aforesaid Creek and Citico Creek
South 30 East 200
60 East 120 Red oak 73rd Mile
South 100
45 East 100
10 West 120 Maple 74th Mile
South 25 East 160
10 East 160 Beach 75th Mile Main Mountain
South 25 West 320 Spanish oak 76th Mile in a low Gap
South 25 West 100 August 18th 1821
South 60
55 West 160 Red oak 77th Mile
South 20 West 40
70 West 80
South 40
45 East 160 Maple 78th Mile
South 15 West 100
70 East 100
452
30 East 120 Beach 79th Mile
South 20 West 260
10 East 60 Beach 80th Mile
South 100
60 East 220 Red oak 81st Mile
South 15 East 200
25 West 80
40 West 40 Beach 82nd Mile
South 40 West 40
50 West 160
40 West 120 Red oak 83rd Mile
South 40 West 320 Locust 84th Mile
South 40 West 120 (August 19th 1821
60 West 200 Chestnut oak 85th Mile
South 60 West 320 Holly tree 86th Mile near the head of the Middle Fork of Tellico River
South 20 West 80
65 West 240 Red oak 87th Mile
South 80 West 320 Red oak 88th Mile
South 80 West 100
North 80 West 60 (August 20th 1821
South 50 West 120
10 West 40 Hickory 89th Mile at the head of Beaver dam Creek
South 10 West 100
due West 100
North 60 West 120 White oak 90th Mile
due West 140
South 70 West 180 White oak 91st Mile

South 15 West 100
North 80 West 160
South 45 West 60 Red oak 92nd Mile
South 55 West 280
North 45 West 40 Red oak 93rd Mile to the trading path leading from the Valley Towns to the overhill settlements
North 45 West 80
South 80 West 120
North 25 West 120 White oak 94th Mile on said path
North 40 West 320 White oak 95th Mile on said path
North 40 West 50
70 West 50
South 45 West 80 (August 21st 1821
70 West 40
453
North 80 West 80
South 70 West 20 White oak 96th Mile on the top of the Unicoy mountain
South 50 West 200
30 West 120 Red oak 97th Mile
South 40 West 160
60 West 160 Chestnut tree 98th Mile
South 60 West 200
X X
X X 40 West 120 Chestnut tree 99th Mile
South 45 West 220
20 West 100 White oak 99th Mile
South 60 West 200
40 West 120 Chestnut tree 100th Mile
South X 40 West 320 To a hickory an rock at the wagon road the 101st Mile "at the end of the Unicoy mountain."

The next paragraph in the field notes evidently written at the same time and with the same pen and ink is as follows)—"Thence South 15 miles & 220 poles to post oak on the Georgia line at 23 poles West of the 72nd Mile from the Nickijack old town on the Tennessee River."

This appears to have been the end of the original field notes, but in a different ink the field notes which follow are given all in Colonel Davenport's handwriting. After the word Mile after the 101st the field notes go on as follows, "at the end of the Unicoy mountain and runs South 320 poles to a White oak tree 102 miles (August 22 1821"

South 320 poles—to a pine 103 mile Xing Branch
South 252 poles to a Spruce pine on the bank of Highawassee River below the mouth of Cane Creek and runs up the bed of said River upwards of a mile to a Maple on the South side marked 1XDRA then the same course

South 53 poles to a holly the 105 m (Aug 23rd
South 320 P Spanish oak 106th Mile
South 320 poles to Post oak 107 Mile
South 320 poles to a Spanish oak 108th Mile
South 320 poles Post oak 109th Mile
South 320 poles crossing a creek to a white oak 110th Mile

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South 320 poles to a black oak 111th Mile
South 320 to a Red oak 112th mile crossing a mountain
August 24
South 320 pos to an oak 113th mile
South 320 poles to a white oak 114th mile
South 320 poles to a Black Gum 115th Mile
South 320 poles to a post oak 116th Mile.
South 220 poles to a post on the Georgia line 23 poles West of the 72 mile on said line.

In the back of the book of field notes are the following entries:—

"Co Mebane paid at Hill's for General Stokes 87½
ferage and turnpike 25
at upper turnpike 50
at Asheville 75
at Davdson 37½

On next page

"Col. Mebane paid W. D. expense from Knoxville home
Paid at Hill's 87½
Paid at Nelson's 75 cents
ferage &c 25
at upper turnpike 50
at Asheville 75
at Davdson's 37½

3.50 "

On the lower side of the page the following "37½ cents paid at Forbays bt Gen'l Stokes for me Liet Col Mebane $4."

On the outside of the last page of the cover is the following:—

"Severe County election 18 (other two figures indistinct) for Govr Corroll 492 Ward 38
For Congress Cocke 477
For Senate Gillespie 264 Lowery 241
Representative 498"

455 *Depositions.*

And afterwards to-wit, on March 9th, 1911, the depositions of Edmund Jones, Jr., et al., on behalf of appellants were filed which read and are as follows:

United States Circuit Court of Appeals, Sixth Circuit.

In Equity. No. 2031.

Bill of Review.

D. W. BELDING, M. M. BELDING, A. N. BELDING, HENRY STIX, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg, and R. N. Archer, Appellants,

vs.

CHARLES HEBARD, Appellee.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, Fred W. Bruch, George Reeves and John Matthews, Appellants,

vs.

CHARLES HEBARD, Appellee.

Examination of witnesses beginning on the 1st day of March, 1911, on behalf of the appellants before me, J. H. Beall, a Notary Public of the County of Caldwell and State of North Carolina, at my office, in the town of Lenoir in said County and State in certain suits now pending in the Circuit Court of Appeals of the United States for the Sixth Circuit at Cincinnati, Ohio, wherein D. W. Belding, M. M. Belding, A. N. Belding, Henry Stix, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg and R. N. Archer are appellants, and Charles Hebard, as appellee, and wherein William R. Hopkins, Benjamin P. Bole, Edward I. Leighton, Fred W. Bruch, George Reeves and John Matthews are appellants, and Charles Hebard, as appellee, commencing at one o'clock P. M. witnesses produced on behalf of the appellants, being first duly sworn, depose and say:

456 EDMUND JONES, JR., being first duly sworn, testified as follows:

Q. What is your name?
A. Edmund Jones, Jr.
Q. Where do you live?
A. I live in Caldwell County, North Carolina. My postoffice is Lenoir.
Q. How old are you?
A. Thirty-two.
Q. I show you a paper writing and wish you would state what you know in regard to it and what it purports to be?

(Here witness is shown paper.)

A. W. D. Jones and I were together the first time I ever saw the paper. It seems to be field notes of a survey and some memoranda of expenses; or a copy of field notes.
Q. A copy of whose field notes does it purport to be?

A. I don't know about that more than what the book itself says on the back.

Q. What does it say on its back?

A. William Davenport's field book, July 18, 1821.

Q. Where did you first see this book?

A. At W. D. Jones' residence in the Yadkin Valley in Caldwell County.

Q. Were you present when it was first found by him, if it was found by him?

A. I don't know whether he had ever seen it before or not.

Q. Did this book ever come into your possession?

A. It did.

Q. Who had the book since you first saw it?

A. I have.

Q. State whether or not it is in the same condition that it was when you first saw it.

A. The writing and the book itself is in exactly the same condition that it was when I first saw it with the exception of a little wear that would naturally result from my having had it in my pocket some and in the drawer.

Q. Do you know anything in regard to the handwriting in this book or on it?

A. No, not of my own knowledge.

EDMUND JONES, JR.

457 W. D. JONES, being produced as a witness on behalf of appellants, being first duly sworn, testified as follows:

Q. State your name, age and residence?

A. My name is William Davenport Jones, my age is seventy-one, and I live in Yadkin Valley, Caldwell County, North Carolina. Patterson is my post office.

Q. How long have you lived in this section?

A. Seventy-one years.

Q. Who was your grandfather?

A. William Davenport on my mother's side.

Q. Where did he live?

A. At the place and in the house where I now live—Patterson Township, Caldwell County, North Carolina.

Q. Where did he live at the time of his death?

A. At the same place.

Q. How old was he when he died?

A. I don't know exactly but I think he was about eighty-seven.

Q. Have you any recollection of him?

A. Yes, I recollect him very well. I was nearly grown before he died.

Q. What was his occupation or calling?

A. He was a farmer on his own plantation.

Q. What other profession had he ever followed that you know of?

A. He was county surveyor a good long while.

Q. What are the traditions in your family, if any, as to his having been a surveyor?

A. There are a great many old grants and surveys, plots of land in my possession now in his handwriting, signed as county surveyor, and throughout the whole country.

Q. Who was your grandmother, the wife of William Davenport?

A. She was the widow McDowell when she married him; her maiden name was Lenoir.

Q. Did she die before or after your grandfather?

A. Several years before.

Q. State what recollection you have of her, if any?

A. I recollect her very well.

Q. About how old were you at the time of her death?

A. Probably ten or twelve years old. I used to stay there a great deal of the time. I was the namesake of the old gentleman
458 and his first grandson and he kept me at his house a great deal. I lived there as much as I did at home; it was just across the river.

Q. Do you know the handwriting of your grandfather, William Davenport?

A. I think so.

Q. How do you know it?

A. By having seen it very often and seeing him writing it to different papers when I was in the house not paying particular attention to him, but I knew his signature in that way.

Q. Do you know your grandmother's signature?

A. I have seen her do a great deal of writing for my grandfather, copy papers he wanted. I have often seen the papers and knew it was my grandmother's handwriting. I couldn't swear to it in any other way; only that I was familiar with the handwriting and think I would know it anywhere in the world.

Q. State whose handwriting, if you know, appears on the back of the book or paper writing which I now show you? (Witness is shown paper.)

A. That is William Davenport's signature—my grandfather.

Q. When you say "that is," what do you mean?

A. I mean the endorsement on this book.

Q. What is that endorsement?

A. William Davenport---Field Notes. July 18, 1821.

Q. Please examine the contents of this book and state what it purports to contain?

A. I see on the back "Field Notes." It purports to contain a survey of a boundary line between North Carolina and Tennessee.

Q. State, if you know, in whose handwriting the contents of the book are, and if more than one handwriting appears in the book state whose, if you know?

A. To the best of my knowledge the first, second and third pages here are in the handwriting of William Davenport; the other pages, up to the third before the last, are in the handwriting of my grandmother; the balance, up to the end, to the best of my knowledge is in the handwriting of William Davenport.

Q. Will you state when and where you first saw the book or paper writing to which you have referred?

A. I have an indistinct recollection of having seen that book probably many years ago in looking over the old desk
459 through mere curiosity. That was long ago. I had looked for this book over and over again or for the papers or anything in connection with the State line, and I think it was the 10th day of November, 1910, that I discovered this book in that old drawer. Ned Jones came over there at my request, or rather, sanction, and I made a search for the book and found it in that old drawer.

Q. Describe the desk or depository where this book was found and just where you found it.

A. It was an old desk that has been in the house since I can first recollect. It was in the house during my grandfather's life; he called it his secretary. It was full of little drawers. It has a large drawer that you can pull out and inside of that drawer there are a whole lot of little drawers, some not thicker than your hand, others are pigeon holes with little drawers to some of them, then four, five or six drawers, some eighteen inches long and very flat; and it was in one of these inside drawers that I found this paper.

Q. Then the drawer in which you found this paper was on the inside of another drawer or pigeon hole?

A. Inside of the big drawer. The front of the main drawer opened down and you make a writing desk of it; it was about a foot wide and the drawers were from there back to the back end—about half of the drawer.

Q. Were there any other papers in the drawer where you found the book in question?

A. A great many of them—it was nearly full.

Q. State the nature of those papers that were with the book in the drawer?

A. I looked over it again last night. I found there President's message, notably one or two from Andrew Jackson; found a whole lot of old deeds, old letters, and almost everything you could think of in the way of old papers.

Q. Did any of those papers pertain to your grandfather's business, or were any of those letters addressed to him?

A. Pretty much all of them were addressed to him.

Q. Were any of those papers in your grandfather's handwriting?

A. I don't know that they were—they might have been. I have some papers here that I think are his handwriting. Some of the papers or the endorsements on them were in his handwriting.
460 Q. Did I understand you to say there were old deeds in the drawer in which the book referred to was found?

A. I rather think not in that drawer. I keep my deeds in another drawer.

Q. How long to your knowledge has the desk in which this book was found been in the possession of the family of William Davenport?

A. Tradition says that it was made there at the house from timber off of the farm and it was there ever since long before my birth, I guess.

Q. When did it first come into your possession?

A. All the old furniture was left in the house—never moved away at all; some renters lived in the house. The desk has been in my possession in the house ever since 1866 when I moved there.

Q. When did your grandfather die?

A. About 1858, I think.

Q. Has the furniture of your grandfather, including this desk, remained continuously in the house from the time of his death until the present?

A. Yes, sir.

Q. You have had this secretary in your possession since 1866?

A. Yes, sir.

Q. Will you please describe the physical condition of the book referred to, how it was made, of what kind of paper, its appearance as to age, etc., as nearly as you can?

A. It looks very much like it might have been made by hand; it is — very well preserved copy; the back is thick paper or thin paste board; in the inside the leaves are put in cross ways from the way they are ruled.

Q. Are there any columns or rulings other than the ones on the original paper?

A. Yes, sir.

Q. How are they made?

A. They seem to be made with a pen in which the poles and courses were entered.

Q. How does it appear as to age, both from the character of the paper and the writing in it?

A. It appears old. Part of this, the back side, doesn't seem to have ever been ruled at all.

Q. The paper in the last part of the book doesn't correspond in make with the other?

A. It seems to be thicker and unruled.

Q. State whether or not the book has the appearance of having been made by hand from different kinds of paper?

461 A. It seems to have been made by hand from all appearances now.

Q. Will you read from the 12th page of this book beginning at the point referred to as the 64th mile?

A. (Witness reads.) A large white oak, 64th mile; south 75 west 320 poles, crossing Tennessee River, to a large white pine south side of the river at the mouth of a large creek; 65th mile; south 80 poles up said creek; 40 west 80 poles; 70 west 40 poles; south 60 poles; due west 60 poles to a spruce pine, 66th mile; south 65 west 80 poles; south 20 west 60 poles; south 70 west 40 poles; south 20 west 140 poles to a birch, 67th mile at the Cheogee path, due west 140 poles (August 16, 1821); south 15 west 180 poles to a sycamore, 68th mile; south 30 west 180 poles; due west 20 poles; south 35 west 120 poles to a maple on the east bank of said creek 69th mile; south 30 west 320 poles to a birch on the west bank of said creek 70th mile, etc.

Cross-examination.

By APPELLEE:

Q. You were born in the year 1839?
A. Yes, March 30th.
Q. Where did you live from 1839 to 1866?
A. My home was at my father's—diagonally across the Yadkin River, in sight of this house I now live in—almost due east.
Q. Where did William Davenport live in 1821?
A. I don't know. I guess he lived right where he lived when he died. He died where I live now.
Q. Who lived in that house from 1858 to 1866?
A. I think it was the manager, Mr. Uriah Cloyd.
Q. Of your own knowledge you don't known where the desk or secretary in which you testified you found the notes was during that eight years?
A. I know it was in the house right where it is now.
Q. You referred to the fact that the first, second and third pages of this book endorsed as the field book of William Davenport were in the handwriting of William Davenport?
A. I think so. I don't know the handwriting as well as the signature.
Q. I will ask if the pages 1, 2 and 3 you refer to do not contain "beginning at the Cattalucha trail," etc., and end at the call prior to "south 30 west 70 poles, birch at six miles"?
462 A. I think so, yes, sir. I am not sure.
Q. Beginning at the call south 30 west 70 poles, birch at six miles, in said book which I hand you, and including all the calls in the succeeding pages and ending with the words "thence south 15 miles and 220 poles to a post oak post on the Georgia line at 23 poles west of the 72nd mile from the Nichijack old town on the Tennessee River," is that in the handwriting of Mrs. William Davenport, wife of said William Davenport, your grandmother, as testified to by you?
A. I think it is in the handwriting of Mrs. Davenport.
Q. You read certain calls in your direct examination beginning at a large white oak, 64th mile, south 75 west 320 poles, etc., including, I think, up to the 70th mile. I will ask you if those notes that you read were in the handwriting of Mrs. William Davenport, your grandmother?
A. To the best of my knowledge, they are.

Redirect examination.

Q. State, if you know, either from your own knowledge or from any tradition in the family as to whether or not your grandmother frequently or customarily wrote various matters for your grandfather?
A. Yes, sir.

Appellee objects to the foregoing question for the reason that it is irrelevant and there is no evidence that the same affects the subject matter of this deposition, and should be stricken out.

Q. State what you know in regard to this?

A. I have often seen her when I was quite a boy writing at his dictation documents of different kinds. It was known by all the connection that she always did all his writing pretty much, deeds, contracts, and things of that kind; she always wrote them out for him. I have often seen her write for him.

Appellee objects to the answer of the witness as being hearsay.

W. D. JONES.

I, J. H. Beall, above named Notary Public, do hereby certify that pursuant to the annexed notice, issued in the above mentioned case, wherein D. W. Belding, M. M. Belding, A. N. Belding, Henry Stix, Nathan Stix, Louis Krohn, D. W. Hyman, Mary Bragg and R. N. Archer are appellants and Charles Hebard is appellee, and
463 wherein William R. Hopkins, Benjamin P. Bole, Edward I. Leighton, Fred W. Bruch, George Reeves and John Matthews are appellants, and Charles Hebard is appellee, I was attended at the office aforesaid of J. H. Beall of Lenoir, in the County of Caldwell and State of North Carolina, between the hours of eight o'clock A. M. and six o'clock P. M., on the 1st day of March, 1911, by Zebulon Weaver, of counsel for above appellants, and by John F. Shields, counsel for said appellee.

The aforementioned witnesses, Edmund Jones, Jr., and W. D. Jones, who were of sound mind and lawful age, were by me first carefully cautioned and duly sworn to testify the truth, the whole truth and nothing but the truth, and who thereupon testified as above shown. The depositions by me above subscribed were by me reduced to writing in the presence of said witnesses and from their statements and were subscribed by said witnesses in my presence and were taken at the place in the annexed notice specified and at the time set forth, and all was so done, written and signed in the presence of said counsel for said appellants and appellee.

I further certify the reason for taking said depositions was and is and the fact was and is, that the said Edmund Jones, Jr., and W. D. Jones, witnesses as aforesaid, live more than 100 miles from the place where said suit is appointed by law to be tried in the Circuit Court of Appeals of the United States for the Sixth Circuit. I am neither counsel nor an attorney for either of the parties to said suit, nor interested in the event of said cause, and that it would be impracticable for me to deliver said depositions and exhibits thereto in my own hand into the court which they will take. I have retained the same for the purpose of being sealed up and directed in my own hand and speedily and safely transmitted to the said court for which they were taken and to remain under my seal until then and there opened.

Witness my hand and Notarial Seal this the 1st day of March, 1911.

J. H. BEALL,
Notary Public.

My commission expires May 11, 1911.

And afterwards to-wit on March 25, 1911, the affidavit of Edmund Jones, was filed which reads and is as follows:

STATE OF NORTH CAROLINA,
Caldwell County, ss:

464 Personally appeared before the subscriber, a Notary Public in and for the County of Caldwell, State of North Carolina, Edmund Jones of Lenoir, North Carolina, personally known to me, who being duly sworn according to law doth depose and say that he is an attorney at law and the grandson of one William Davenport, who was a surveyor and resided in Caldwell County, North Carolina. That it is said that said William Davenport was a surveyor representing the State of North Carolina during the year 1821 as to making a survey of the State Line between the States of North Carolina and Tennessee from about the Pigeon River to the northern boundary of the State of Georgia.

I have seen and examined certain notes of survey found by my son Edmund Jones, Jr., which notes purport to refer to a survey made of such part of the State Line as is above mentioned and marked on the outside "W. Davenport's Field Book, July 18, 1821." I am also the personal representative of said William Davenport, being the Executor of the Estate of the one who was the administrator of said William Davenport's Estate, and as such, a large number of family papers have come into my hands, including many papers purporting to be in the handwriting of said William Davenport and his wife, and which I have every reason to believe are genuine.

I never remember having seen either William Davenport or his said wife write, but from the knowledge I have of their writing in the papers which I have or have seen purporting to be in their handwriting, it is my firm belief that the field notes referred to above, and which I am informed are sought to be filed in a certain case in the United States Circuit Court of the Sixth District, known as Belding et al. vs. Hebard, or Hopkins et al. vs. Smoky Mountain Company, correspond to the handwriting of the wife of said William Davenport and are not in said William Davenport's handwriting, and that the back or cover, which is stitched or sewed to the separate sheets containing the notes of survey, is in the handwriting of William Davenport. But the actual notes of survey are not in his handwriting, and are, therefore, not the original notes taken by said William Davenport while on the survey.

EDMUND JONES.

Sworn to and subscribed before me the 2nd day of February, 1911.

[SEAL.] R. H. SPAINHOUR,
Notary Public With Seal.

My commission expires May 7th, 1911.

465 And afterwards to-wit on March 29th, 1911, the deposition of John L. Williams was filed clothed in the words and figures as follows:

In the United States Circuit Court of Appeals, Cincinnati, Ohio.

No. —.

W. R. HOPKINS et al.
vs.
CHARLES HEBARD.

The deposition of John L. Williams, taken by consent of parties, notice being waived, at Hotel Imperial, Knoxville, Tennessee, March 23rd, 1911, before John F. Edington, Notary Public for Knox County, Tennessee, in the presence of T. E. H. McCroskey, Attorney for Appellee and C. B. Matthews, Attorney for Appellants in the above styled cause, evidence to be used on behalf of the Appellees.

The witness, JOHN L. WILLIAMS, being duly sworn, deposed as follows:

Examined by Mr. McCROSKEY:

Mr. McCROSKEY: Denying the competency of the testimony of D. B. Burns heretofore taken upon the authenticity of the field notes of W. Davenport, and still insisting that the same is incompetent under order of court, the deposition of the witness John L. Williams is taken in rebuttal of the testimony of said Burns, and at the same time reserving the right to except, as already done, to the competency of the testimony of said Burns.

Q. 1. What is your business or calling and how long have you been in that business?

A. I am a surveyor; I have been for about fourteen years.

Q. 2. Where is the principal part of your work as surveyor, where has it been done?

A. Most of my work was done in Polk County, Tennessee.

466 Q. 3. State whether or not it has been mountain work, or the general character of the work?

A. The larger portion of my work has been mountain work.

Q. 4. In a general way state your experience as a surveyor, the kind and character of surveying, the different tracts you have surveyed, and their sizes?

A. Since the latter part of 1900, I have had charge of all the surveying done on the lands of the Ocoee Timber Company, approximating some 62,000 acres. The Wetmore estate in Polk County of 30,000 acres, and the Parmentier estate of 30,000 acres. The Parmentier estate was sold to the Conasauga Lumber Company about 1907, and after it was sold I surveyed the boundary lines of that 30,000 acres of land marked and monumented the lines. In De-

cember, 1908, the Ocoee Timber Company sold 50,000 acres to the Prendergast Lumber Company and soon after I surveyed, marked and monumented the 50,000 acres sold to the Prendergast Company. I have surveyed a great many small tracts for citizens of Polk County, ranging from 100 to 2,000 acres. I also made a survey of 20,000 acres in the counties of Fannin, Gilmer, and Pickens, in Georgia. I also made some surveys in Monroe County, Tennessee, some in Knox County, and I made a survey of 2,000 acres in Union County.

Q. 5. Has your deposition been heretofore taken in this case under the Bill of Review?

A. It has.

Q. 6. Prior to the taking of your former deposition, had you assisted in running the State Line between North Carolina and Tennessee of that part in dispute in this cause?

A. I had surveyed a part of the State Line for a few miles north of the Tennessee River, went over and looked at the part in dispute along the Hangover Ridge south of the Tennessee River, and I made a survey of the part in dispute on the Tellico River.

Q. 7. Have you seen the map filed as exhibit to D. B. Burns' deposition, under the Bill of Review?

A. I have.

Q. 8. Have you seen what purports to be a copy of the field notes of W. Davenport, one of the surveyors, along when the State Line was located, between North Carolina and Tennessee, in 1821?

A. I have.

467 Q. 9. Have you prepared a map or plat of that part of Burns' map bearing particularly upon the line in dispute in this cause, and also located thereon the calls or line of the purported field notes of W. Davenport, and if so, file the same as Exhibit "A" to your deposition?

A. I have made a map from the 59th mile tree as given in the field notes to the 75th mile tree. I then made a tracing copy of the line so platted and I then took the same tracing and laid it over a blue print of Mr. Burns' map, fitting the 65th mile as given in the field notes to the mouth of Slick Rock Creek, on the south side of the Tennessee River, and copied Slick Rock Creek and the line as laid down by Mr. Burns, on the same tracing. I file the map as Exhibit "A" as requested. Exhibit A.

Q. 10. If I understand, your plat you file, correctly, locates the line as located by D. B. Burns, and on the same paper, correctly shows the field notes—purported field notes—of W. Davenport?

A. Yes, that is correct.

Q. 11. And each line shows in writing what it is, one the marked line of the ground, as located by Burns, and the other field notes of W. Davenport?

A. Yes, the description is put on the map showing which is which line.

Q. 12. The plat speaks for itself, Mr. Williams, but will you also point out the discrepancies between the two, if any, as the same appear to you as a surveyor?

A. Well there seems to be but little similarity between the lines, for most of the distance shown, and it looks that the lines might be fitted together better than to place the 65th mile as given by the field notes at the south bank of the Tennessee River and to place the 59th mile circle over the end of the line as shown by Burns' survey, and which is said to be the 59th mile tree; the lines fit very much better to the river, but it only makes it fit worse on the south side of the river. The greatest discrepancy is the entire separation of the lines near the point marked "Big Fodderstack" where the lines continue a mile apart, or further for some three miles west there. The line as drawn from the field notes cannot follow Slick Rock Creek for any considerable distance. The lines fit very badly where the line is not in dispute, north of the river.

Q. 13. I believe you stated in your former deposition that you traced the line from the 59th mile tree to the north bank of the Tennessee River?

468 A. Yes.

Q. 14. And even the mark?

A. Yes.

Q. 15. And found a marked hemlock tree a half mile above the mouth of Slick Rock Creek?

A. Yes.

Q. 16. State whether or not you followed down the north back of the Tennessee River from the marked hemlock to the mouth of Slick Rock Creek, and if so, did you find any State Line marks down the river on the north side?

A. I didn't go down the river at the time I traced the line from the 59th mile tree to the north bank of the river, but at another time I went there on the river and went up the river to the marked hemlock and between the mouth of Slick Rock Creek and the marked hemlock, we found a marked chestnut oak, showing the marks on the east side and the west side. We cut into that tree and found no marks older than 58 years old on the east side of the tree. I never saw any other tree than I thought had State Line marks on it.

Q. 17. In Mr. Burns' deposition he states that he blocked, I believe, the same tree, and found that it had State Line marks of the proper age, that is showing 1821 when it was marked. State what you know about that block, and about this particular tree, and whether or not the block that he produced, showed State Line marks?

Mr. MATTHEWS: I object to all testimony in relation to the blocked trees, for the reason that it has no reference to the authenticity of the Davenport field notes, or what those field notes show as to the line surveyed.

A. I have seen, and examined the block filed by Mr. Burns, and have seen the marks in the block. I don't think they show the State Line marks as described. The block shows four hacks instead of two hacks and a blaze. They seem to be about the proper age.

Q. 18. Is there any State Line marks indicated by the four hacks?

A. No, none that I know of.

Q. 19. Have you copy of the field notes of W. Davenport, with you?

A. I had a copy, but I haven't them with me.

Q. 20. Where is the copy?

A. I left them at my home.

469 Q. 21. State whether or not you forgot to bring a copy with you when you came to Knoxville to have your deposition taken.

A. I did forget them; I meant to bring them with me.

Q. 22. How far is your home from Knoxville?

A. About 75 miles.

Q. 23. State whether or not you compared the copy that you had with the copy of the field notes filed by D. B. Burns with his deposition, and are they alike?

A. I compared the notes that I had with the copy that Gen. Cates had. I don't remember noticing whether it was the copy that was filed by Mr. Burns or not.

Q. 24. How long would it take you to get this copy to the Notary Public, who is taking this deposition?

A. Probably two days.

Q. 25. Will you please get the copy and turn it over to the Notary Public so that he may file the same as Exhibit "B" to your deposition?

A. I will.

Exhibit "B."

Q. 26. Have you read the report of the Commissioners locating the line between North Carolina and Tennessee in 1821?

A. Yes, I have read it several times.

Q. 27. You are familiar with its contents then?

A. I am, in a general way.

Q. 28. Does that report speak or mention the field notes?

A. No.

Q. 29. Taking the report of the Commissioners, or that part of it crossing the Tennessee River at 65 miles, thence to the main ridge and along the extreme heights of the same to where it is calld Unicoi or Unaka Mountain, and then comparing the field notes, the purported field notes of W. Davenport with those calls, state whether or not it is possible for the Commissioners to have adopted the field notes of W. Davenport as the State Line between North Carolina and Tennessee, or whether it is even probable that they did so, and give your reasons?

A. I don't think the field notes and the calls in them conform to the calls in the report of the Commissioners, and it don't seem to me that it is probable that they meant to report such a line as is shown by the field notes. The call "thence to the main ridge" don't seem to fit with the line running up the creek for five miles,

470 and then to a minor ridge and along that ridge to the main mountain, reaching the main mountain at a distance of ten miles, when the main ridge could have been reached by a line run-

ning four or five miles long. To take the line as shown by the purported field notes, would be contrary to the idea of the survey following the top of the mountain, and contrary to the Cession Act.

Q. 30. The Davenport field notes called for reaching the main mountain at the 75th mile. What is the main mountain, as you understand from your observation and experience as a surveyor, in locating the State Line along the point in dispute?

A. Well it is the mountain running from Laurel Top and dividing the waters of Citico Creek and Santeetla Creek by Stratton Bald, the Hayo and on towards Cheoah River.

Q. 31. Where is Laurel Top with reference to the point in dispute?

A. It is several miles to the south of the point in dispute.

Q. 32. On the State Line?

A. Yes.

Q. 33. When you speak of Hayo and then on to the Cheoah River, how far is Hayo from the Tennessee River, where it says, crossing Tennessee River at 65 miles?

A. Something like five miles.

Q. 34. Is there a ridge running from Hayo to Tennessee River, striking the river a half mile or so above Slick Rock Creek?

A. Yes.

Q. 35. What is that ridge called?

A. It is called the Hangover Ridge or Lead.

Q. 36. State whether or not that is a plain, distinct ridge and direct from the river to Hayo?

A. It is.

Q. 37. When the Commissioners then said "from Tennessee River to the main ridge and along the extreme height of the same" what ridge or spur would they naturally follow from the calls to reach the main ridge?

A. It seems to me that would place it on the Hangover ridge, the Hayo, and Stratton Bald.

Q. 38. Would that be a straight course from the river to the main ridge?

A. Yes, nearly a direct course. The ridge of course has some bends in it.

471 Q. 39. Is it the most direct course to the main ridge?

A. It is.

Q. 40. How much more of a direct course is it than following down the river a half mile, and thence up Slick Rock Creek to the top of Fodder Stack Ridge to the main mountain, either by Burns' claim under the deposition, or by the field notes of W. Davenport?

A. It is only about half the distance by the main ridge, by way of Hangover Ridge, than by the other line as surveyed by Burns, or as given by the field notes.

Q. 41. North of the river, according to the reported field notes of W. Davenport, there is a straight line for one mile, terminating on the south side of the Tennessee, at or near the mouth of Slick Rock Creek. Mr. Burns, in his deposition in this particular matter, states that the hemlock on the north bank of the Tennessee River, a half

a mile above the mouth of Slick Rock Creek, is only some three hundred or four hundred feet from this projected line, according to W. Davenport's purported field notes. As a matter of fact, how far is that marked hemlock from said projected line?

A. By the map, it is nearly a quarter of a mile. I scaled it yesterday, and by the scale, made it 1,180 feet.

Q. 42. Does this Exhibit "A" show the Tennessee and Cheoah rivers as located by Burns, on his map, as well as Slick Rock Creek?

A. Exhibit "A" is a copy of the streams shown on Burns' map.

Cross-examination.

By Mr. MATTHEWS:

X Q 1. Where do you reside Mr. Williams?

A. About two miles northeast of Benton, in Polk County, Tennessee.

X Q. 2. How long have you resided there?

A. All my life.

X Q. 3. Now to go back to where you say you scaled that hemlock as 1,180 feet from that straight line just north of the river, as shown by the field notes that terminate at or near the mouth of Slick Rock Creek, to what point in that straight line did you scale 1,180 feet from the hemlock?

A. I scaled the distance on a perpendicular let-fall from the hemlock to the straight line.

X Q. 4. Now where is Citico Creek located, and in what direction does it run?

472 A. It rises to the west, south and southwest of the point marked "Big Fodderstack" on Exhibit "A" to my deposition, and flows into the Tennessee River something like twenty miles below the mouth of Slick Rock Creek, I guess, and flows in something like a general northwest direction.

X Q. 5. It does not cut through the Fodderstack range at all, does it?

A. No.

X Q. 6. And do you say that it is located entirely within the State of Tennessee?

A. Yes.

X Q. 7. How near does it come to the Fodderstack, in its headwaters, or at its headwaters?

A. Well the Fodderstack Ridge, is the dividing ridge between the waters of Slick Rock Creek and Citico Creek. The main head of Citico Creek is to the south of Big Fodderstack, but some of its waters, or branches, are located north of Big Fodderstack.

X Q. 8. Well, how near, at any point, do these headwaters come to the Big Fodderstack range, I don't mean to give it in feet, but as near as you can get at it, do they come close up to the Big Fodderstack range in places?

A. Yes, I suppose some of the waters are as close as a quarter of a mile to the top of the Big Fodderstack range.

X Q. 9. And how near the foothills on the west side of the Fodderstack, do the headwaters come at any point?

A. Well the small streams, rising on the west slope of the Fodderstack range, run into Citico Creek, so that the waters of Citico are on the western slope of the Big Fodderstack, and at the foothills too.

X Q. 10. Now when you say that the field notes are contrary to the Cession Act and the report of the Commissioners, you have assumed all along that the Cession Act and the report of the Commissioners fixed that State Line as running along Hangover Ridge, have you not?

A. As along the mountain top and the line as following the mountains.

X Q. 11. Well what mountains, the Hangover Ridge, isn't it?

A. Yes, that is the main ridge; that is it leading up to the main ride.

X Q. 12. I understand you to say that what is called Hangover Ridge, is rather a spur to the main ridge?

473 A. Yes, the Hangover Ridge is a spur of the main ridge.

X. Q. 13. Now when you speak about reaching the main mountain with a line only four or five miles long, you don't mean a line running along Hangover Ridge to that junction below there in Fodderstack, you mean a straight line through the valley, don't you?

A. I have not measured the distance along the ridge or along a straight line from the river to the Hangover and the Hayo, but I have walked over it, and I have seen a number of maps showing the ridge, and from that I estimate it is about five miles from the river.

X Q. 14. Along Hangover Ridge?

A. Along Hangover Ridge to the Hayo, and it would be some three miles from the Hayo to the junction.

X Q. 15. Was it that Hayo you called the commencement of the main ridge, or the junction where it runs down from the junction to Unicoi; do you call that the main ridge or from Hayo down?

A. I describe the main ridge as being the Laurel Top and the main ridge leading from Laurel Top to the junction, Stratton Bald and Hayo, and extending from Hayo towards the Cheoah River.

X Q. 16. Now with regard to that tree, were you with Hale when he blocked that tree between the hemlock and the mouth of Slick Rock?

A. Yes, we were there together.

X Q. 17. Now that tree you say was marked both on the east and west side?

A. Yes.

X Q. 18. The marks that were visible on the outside were State Line marks, apparently, were they not?

A. Yes.

X Q. —. On both sides?

A. Yes.

X Q. 20. Now you say you noticed the block Mr. Burns brought in, and you did see some marks in the wood that were as old, you

thought, as 1821, but that they were not two hacks and blaze, but rather four hacks you thought?

A. Yes.

X Q. 21. Was there any indication in those marks that those cuts had been made through the bark, from discoloration of the wood or otherwise?

474 A. Yes, the interior of the block showed plainly that it had been cut through the bark and into the wood.

X Q. 22. Even with the marks on the outside then, which you say on one side you discovered only to *the* 59 years old?

A. 58 years old.

X Q. 23. 58 years old; if these other marks had gone clear through the bark, would there not have been some scar or other mark on the outside?

A. I don't believe I quite understand your question.

X Q. 24. If the tree had been marked in any way by cutting through the bark in 1821, and then afterwards, about 58 years ago, a State Line mark had been made, an apparent State Line mark on the outside of the tree, would these older marks not have left a scar, or been visible as some kind of a mark or scar on the outside of the tree, in addition to what you saw there, assuming now that they had been cut through the bark?

A. At the time I was there and examined the tree, I saw no sign of anything but the one set of marks on either side of the tree. Then on examining the block filed by Mr. Burns, and which still had the bark, I couldn't find any sign of anything but the one set of marks, and the two hacks and blazes as shown in the bark on that block filed by Mr. Burns, corresponded to the marks in the block 58 years old.

X Q. 25. That is not my question Mr. Williams. I understand that you didn't find any other marks, and I understood that before, but I say that if these marks had gone through the bark that were as old as 1821, and I will put it in this way: If the State marks which were afterwards visible there on one side were only 58 years of age, would not the other marks have left some scar or mark which would have been visible on the outside of the tree, other than the marks you saw, unless the 58 year old marks had been made over the other?

A. Yes.

X Q. 26. Now Mr. Williams, you knew when you came here, didn't you, that you were to be examined with reference to those field notes, or purported field notes of Davenport, did you not?

A. No, I didn't know it; I expected it, but when I was sent for, there wasn't anything said about what my examination would be. I knew about the field notes.

475 X Q. 27. But the field notes had previously, or copies of them, had been sent you for examination?

A. Yes.

X Q. 28. And for the purpose of making this map, were they not?

A. Well I made the map from what I made this copy, sometime ago from the field notes; it has probably been two months ago.

X Q. 29. What were you informed was the object of sending these field notes, or a copy of them to you?

A. They were handed to me in Knoxville, at the Court House, and I was asked to make a map of the field notes on the same scale as the map filed by Mr. Burns, that is 2,000 feet per inch, and I made the map from the 54th mile tree to the 101st mile tree on that scale, and also made a tracing of that map.

X Q. 30. Do you mean the 54th or the 59th mile tree?

A. The 54th mile tree.

X Q. 31. Then you did suppose you were summoned here today that you came to testify with regard to the map you made, and you brought the map with you, but you didn't bring the field notes with you, although you say you expected to bring them and forgot them?

A. Yes, sir, I forgot them, and I expected to be examined on the field notes.

X Q. 32. Well you supposed that the presence of those field notes would be useful in your examination, did you not?

A. Yes, sir, I meant to bring them.

X Q. 33. Now you say that this is a copy of the map you made sometime ago?

A. It is as to the line from the field notes, the purported notes of W. Davenport.

X Q. 34. I don't know that I catch that; you didn't make any copy of that line from the field notes until you got a copy of the field notes themselves, did you?

A. No.

X Q. 35. When you say "from the map you made sometime ago" then you mean that the map that was made sometime ago was made subsequent to the getting of the copy of the field notes?

A. I first saw a copy of the field notes on the 16th of January 1911, and was given a copy of the field notes one or two days later. I finished making the map on the 24th of January, but later, in comparing the notes which I had, with a copy that was here
476 at Knoxville, I found that there was an error in the notes, and a few days later, about the 30th or the 31st of January, I corrected the map to correspond with the correction I made in the field notes.

X Q. 36. Yes; do you recollect at what point on this map that correction was made?

A. It was about the head of Tellico River, about the point known as "County corners."

X Q. 37. Now you have no meridian on this map, have you?

A. No.

X Q. 38. There is nothing on this map by which any portion of your work then can be compared with the true meridian?

A. There are some faint pencil lines on it that show the north and south points. Those pencil lines were put on from the meridian lines shown, on Mr. Burns' map.

X Q. 39. And they are similar lines, are they not to his lines on

his map?

A. Yes.

X Q. 40. What he calls the "coordinates"?

A. Yes.

X Q. 41. Now how did you locate this northeastern part of the line by the 59th mile tree, by the field notes, with reference to Burns' survey?

A. By placing the 65th mile as shown on the line drawn from the field notes at the mouth of Slick Rock Creek on the south side of the Tennessee River. That places the 59th mile tree where it is shown from the point shown on Mr. Burns' map.

X Q. 42. And how did you locate the 59th mile tree or circle as shown by the field notes?

A. That was done by putting the tracing over the map I had made from the notes.

X Q. 43. Did you make any allowance for variation of the meridian line at all on the compass?

A. Yes, I did.

X Q. 44. What variation did you make?

A. It was about six and one-half degrees. I placed the 65th mile circle, as shown by the map of the field notes at the mouth of the Slick Rock on the south side of Tennessee River, as shown by Mr. Burns' map, and swirnging the tracing, made the best possible fit I could with Slick Rock Creek, and it shows a difference of about six and one-half degrees in variation from the field notes
477 and the true meridian as shown on Mr. Burns' map.

X Q. 45. From time to time, the magnetic and even the true meridian vary, do they not?

A. The magnetic only, the true meridian does not vary.

X Q. 46. Never in any length of time?

A. No.

X Q. 47. Aren't you aware that what may be the true north star, may at some future time move out of place and some other star be the true north star?

A. I don't know enough about astronomy to know about that, but the true meridian is used for all comparisons, and it couldn't be used if it wasn't true all the time.

X Q. 48. Well all of the time during these periods when it is used?

A. Yes.

X Q. 49. But the magnetic meridian does vary, and there are tables which are established by the Government, for different times and localities?

A. Yes.

X Q. 50. You have always understood, haven't you, from 59th mile circle to the 64th mile, the location of the State Line is undisputed?

A. Yes, that has been my understanding all the time.

X Q. 51. Now at that straight line, from 64th mile, according to those field notes, and at the angle of 75 degrees, which that report states, does reach the mouth of Slick Rock Creek does it not?

A. It does, about so, as shown on the map, the 64th mile circle

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being just a little west from the top of the ridge as shown by Mr. Burns' survey.

X Q. 52. Now those field notes couldn't in any way, I judge, from your copy here, be made fit a line over Hangover Ridge?

A. No, I think not.

X Q. 53. And there is no creek coming out opposite the hemlock tree towards Hangover Ridge, is there, or stream or any kind?

A. No.

X Q. 54. Can you give me the angles that you took, say from the 70th to the 71st mile, in laying down this line according to the field notes?

A. No, I cannot, without having a copy of the field notes.

478 X Q. 55. Nor from the 71st to the 72nd mile?

A. No, nor for any other distance shown on the plat.

X Q. 56. I notice that at the 72nd mile, which is about seven miles from the Tennessee River, according to the field notes, it takes a turn to the left on this map similar to the turn shown on Burns' survey, but at a further distance from the Tennessee River?

A. Yes.

X Q. 57. So that the main difference, the larger difference, I mean, the more apparent difference between the field notes line and Burns' line is in the distance from the Tennessee River at which that turn comes in?

A. That is the greatest difference. They both make about the same turn, and the lines are about parallel from the turn.

X Q. 58. And you make the 71st mile circle a little southwest of the Big Fodderstack, or southeast, is that, or south or what?

A. It is nearly south.

X Q. 59. Now you have examined the map of 1821, of course?

A. Yes.

X Q. 60. That is called the "Commissioners' map" that was filed; that map is on a very small scale, isn't it?

A. Yes, it is on a very small scale.

X Q. 61. This is one inch to two thousand feet, and that was one inch to two and one-half miles, wasn't it, or eight hundred poles?

A. Yes, I believe so.

X Q. 62. And it would be largely impossible, wouldn't it, to give all the angular turns upon a map, upon such a small scale?

A. It would be on such a survey as made by Mr. Burns, and on such a survey as I made north of the Tennessee River.

X Q. 63. That is, when you say such a survey made by Mr. Burns and you, that is with the angular turns?

A. Yes, sir.

X Q. 64. That is it would be impossible in a short distance, that is a map with a scale of eight hundred poles, to the inch, it would be impossible to give in a short distance, all the little turns, would it not?

A. Yes, it would be practically impossible to show them.

479 X Q. 65. And that map of 1821, does in fact show many straight lines, does it not, where in fact on the ground there are many turns?

A. Yes.

X Q. 66. And in those straight lines, you would lose distance, wouldn't you; in other words take this 67th to 68th mile, a straight line would be the third of a triangle there, of course that would be a loss of distance, wouldn't it, measuring by that line, and measuring around the other two lines of the triangle?

A. If the bearing is taken on a straight line and the distance is measured by crooks and turns, following a brook or stream or anything else, then it is a loss of distance.

X Q. 67. The creeks and turns, in other words, would show a greater distance than a straight line?

A. Yes.

X Q. 68. And wouldn't that indicate, so far as the map of 1821 is concerned, that between miles and particularly between prominent points, they made straight lines rather than angular ones?

A. It might indicate that, and it might indicate that they measured over very straight lines, but measuring very carelessly and with surface measure and lost distance in that way. I don't know, but it might indicate either.

X Q. 69. Please explain just what you mean by surface measure?

A. Surface measure is taken with the chain or tape lying on the ground.

X Q. 70. And conforming to all the turns of the ground?

A. Yes.

X Q. 71. Elevations and everything?

A. Following the surface of the ground, both in going up and down hill, and in measuring on level ground, in doing that, it is a crooked line, and a straight line is the shortest distance between two points.

X Q. 72. Even if in your imagination you had to cut the line through the hill?

A. Yes.

X Q. 73. In other words you make a horizontal straight line?

A. A horizontal measure is taken very approximately by keeping the chain level, that is in going up hill the rear of the chain is held up so as to be on the same level with the front end of
480 the chain, and changing vice versa in going down hill.

X Q. 74. And what is the proper way of measuring the surface of mountain lines?

A. The proper way is to make horizontal measurements, because no one can make a proper map or know the correct distance without doing that. In other words this survey, with surface measurements, will not check out and close in platting or mapping.

X Q. 75. And you don't know the course which the Commissioners adopted in 1821?

A. No, I don't know whether by level measurements or surface measurements.

X Q. 76. Have you been on the ground there and made any additional surveys on the ground since you made this map?

A. No.

X Q. 77. Did you take the meridian of that so-called straight line

down at the south end of the map of 1821, to ascertain how near it came to the true meridian or magnetic meridian?

A. No. I don't know whether the original map shows anything that would indicate the true meridian or not. I think it probable that the north point, shown on the original map, was intended for the true meridian, but I don't know, that is merely a guess.

X Q. 78. And then if there is a difference between the meridian shown between that south line that I speak of and the north line, you would take the north end of the line as the correct meridian rather than the other, is that the idea?

A. I would, as the correct meridian, yes; because I know the straight part of the line, running due south from the Unicoi turnpike, was taken from the magnetic bearing.

And further deponent saith not.

JOHN L. WILLIAMS.

Sworn to and subscribed before me this the 23rd day of March, 1911.

[SEAL.] JNO. F. EDINGTON,
Notary Public in and for Knox County, Tennessee.

My commission expires January 5th, 1915.

STATE OF TENNESSEE,
County of Knox, ss:

I, John F. Edington, a stenographer and Notary Public, hereby certify that the above witness, John L. Williams, was by me
481 first duly sworn to testify the truth, the whole truth and nothing but the truth; that his deposition was reduced to writing by me, and when completed read over by said witness and subscribed by him in my presence; and that said deposition was taken by consent, notice being waived, at Hotel Imperial, Knoxville, Tennessee, on the 23rd day of March, 1911; that the parties were represented at the taking of said deposition by their respective counsel as set forth; that the several exhibits recited were offered in evidence, marked as specially noted in the foregoing deposition; and that I am not counsel or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof, I have hereunto set my hand and official seal, this the 23 day of March, 1911.

[SEAL.] JNO. F. EDINGTON,
Notary Public in and for Knox County, Tennessee.

The following and every part thereof is a true, complete and exact copy of the book of field notes made by William Davenport, the surveyor for the State of North Carolina when the State Line was run, between North Carolina and Tennessee in the summer of the year 1821. The book of notes was found by Edmund Jones, Jr., on the 10th day of November, 1910, in a secret drawer of an old sideboard formerly belonging to William Davenport at his old home in

Caldwell County. Both the home and the old sideboard are at present the property of his grand-son William Davenport Jones, who together with Mrs. Emma H. Gilley was present when the book of field notes was discovered. Edmund Jones, Jr., is a great grand-son of William Davenport. The notes are contained in a book six and a half inches long by four inches wide and are written on unruled paper. The book is stitched together with coarse thread, with heavy brown paper backs and is in a perfect state of preservation. On the outside of the front page is written:

"W. Davenport's
Field Book
July 18th 1821."

"July the 19th 1821 began at the Cattalucha Track to run the line between the State of North Carolina & Tennessee Marked a rock there on North Carolina side N. C. 1821 and on the other
482 side T, E, N 1821—and runs with the line that J M Dowel & D Vance run in the year 1799 and runs with said line about 2 miles and a half to where they stopped.

South	88	W	6	poles	—hickory
No.	42	W	12	Do	—chestnut
South	64	W.	14	Do	—chestnut
South	50	Do	16	Do	Bo
Do	64	W	27	Do	pine
West			30	Do	chs't
South	65	W	38	Do	B, Gum
S	18	W	23	poles	
X S	30	W	60	poles	
X N	80	W	100	P.	Chestnut 1st Mile
X N	60	W	60	P.	
X S	75	W	100	P	
X S	60	W	80	P	
X West			80	P	Chestnut 2nd M
X West			40	P	
X S	75	W	30	P	
X S	85	W	40	P	
X S	50	W	50	P	
X S	80	W	40	P	
X N	80	W	50	P	
X S	60	W	20	P	
X N	80	W	50	P	Maple 3rd M
X N	80	W	60	P	
S	50	W	70	P	to the top of the smokey mountains at a spring on the extreme height of the mountain
X S	50	W	20	P	
X S	50	W	80	P	
X South			90	P	Larch 4th M
X S	20	E	40	P	
X S	30	W	100	P	
X S	15	W	120	P	

X S 70 W 60 P red oak 5th M
X S 80 W 70 P
X S 30 W. 100 P
X S 25 W 80 P to red oak in a low gap lay by on Sunday and monday and set out Tuesday morning
X South 30 W 70 Burch at 6 miles
due So 80
" 35 W 60
" 70 W 180 Spruce pine at 7 miles

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X South 30 W 100
due West 100
X South 40 W 120 Spruce pine at 8 miles
X S 70 W 320 Spruce pine at 9 miles
" 80 W 228
X due South 40
X South 10 W 52 Fir or balsom pine at 10 Miles
X " 10 W 40 P
X " 65 W 80 P
X " 60 W 60 P
X " 35 W 140 P Fir or Balsom pine at 11 Miles
X " 30 East 154 P
X due South 166 P Balsom pine at 12 Miles
X South 160 P at the top of the main smokey or Iron Mountain
X South 20 East 80 P on a high Mt head of Big (unintelligible) (creek) from the point to the (cannot be deciphered) (white oak it is N 45 E)
X " 40 West 80 P, Bush at 13 Miles
X " 10 West 80 P
X " 55 West 80 P
X due West 80
X South 60 West 80 Spruce pine at 14 Miles on a high point of smokey Mts
X due South 160 low gap
X South 30 West 80
X " 70 West 80 Burch at 15 Miles
X South 40 West 80
X " 80 West 80
X " 35 West 80
X " 25 West 80 to a Burch & Mountain China Tree at 16 miles in a low gap between the East Fork of Little Pigion and Oconuftly River
X South 10 West 80
X " 25 West 60
X due South 40
X South 20 West 140 Spruce pine at 17 Miles
South X 30 West 40
" 50 West 120
" 75 West 80
due West 80 Fir or balsom at 18 Miles

X South 80 West 40
X North 70 West 120

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N North 45 West 160 Spruce pine at 19 Miles
X South 60 West 40
due X West 220
North X 70 West 60 Spruce pine at 20 Miles at the top of an extreme high pinacle in view of Severeville
South X 50 West 260
X 70 W 60 Burch on high point at 21 Miles
South X 85 W 40
" X 30 W 180
" 10 East 100 Spruce pine at 22 Miles
X South 25 East 94 to porter's gap, from Porters Gap
South 15 East 20 (30th July 1821)
" 50 West 60
30 West 60
70 W 86 Spruce pine at 23rd Mile
South 30 W 80
80 W 40 To the Indian Spring waters of Lufty
80 W 40
60 W 160 Burch 24th Mile
South 20 W 80
60 W 180
due South 60 Spruce pine at 25th Mile
North 65 West 60 Spruce pine 25th Mile August the 1st 1821

Balsom pine 29th mile the above corner is against the head of the west fork of Pigeon River near an old Indian Camp (aug. 2nd 1821) which is at a low gap at the head of Big Creek of Tennessee and if there ever is a wagon road through the Big Smokies Mountain it must go through this Gap

5th of August 1821
South 20 West 160
South 70 West 160 Spruce pine and Burch 26th Mile
South 55 West 100
40 West 160
West 60 Balsam pine 27th Mile (Aug. 6th 1821
South 75 West 40
10 W 40
70 Wt 100
80 Wt 140 Beach 28th Mile at head of the South Wt fork lufty
West 160
South 45 Wt 80

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30 Wt 80 Beach 29th Mile Indian path at the head of deep or
South 20 Wt 80
50 Wt 60

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	15	Wt	80	
	30	Wt	100	Spruce pine 30th Mile
South	55	West	320	Wild Cherry tree 31st Mile (Aug 7th
South	50	West	160	to Meigs (?) post
	40	West	160	Balsam pine 32nd Mile head of Little River
South	25	West	320	Balsam pine 33rd Mile
South	75	West	100	
	40	West	120	
	80	West	100	Balsam pine 34th Mile in view of Bears town
		West	120	
South	75	West	100	
North	70	West	100	Spruce pine 35th Mile
South	75	West	160	
		West	160	Buck eye 36th Mile, in rich beech flat Aug 8th 1821
South	80	West	80	
	60	West	120	
North	75	West	120	Mount China 37th Mile
		West	160	(August 9 1821
South	50	West	40	
Due		West	120	Beach 38th Mile
South	70	West	180	
North	60	West	140	Cherry Tree 39th Mile
North	60	West	320	Cherry Tree 40th Mile
"	70	West	160	
South	45	West	80	
"	70	West	80	Beach 41st Mile
South	70	West	80	
				10th August 1821
Due		West	80	
South	60	West	160	Beach 42nd Mile
North	65	West	100	
South	45	West	160	
Due		West	60	Spanish Oak 43rd Mile
North	65	West	80	
Due		West	240	Beach 44th Mile
South	80	West	320	Beach 45th Mile head of the West Fork of Little River
486				
South	55	West	40	
South	80	West	280	Beach 46th Mile
	55			
North	55	West	60	
South	50	West	140	
North	80	West	120	Beach 47th Mile
South	55	West	160	(August 11th 1821
"	70	West	160	Buck eye 48th Mile
Due		West	320	Burch 49th Mile, at the head of Abrums Creek
South	40	West	100	
North	70	West	120	

South 50 West 100 Red oak 50th Mile
Due West 80
South 30 West 40
South 80 West 100
South 10 West 100 Cucumber tree 51st Mile
South 40 West 200
75 West 60
40 West 60 Chestnut tree 52nd Mile
Notes compared to this place
South 75 West 120
35 West 100
60 West 100 White oak 53rd Mile
South 35 West 200 (August 13th 1821
50 West 120 Red oak 54th Mile Equonutty path to Cades Cove
South 60 West 100
70 West 120
due West 100 Red oak 55th Mile
South 60 West 320 Red oak 56th Mile
due West 320 To the top of the Bald Spot in sight of Tellessee Old Town 57th Mile
South 65 West 320 Red oak 58th Mile in the edge of second Bald Spot
South 25 West 320 Red oak 59th Mile
South 45 West 160
25 West 160 Hickory 60th Mile in a low gap at the path from Equinnotty to Tellessee
South 20 West 60
50 West 100 (Aug 14 1821
South 20 West 100 Red oak 61st Mile
South 20 West 60
South 60

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South 50 West 100
due West 100 Locust 62nd Mile
South 75 West 220
55 West 100 Red oak 63rd Mile
South 30 West 40
45 West 80
15 West 80
60 West 120 Large White oak 64th Mile
South 75 West 320 Crossing Tennessee River to a large white pine So side of the river at the mouth of a large Creek 65th Mile
(August 15th)
South 80 Up said creek
40 West 80
70 West 40
South 60
due West 60 Spruce pine 66th Mile
South 65 West 80

	20	West	60	
	70	West	40	
	20	West	140	Burch 67th Mile at Cheogee path
due		West	140	(August 16th 1821
South	15	West	180	Sycamore 68th Mile
South	30	West	180	
due		West	20	
South	35	West	120	Maple on east bank of said creek 69th Mile
South	30	West	320	Burch on west bank of said creek 70th Mile
South			40	
	10	West	60	August 17th 1821
due		West	60	
South	30	West	200	Pine 71st Mile
South	35	West	80	
	80	West	160	
	30	West	80	White oak 72 Mile on a ridge between aforesaid creek and Citico Creek
South	30	East	200	
	60	East	120	Red oak 73rd Mile
South			100	
	45	East	100	
	10	West	120	Maple 74th Mile
South	25	East	160	
	10	East	160	Beach 75th Mile Main Mountain
488				
South	25	West	320	Spanish oak 76th Mile in a low gap
South	25	West	100	August 18th 1821
South			60	
	55	West	160	Red oak 77th Mile
South	20	West	40	
	70	West	80	
South			40	
	45	East	160	Maple 78th Mile
South	15	West	100	
	70	East	100	
	30	East	120	79th Mile
South	20	West	260	
	10	East	60	Beach 80th Mile
South			100	
	60	East	200	Red oak 81st Mile
South	15	East	200	
	25	West	80	
	40	West	40	Beach 82nd Mile
South	40	West	40	
	50	West	160	
	40	West	120	Red oak 83rd Mile
South	40	West	320	Locust 84th Mile
South	40	West	120	(August 19th 1821
	60	West	200	Chestnut oak 85th Mile
South	60	West	320	Holly tree 86th Mile near the head of the Middle Fork of Tellico River
South	20	West	80	

	65	West	240	Red oak 87th Mile
South	80	West	320	Red oak 88th Mile
South	80	West	100	
North	80	West	60	(August 20th 1821
South	50	West	120	
	10	West	40	Hickory 89th Mile at the head of Beaver dam Creek
South	10	West	100	
due		West	100	
North	60	West	120	White oak 90th Mile
due		West	140	
South	70	West	180	White oak 91st Mile
South	15	West	100	
North	80	West	160	
South	45	West	60	Red oak 92nd Mile
South	55	West	280	
North	45	West	40	Red oak 93rd Mile to the trading path leading from the valley towns to the overhill settlements

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North	45	West	80	
South	80	West	120	
North	25	West	120	White oak 94th Mile on said path
North	40	West	320	White oak 95th Mile on said path
North	40	West	50	
	70	West	50	
South	45	West	80	(August 21st 1821
	70	West	40	
North	80	West	80	
South	70	West	20	White oak 96th Mile on the top of the Unicoi mountain
South	50	West	200	
	30	West	120	Red oak 97th Mile
South	40	West	160	
	60	West	160	Chestnut tree 98th Mile
South	60	West	200	
XX				
X X	40	West	120	Chestnut tree 99th Mile
South	45	West	220	
	20	West	100	White oak 99th Mile
South	60	West	200	
	40	West	120	Chestnut tree 100th Mile
South	40	West	320	To a hickory an rock at the wagon road the 101st Mile"

(The next paragraph in the field notes evidently written at the same time with the same pen and ink and is as follows:

"Thence South 15 miles & 220 poles to a post oak on the Georgia line at 23 poles west of the 72nd Mile from the Nickijack old town on the Tennessee River."

This appears to have been the end of the original field notes, but in a different ink the field notes which follow are given all in

Colonel Davenport's handwriting. After word Mile after the 101st the field notes go on as follows "at the end of the Inicoy mountains and runs South 320 poles to a white oak 102 miles (August 22, 1821).

South 320 poles—to a pine 103 Mile Xing Branch
South 252 poles to a spruce pine on the Bank of Highawassee River below the mouth of Cane Creek and runs up the bed of said river upwards of a mile to a maple on the south side marked IXDRA then the same course South 53 poles to a holly the 105 m (August 23rd

490 South 320 P Spanish oak 106th mile
South 320 poles to post oak 107 Mile
South 320 poles to a Spanish oak 108th Mile
South 320 poles post oak 109th Mile
South 320 poles crossing a creek to a white oak 110th Mile
South 320 poles to a black oak 111th Mile.
South 320 poles to a red oak 112th mile crossing a mountain
August 24th
South 320 poles to a red oak 113th Mile
South 320 poles to a white oak 114th Mile
South 320 poles to a black gum 115th mile
South 320 poles to a post oak 116th mile
South 220 poles to a post on the Georgia line 23 poles West of the 72 mile on said line

In the back of the book of field notes are the following entries:

"Co Mebane paid at Hill's for General Stokes	$7-½
ferage and turnpike	25
at upper turnpike	50
at Asheville	75
at Davdson	37½"
Blurred	6¼

On the next page

"Col Mebane paid W. D. expense from Knoxville home	
Paid at Hill's	$7-½
Paid at Nelsons	75 cents
ferage &c	25
At Upper turnpike	50
At Asheville	75
At Davdsons	37½
	3.50

On the lower side of the page, the following:

37½ cents paid at Forbays by Genl Stokes for me sent Col Maben $4."

On the outside of the last page of the cover is the following:

"Severe County election 18 (other two figures indistinct) for Govr Carroll 492 Ward 38
For Congress Cocke 477
For Senate Gillespie 264 Lowry 241
Representative 498"

491 The writings on the covers of the book containing the field notes are in Col. Davenport's writing. But the notes themselves are not in his writing, but are in the handwriting of his wife. From which I concluded that Mrs. Davenport took the original covers and attached them to the copy made by her. The original notes are perhaps lost beyond recovery.

E. J.

And afterwards towit on May 11, 1911, an order denying motion was filed in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 2031.

WILLIAM R. HOPKINS et al.
vs.
CHARLES HEBARD.

Before Severens, CJ. and Sanford and Hollister, D. J. J.
Motion to remit the record to the Circuit Court for further evidence is hereby denied.

And afterwards towit on October 2, 1911, a decree was entered in said cause which is in words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 2031.

WILLIAM R. HOPKINS et al.
vs.
CHARLES HEBARD.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States for the Eastern Dis-
492 trict of Tennessee and was argued by counsel.
In Consideration Whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause be and the same is hereby affirmed with costs.

And afterwards, towit, on December 1st, 1911, an opinion was filed in said cause which reads and is as follows:

Opinion.

United States Circuit Court of Appeals, Sixth Circuit.

No. 2031.

WILLIAM R. HOPKINS et al., Appellants,
vs.
CHARLES HEBARD, Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

Submitted October 5, 1910.
Decided October 2, 1911.

Before Severns and Knappen, Circuit Judges, and Cochran, District Judge.

Knappen, Circuit Judge, delivered the opinion of the court.

The appeal in this cause is from a decree of the Circuit Court dismissing the bill filed to review and reverse the decree of this court in Belding vs. Hebard, the opinion in which case is reported in 103 Fed. at p. 532. The bill in the original cause was filed by Hebard against Belding and others, to quiet the title of, and restrain trespasses upon, the tract in question, containing (according to the allegation of the original bill) about eight thousand acres, and, as stated in one of the briefs of counsel, about 6,600 acres:
493 Hebard claiming under grants from the State of Tennessee, Hopkins and his associates claiming under grants from the State of North Carolina.

The decision in the original suit turned upon the location of a portion of the boundary line between the States of Tennessee and North Carolina, as run in 1821 by commissioners appointed by the respective states. This court affirmed the decree of the Circuit Court, which was rendered in accordance with Hebard's contention as to the location of the boundary line, and thus held that the lands in dispute were in Tennessee and Hebard's title thereto good under the Tennessee grant. Before the final decree of this court (which was rendered July 13, 1900), but after the decree of the Circuit Court in the original case, Belding and his associates conveyed to Archer and McGarry, in trust, for the payment of certain indebtedness, a large tract of land of which the lands here in question formed part; and after the final decree of this court Archer and McGarry, trustees, conveyed to Hopkins and his associates, appellants here, the lands so conveyed to said Archer and McGarry by Belding and his associates. The contract of sale, in pursuance of which the deed

was given, declared that it was dependent upon the condition that "there shall not be less than 38,000 acres of land in the purchase." The deed of conveyance to Hopkins and his associates recited that the conveyance from Belding and his associates to McGarry and Archer was subject "to all deductions, if any, arising by, through or under the 'state line' suit hereinafter mentioned. Grants Nos. 8,100 for 16,800 acres, and No. 2,336 for 14,800 acres above mentioned, being for the same lands" and contained this further language:

"But there is especially excepted from the covenants of this conveyance all those lands situated at or near the state line, between the State of North Carolina and Tennessee, which were recovered in a certain action known as the 'state line' suit which was pending in the United States Circuit Court for the Eastern District of Tennessee and was brought by one Hebard against David W. Belding and others if future proceedings do not recover the title thereof."

Immediately after the final decree of this court, Hebard sold the lands in question, as part of a total acreage of 41,000 acres, to Blaisdell and others, who later conveyed the same entire tract to the Smokey Mountain Land & Improvement Company, which purchased with knowledge of the final decree and in reliance upon it.
494 September 25, 1906, and thus more than six years after the final decree of this court, Hopkins and his associates asked leave to file a bill in the name of the original defendants Belding and his associates, but on behalf of Hopkins and his associates, to review said decree, upon the ground that the then newly discovered map of the commissioners' location furnished evidence controlling and decisive of the actual location of the boundary line according to the contention of Belding and his associates, and thus that the lands here in question are in the State of North Carolina and so belonged to Hopkins and his associates by virtue of the grants from that state. The Smoky Mountain Company was given notice of this application, and allowed to intervene for the protection of its rights. This court granted the petition to apply to the Circuit Court for leave to file a bill, the per curiam opinion filed in connection with said order containing the following statement:

"Without deciding any question which may be involved in the application for leave to file such a bill, this court, for reasons satisfactory, now consent that the petitioners may apply directly to said Circuit Court, which court will grant or refuse permission as it may be advised."

The judge of the Circuit Court said in his opinion that it seemed to him that—

"there is no ground on which the success of the proposed bill of review might finally be expected. The objections which are made to permitting this bill to be filed, go to the very merits of the bill, and can, and in my opinion, should, more properly be taken up by demurrer to the bill if filed. If, in the exercise of discretion, I refuse to allow the bill of review to be filed, it is not certain that my refusal to do so would be subject to review. On the contrary, if the bill is filed and a demurrer should be sustained to it on the same

grounds that are now urged against its filing, the action of the court would be subject to easy review, and so the petitioners for review would suffer no error at the hands of this court that could not readily be corrected. In view of these considerations I have determined to allow the bill of review to be filed, subject, of course, to all legal objections by demurrer, answer, plea or otherwise, as the defendants may be advised, and it is ordered accordingly."

The Smoky Mountain Company, both by answer to the petition for leave to file the bill and by its answer to the bill as filed, raised the objections, among others, that appellants, being assignees of the original defendants, could not properly file such a bill, and
495 that the Smoky Mountain Company, being a good-faith purchaser for value, should be protected in its purchase as against the leave asked; and in answer to the petition for leave to file invoked the rule, among others, that a bill of review may be refused although the evidence, if admitted, would change the decree, when the court, looking to all the circumstances, shall deem it productive of mischief to innocent parties or for any other cause unadvisable.

The Circuit Court, upon hearing on pleadings and proofs, dismissed the bill of review, saying in its opinion that relief should be denied upon more than one of the grounds relied upon by defendants, but basing its decision specifically upon the fact that the newly discovered evidence was not such as to show that the original decree was wrong. Belding and his associates did not appeal from this decree of dismissal, the appeal being taken by Hopkins and his associates "prosecuting a bill of review herein in the name of the original defendants."

In the opinion of a majority of the members of this court, the decree of the Circuit Court, dismissing the bill of review, should be affirmed. This bill of review is not filed for error apparent upon the face of the decree, but solely for newly discovered evidence. The rule is well settled, that while a bill of review, on account of error upon the face of the decree, may be filed as matter of right, the granting of a bill of review on account of newly discovered evidence is not of right but of sound discretion in the court. In Dexter vs. Arnold, 5 Mason, 303, 315, Justice Story, speaking of such a bill, said:

"It may be refused therefore although the facts if admitted would change the decree, where the court, looking to all the circumstances, deems it productive of mischief to innocent parties, or for any other cause unadvisable. Bennet vs. Lee (2 Atk. 528); Wilson vs. Webb (2 Cox 3); and Young vs. Keighley (16 Vez. 348), are strong exemplifications of the principle."

The rule thus laid down by Justice Story is not only adopted by the text books generally, but has been declared and affirmed by numerous decisions, which, as well as the text books, have generally stated the rule in the precise language of Justice Story. 2 Daniell's Ch. Pr. 1577; Story's Eq. Pl. Sec. 417; Hughes vs. Jones, 2 Md. Ch. Dec. 289, 296; Harris, Admx. vs. Edmondson, 3 Tenn. Ch. 211; P. & M. Bank vs. Dundas, 10 Ala. 661, 669; Massie's Heirs
496 vs. Graham's Admrs., 3 McLean, 41; Craig vs. Smith, 100 U. S. 226, 233; Ricker vs. Powell, 100 U. S. 104, 107;

Thomas vs. Harvie's Heirs, 10 Wheat. 146, 150; Stockley vs. Stockley, 93 Mich. 307, 313.

In Ricker vs. Powell this language was used:

"A bill of review on the ground of newly discovered matter can only be filed on special leave, which depends on the sound discretion of the court to which the application is made. Thomas vs. Harvie's Heirs, 10 Wheat. 146; Rubber Company vs. Goodyear, 9 Wall. 805; Story Eq. Pl. 421*c*; 2 Daniell Ch. Pr. (4th Ed.) 1577. 'It may be refused, although the facts, if admitted, would change the decree, when the court, looking to all the circumstances, shall deem it productive of mischief to innocent parties, or for any other cause unadvisable.' Story Eq. Pl. Sect. 417; Griggs vs. Gear, 8 Ill. 2."

In Craig vs. Smith it was said:

"There is no universal or absolute rule which prohibits the courts from allowing the introduction of newly discovered evidence under a bill of review to prove facts which were in issue on a former hearing. 'But the allowance of it if not a matter of right in the party, but of sound discretion in the court, to be exercised cautiously and sparingly, and only under circumstances which demonstrate it to be indispensable to the merits and justice of the cause.' Such was the language of Mr. Justice Story in Wood vs. Mann (2 Sumn. 334) and he states the rule none too strongly."

In Stockley vs. Stockley it was said:

"An application for leave to file a bill of review is the method employed to obtain a rehearing and to vacate a decree after its enrollment; but the results to be attained, and the facts properly to be considered, are the same as though it were a motion for a new trial, or a motion for a rehearing and to vacate a decree before its enrollment and in like manner it addresses itself to the fair discretion of a court. In passing upon it, each case stands by itself, and is controlled by the circumstances surrounding it, and without reference to any other case. The power of the court in granting or denying it is largely discretionary, and is always to be exercised in view of the peculiar circumstances of each case, so as to effectuate substantial justice, and protect the legal and equitable rights of the parties."

In the opinion of a majority of the court, the case is one calling for the application of the principle recognized by the de-
497 cisions cited. The appellants here are purchasers of the lands after decree and under express exception thereof from the covenants of warranty. Their purchase, so far as concerns the lands here involved, was speculative. On the other hand, the Smoky Mountain Company was a good-faith purchaser for value and in reliance upon the decree.

In Thompson vs. Maxwell, 95 U. S. 391, 397, 398, it is said that "none but parties and privies can have a bill of review. It does not lie for assignees," and that the fact that the original defendants were joined as complainants with their assignees does not obviate the difficulty. But we do not decide that an assignee cannot, under any circumstances, file a bill of review, nor that this case is controlled by Thompson vs. Maxwell, nor that the mere fact of a good-

faith purchase by a party in reliance upon, but not under, a decree precludes the review and reversal of that decree. What we do mean to decide is that, in our opinion, taking into account not only the speculative purchase by appellants, but also the good-faith purchase by the Smoky Mountain Company, a case is not presented which appeals to the equitable discretion of the court to allow the review of a decree upon the ground alone of newly discovered evidence. We rest our decision solely upon this proposition. Bearing in mind the rule that this bill of review for newly discovered evidence is not of right, no matter how persuasive of error in the original decree the new evidence may be, and that it should not be allowed if such allowance would result in mischief to innocent parties, and having in view the stability necessary to be afforded to decrees, especially of courts of last resort, where disturbance thereof is not essential to the protection of the real equities of the parties before the court, we think the review asked for should be denied. In our opinion, the stability of judgments, and thus the protection of rights acquired in reliance upon them, are such as, under the peculiar circumstances of this case, to make the review asked for inequitable. Nor do we think the situation is changed by the fact of the conveyance by Belding and his associates to the trustees pending the suit, nor by the fact that appellants were negotiating for, and possibly may be said to have had, to some extent, an option for the purchase of the land previous to the final decree. The appellants were not bound to make the purchase until contract therefor was actually made, which was after the decree sought to be reviewed was entered; and the purchase then made, as has been said, was speculative as to the land here involved.

498 It is urged that the Smoky Mountain Company is not a good-faith purchaser, because of an option taken by Peck and his associates previous to the decree of this court. But even if the Smoky Mountain Company or its grantors derived any interest from the Peck option, which does not clearly appear, the actual purchase was not in fact made until after the decree of this court, and is shown to have been made with knowledge of and reliance upon that decree, and thus the earlier option could not affect the status of the Smoky Mountain Company as a good-faith purchaser.

It is urged that the original defendant lost his land by the decree of the court, and that the court was the means by which this result came about. But this court committed no error. It decided rightly upon the case presented to it. It was the misfortune of the defendants that the map was not discovered before the hearing of the original cause. But the reversal of this decree would result, on the one hand, not in benefit to the original defendants, but to purchasers of their rights after the unfavorable decree was made, and, on the other hand, to the detriment of those who bought in reliance upon that decree. Proceedings under bills of review are in the nature of applications, for rehearings or new trials. In Pomeroy vs. Noud, 145 Mich. 37, 44, it is said that the rules governing the granting

of bills of review are, to some extent, founded upon considerations of public policy as well as those of private rights.

We have not overlooked the fact that the deed from Hebard to Blaisdell and his associates contained no covenants of warranty, except as against those claiming under the grantor, and that the deed to the Smoky Mountain Company was a quit-claim deed. But such facts are not controling. A person holding under quit-claim deed may be a bona fide purchaser. Moelle vs. Sherwood, 148 U. S. 21, 28, 30; United States vs. California & Oregon Land Co., Ibid. 31. In Moelle vs. Sherwood, Justice Field, speaking for the court, said:

"The doctrine expressed in many cases that the grantee in a quit-claim deed cannot be treated as a bona fide purchaser does not seem to rest upon any sound principle."

And again:

"The character of bona fide purchaser must depend upon attending circumstances or proof as to the transaction, and does not arise, as often, though, we think, inadvertently, said, either
499 from the form of the conveyance or the presence or the absence of any accompanying warranty. Whether the grantee is to be treated as taking a mere speculative chance in property or a clear title, must depend on the character of the title of the grantor when he made the conveyance; and the opportunities afforded the grantee of ascertaining this fact and the diligence with which he has prosecuted them, will, besides the payment of a reasonable consideration, determine the bona fide nature of the transaction on his part."

It is true that the specific proposition upon which we rest our decision was not, in terms, presented by answer, but we think that the defense as presented, in connection with the objection of granting leave to file a bill of review, is sufficient to properly present it to this court. In reaching this conclusion, we have not overlooked the fact that leave to file the bill was granted by the Circuit Court. In our opinion, however, the granting of such leave, especially under the conditions we have before set out, was not so far an adjudication of the equities of the cause as to preclude their review. An order allowing the filing of a bill of review is not appealable while an order denying permission is final and appealable. Maxfield vs. Freeman, 39 Mich. 64; Scriven vs. Hursh, Ibid. 98. Unless, therefore, this defense may be considered upon final hearing, the decision of the Circuit Court granting the leave to file could never be reviewed. But this consideration apart, we think the party against whom a bill of review is filed is not foreclosed from a defense of this nature by the mere granting of leave, especially where, as in this case, both this court and the Circuit Court have apparently refrained from adjudicating anything except the leave to file. See Massie's Heirs vs. Graham's Admrs., 3 McLean, 41, 48.

For the reasons above stated, the decree of the Circuit Court, dismissing the bill of review, must be affirmed.

SEVERNS, *Circuit Judge,* dissenting:

For the reasons stated in the following opinion I am unable to agree with the majority of the court or with the reasoning on which their conclusion is based. Inasmuch as the statement of facts contained in the opinion of the other judges is not, as I think, sufficiently full to disclose the whole case and omits to mention several important facts material to the proper disposition of it, I am constrained to state the case in my own way.

This is an appeal from a decree of the Circuit Court dismissing a bill of review which was allowed to be filed there by the consent of this court given upon a petition filed here August 6,
500 1907. The decree which was complained of was made by this court on an appeal, July 13, 1900, affirming the decree of the Circuit Court. The reasons which induced this court to affirm the decree of the court below are stated in the opinion by Judge Lurton reported in 103 Fed. 532. The object of the original bill was to obtain an injunction to restrain trespassers on certain described lands alleged by the complainant to be in Tennessee and to belong to him, and to obtain a decree quieting the complainant's title to said lands. The complainant claimed title under a grant from the State of Tennessee. The answer of the defendants averred that the lands were not in Tennessee, but were in North Carolina, and claimed title in themselves under grants from the latter State. The lands lie along the boundary line between the two States, and the question was which of the two lines claimed by the respective parties to be the boundary was the true boundary line, for the lands in controversy lie between those lines. This was the sole question in controversy. The regularity of the derivation of the title was not disputed on either side. The following excerpt from the statement of facts prefacing the opinion of the court will explain the history of the respective grants, the steps which had been taken by the public authorities of the two States to ascertain and settle the boundary line and the character of the lands in controversy:

"The territory now comprising the State of Tennessee was ceded by the State of North Carolina, in 1789, to the United States. The Session Act describes the eastern boundary line as follows: 'Beginning on the extreme height of the Stone Mountain, at the place where the Virginia line intersects it, running thence along the extreme height of the said mountain to the place where the Wautauga River breaks through it; thence a direct course to the top of the Yellow Mountain, where Bright's road crosses the same; thence along the ridge of said mountain, between the waters of Doe River and the waters of Rock Creek, to the place where the road crosses the Iron Mountain; from thence along the extreme height of said mountain to where Nolichucky River runs through the same; thence to the top of the Bald Mountain; thence along the extreme height of the said mountain to the Painted Rock, on French Broad River; thence along the highest ridge of the said mountain to the place where it is called the 'Great Iron' of 'Smoky'

Mountain; thence along the extreme height of the said moun-
501 tain to the place where it is called 'Unicoy' or 'Unaka' Mountain, between the Indian towns Cowee and Old Chota; thence along the main ridge of the said mountain to the southern boundary of this state.' The line here to be ascertained is included within the call beginning 'thence along the extreme height of the said mountain to the place where it is called Unicoy of Unaka Mountain.' The mountain whose extreme height is to be followed until Unaka Mountain is reached is the 'Great Iron or Smoky Mountain.' The necessity for a definite location and marking of the line became evident to both States, and in 1821, under Acts passed by each State, a joint commission was appointed for the purpose of settling, running, and remarking the boundary line. The Tennessee commissioners were appointed under an Act which provided that the commissioners should 'settle, run and remark the boundary line between this State and the State of North Carolina, agreeably to the true intent and mean- of the said Act of the general assembly of the State of North Carolina, entitled: 'An Act for the purpose of ceding to the United States of America certain western lands therein described.' Acts Tenn. 1820, C. 22. The North Carolina Act, providing for the running of the line, was substantially identical with the Tennessee Statute above set out. 2 Ired. & B. Rev. St. N. C., p. 94. The joint commissioners did run and remark the line, and each State passed an Act, ratifying, confirming, and adopting the line as run and reported by the commissioners Acts Tenn. 1821, p. 45, C. 35; 2 Ired. & B. Rev. St. N. C., p. 96."

It will be sufficient for the present purpose to state that the line run by the commissioners as claimed by the plaintiff in the original suit would be a line starting from a known point where the disputed lines separate northeast of the land in controversy and extending southwardly and somewhat westwardly over what is known as Hangover Rock to another known point where the disputed lines converge. If this were the true line, these lands lie in Tennessee. The line which the defendants in the original suit claimed was the one run by the commissioners, starts from or near the same point as the other, but diverging therefrom extends more to the right, as one looks to the southwest, and passes over the Fodder Stack range of heights to the converging point. This line lies west of these lands and would locate them in North Carolina. The evidence in the original case showed that there were signs and marks along each line, the character of which is stated in Judge Lurton's opinion on the original case. On the Fodder Stack ridge line there
502 were 41 trees marked like those on the general and undisputed line established by the commissioners. This court thought the probability was that these trees were thus marked by the commissioners, but concluded that this line was only temporarily run and was afterwards abandoned and the Hangover Rock line substituted. We need not go into the various reasons which led the court to conclude that the Hangover Rock line was the true boundary line. The necessary result was that the land in question passed by the Tennessee grant and that therefore the complainant was the

true owner; and the court decreed accordingly. Counsel for the defendant remind the court with great earnestness of the importance to the public of the stability of judgments. But it is of even higher interest to the public that the citizen shall not be despoiled by a wrong judgment. It is for the prevention of such unjust consequences that the law gives to the courts the power of correction by a bill of review. It is an ancient principle of equity that if a man shall lose his property to his adversary by the decree of the court, he still retains the right to regain it, if by subsequent discovery of hitherto unknown proof bearing directly on the issue, he is able to convince the court that its decree was clearly wrong. This right is one to which the right acquired by the decree is subordinate, and neither the opposite party nor any one claiming under him can successfully deny that right, so long as the true owner has done no act either of commission or omission, whereby he should be *etsopped* from claiming it.

When the former suit was pending nothing of the work of the commissioners was to be found in the archives of either State, although diligent search was made. The State House of North Carolina at Raleigh was burned in 1831 and its archives nearly all destroyed. But what had become of the report of the commissioners which came to the State of Tennessee, no one could explain. The court had only scant means for locating the line and was in doubt about the conclusion to be drawn from what it had, but based its judgment upon the probabilities as they seemed to be. But about the beginning of the year 1904 and after the three years which a statute of Tennessee prescribes as a limitation for bills of review, had elapsed, the report of the commissioners and the map which accompanied it, belonging to the State of Tennessee were discovered in a barrel of rubbish in the basement of the capitol of the State at Nashville, which the State authorities had ordered to be
503 cleaned out. The rumor of this discovery spread abroad and came to an agent of the defendants residing in North Carolina. The grants of these lands by the State of North Carolina were made upon sales made during the years 1853, '4, '5 and '6. That by the State of Tennessee was made in 1892, and probably was at a time subsequent to the time of the disappearance of the commissioners' report and map. I say "probably," because it is hardly to be credited that the official who had charge of the making of the grant would have allowed it if he had knowledge of the action of the commissioners. But it is possible that the making of this grant was the result of the seemingly loose practice of the Land Department of that State which is stated thus by Judge Caruthers in Crutchfield vs. The State, 3 Head 113, at page 115: "The state does not warrant the title to the land which she grants. She opens her offices, and permits individuals to enter, at their own risk, any lands they choose, and she issues her grants. They must beware of the titles they get." The lands were wild, rough and uncultivated and almost unsettled and were valuable mainly for their ore mines and timber.

The State of Tennessee at one time caused a survey and sectioniz-

g to be made of lands in this locality. Of this survey, Judge Clark
his opinion in the original case said: "that the State has through
e Ocoee District commissioners established its line on Slick Rock
reek, and has sectionized all the territory supposed to belong to the
tate." This survey and sectionizing took place in 1836, and
lick Rock Creek is on the line running over the Fodder
tack range. Aside from the making of the grants, neither
tate had made any distinct claim of territorial dominion. Taxes
ave been assessed upon them by the State of North Carolina and
ney have been paid by the appellants or their predecessors in title.
nd recently the appellees have paid taxes to the State of Tennessee.
he complainant in the original suit alleged that he was in possession
ut this statement was not supported by the evidence. Judge Clark,
n the opinion on which he based his decree, said: "After careful
onsideration of this case, I reach the conclusion that I am not war-
anted upon the facts in differing from the commissioner in the view
vhich he takes of the case. It is a very close one on the facts, and
he equity of the case is rather with the defendants in view of the
act that they obtained their grants earlier, and have been paying
axes upon the property while the plaintiff's grant was only re-
cently obtained."

504 The report and map of the commissioners above mentioned were put in evidence in the court below in this proceeding and are now before us. The authenticity of them is not disputed. The map shows the line run by the commissioners, in distinct color, and it shows the line as it was contended to be by the defendants in the original case, and is the line running over the Fodder Stack ridge, and is on the line of the 41 marked trees above mentioned. The inevitable conclusion is that the original decree was erroneous. The appellees contend vigorously that these documents are not conclusive and still insist that the true line runs over by Hangover Rock. But it is, as I think, a hopeless contest, and my conviction that the map shows the true line is in no wise shaken. What is the result of this conclusion if it is correct? It must be that these lands lie in North Carolina, that the appellees had no title, and that the appellants are the lawful owners of them.

Counsel for appellants urge that where it is found that the lands are not within the territorial limits of Tennessee the jurisdiction of the Circuit Court fails, and that the order should be that the bill be dismissed on that ground. This objection was presented to the Supreme Court in boundary cases at an early day, and was overruled, the court being of opinion that if upon the allegations of the bill the land is within the territorial jurisdiction of the court, that is enough; and that its authority will not be divested by its final conclusion that the land is located in an adjoining State. Fowler vs. Miller, 3 Dall., 411; New York vs. Connecticut, 4 Dall., 1; Handly vs. Anthony, 5 Wheat., 374; Rhode Island vs. Massachusetts, 12 Pet., 657, 726, 727; Howard vs. Ingersoll, 13 How., 381.

On the merits the conclusion above stated is fatal to the claim of the appellees. The bald, but perfectly true, state of the case is this; the real owners of the property have defended it against a claimant

having in truth no interest in it, by all the lawful means available to them, but by the adverse decision of the court the owners have lost it. The court has been the instrumentality by which this grievous miscarriage had been accomplished. It does, indeed, sometimes happen that by error or accident such injustice is done and is irremediable; but it certainly ought not to happen by the conscious act or omission of the court while it yet has th power and opportunity to prevent the mischief.

The only question in the case at the original hearing was that of the location of the boundary line between the States. The
505 new evidence seems to be conclusive of that question. It is difficult to conceive of a case more suitable for the remedy now invoked.

But the appellees, apprehending that perhaps the court would come to the foregoing conclusion in respect to the boundary line upon the new facts, interpose a great variety of objections to the relief prayed, among them these: first, it is urged that these complainants are not persons aggrieved by the original decree, and further, as they contend, the parties in whose behalf the bill of review is filed, are assignees, in whose favor the court will not review the decree. These contentions are directed to the ultimate question, namely, whether they have any interest affected by the decree which entitles them to the relief which they seek. The first of these, that these complainants were not aggrieved, does not merit prolonged discussion, certainly not, if this bill is to be treated as a bill by the original defendants as I think it should. The second, concerning the rights on such a bill is more serious and is the principal ground as I understand on which the court is to affirm the decision of the court below. The general rule is stated by the Lord Chief Baron Gilbert in his book on the Chancery Practice entitled Forum Romanum at page 186, which is this: "None but parties and privies such as heirs, executors or administrators can have this bill of review since nobody else can be aggrieved by such decree because it can only be revived upon such privies." Mr. Justice Story in his work on Equity Pleadings, note to Section 409; in quoting this language uses the word "by" instead of "upon" in the last line. But I suppose this is an error, as the original publication has it "upon." This rule has been stated and followed in many judicial opinions, and is no doubt the foundation of the practice of the court. Some qualifications to its generality however have been made where the special circumstances require it, which is an incident to all general rules. And Mr. Justice Story in the note above mentioned says: "This language is very broad and requires qualification." And he proceeds to state several of such.

The majority of the court treat this bill of review as one brought by assignees and not as one brought by the parties to the original decree to enforce their own rights. While it is true that the petition filed in this court for permission to make application to the Circuit Court for leave to file it, was presented by the "assignees," as we will call them, the bill which was allowed by the Circuit Court
506 to be filed is the bill of the original defendants themselves, as complainants, and they pray in their bill that they may

be allowed to file it. The case stated is the case of those parties. The relief prayed is in their own behalf, and the bill is signed by their solicitors. No statement of any facts in behalf of any other persons than themselves is made—nor indeed is there any reference to the rights or interests of any other person. They thus become parties to the suit, and subject to the jurisdiction of the court and would be bound by the decree which the court should render. The discretion of the Circuit Court as to whether leave to file should be granted was invoked and exercised and at no time was its permission to file the bill recalled. Nor does the fact that the other parties assisted in the promotion of the suit constitute an objection. They had an interest which they might subserve without censure.

It would seem from the rule approved by the Supreme Court upon the authority of the Lord Chief Baron Gilbert's book, that the original parties and their privies by representation who were bound by the decree are the only ones properly joined in the suit. Thompson vs. Maxwell, 95 U. S., 397; Gies vs. Green, 42 Mich., 107. Nevertheless, a purchaser subsequent to the decree was allowed to intervene as defendant.

But passing by this objection for the present, I proceed to inquire whether the parties complainants are so affected by the original decree that they are entitled to maintain a bill of review. The original defendants are aggrieved because the decree cut them out of the interest they had in the lands subject to the deed in trust to Archer and McGarry and so affected the value of the title conveyed in trust as to materially depreciate the price that could be obtained for it, and the extent to which their debt would be paid. This deed in trust was made pendente lite. The deed of the trustees was offered in evidence by the defendant and is therefore evidence of any disserving statements made in it. 1 Wharton's Evidence, Section 619. Turning to the deed itself it appears to have been given to carry into effect certain trust agreements entered into before the making of the final decree. It was of these and other lands to secure a large indebtedness, a very considerable portion of which was due to Archer, one of the trustees. It contained a power of sale, the power being coupled with an interest, and was irrevocable. The good faith of the transaction is not questioned. It was therefore perfectly valid in law and in equity. Hartley vs. Russell, 2
507 Simons & Stuart, 244; Hartington vs. Long, 2 Myl. & K., 590. To be sure the grantees would be bound by the decree if one should be finally entered against the grantors. This because of the rule which the court applies for the maintenance of existing conditions and consequently of its jurisdiction to make an effective decree. The fact that the grant was made pendente lite has no other consequence. In earlier times the courts looked with disfavor upon a purchase pendente lite, not only because of its disturbance of the status quo, but also because it afforded an opportunity for maintenance and champerty. To avoid the first of these objections, the rule that the purchaser should be bound by the judgment was applied. With respect to the subject of maintenance and champerty the objection has lost much of its force and is now only sustained

upon a plain case. It is not sustained where the purchaser has an interest in the subject of the litigation, but only when he comes in as a volunteer, to assist the party from whom he buys. 6 Cyc., 865, where the subject is fully treated and numerous authorities are cited in support of the rule just stated. After the transfer by the defendants they, to the extent of the interest transferred, continued as representatives of the transferee as was said by Chief Justice Waite in Stout vs. Lye, 103 U. S., 66, and repeated by Mr. Justice Brewer in 150 U. S., 371, 386. Archer and the other creditors sought to obtain this security for their debt, and if we look to ultimate justice it would be more just that the debt of the real owner should be paid to his creditors, rather than that the fund should go to a stranger to that ownership. If the purchasers from the trustees would have no other means of protection, it would seem that they should have such a right as the trustees had. It was necessary that there should be purchasers, else the power of the trustees could not be executed; the title would not be marketable and would remain stagnant in their hands. But we need not pursue this subject. It is enough that the original defendants are in due form before the court and were injured by the decree. And it is of no concern whatever to the defendant in this bill, what use the complainants make of the fruits of the decree, as for instance whether they shall thereby make good their own conveyance to their grantee. Counsel for defendants maintain in effect that notwithstanding the original decree had the effect to pass the title from the defendants to the complainant, no one was aggrieved thereby.

508 I have been induced to discuss these questions touching the interests of parties deriving such interests from one of the parties to the original suit but who were not themselves parties because the case has been presented and argued as if such questions were open on a bill of review. It is only by such an assumption that the presence of the Smoky Mountain &c., Co. can be recognized; for its rights are only such as it has derived since the decree sought to be reviewed. Thus on both sides proofs have been introduced as if new issues could be raised and decided in this proceeding, a proposition which I doubt. There are some precedents cited by counsel wherein, as is claimed, such a broad jurisdiction has been exercised on a bill of review. But it seems manifest that this practice destroys the proper limitations of such a proceeding and confounds it with the proceedings of an ordinary suit in equity; and it is inconsistent with the equity practice of the Federal Courts. It is a singular circumstance that in this case the defense is made by a party who, under the rule referred to, could not properly be made a party to the proceeding at all. But proceeding further, another objection is, that "a bill of review will not affect the title of a bona fide purchaser (of the property in controversy) from the successful party after a final decree and without notice that a bill of review is to be filed." Now, whatever application such a rule may have to a bill filed to review a decree for error apparent on the face of it, it can have none to a case where the bill is filed on account of newly discovered evidence of which the plaintiff in most cases would have no knowledge and no

definite hope of discovery. Moreover, how is he to give notice of an intention to file such a bill? And to whom must the notice be given? How is he to know who is an intending purchaser? In this connection it may be worth while to remark that the original complainant lost no time in disposing of the lands to another after the decree of this court was entered. Only a few days elapsed after the decree before he had sold it, and it was conveyed before the time had elapsed for moving for a rehearing or applying for a certiorari. If in such circumstances a man may cut off the true owner by forthwith conveying away the property, then, as said by the Court of Appeals of Kentucky, a bill of review is of little value. Clark's Heirs vs. Farrow, 10 B. Mon. 446, 451. This point is made in the interest of the Smoky Mountain &c., Co., which claims to be a bona fide purchaser. Admitting it to have that character, for the
509 sake of argument, it would not suffice to defeat the claim of the complainants. For it never acquired the title to the property, and it is only in such case that a bona fide purchaser can have protection. 1 Story's Eq. Jur., Sec. 64. The grant of the State of Tennessee conveyed no title, legal or equitable, and the grantor of the Smoky Mountain &c., Co., had no title to sell and nothing passed by the deed. Non dat qui non habet is a maxim of the law, as well as sound logic. An apparent title is not always enough; as, for instance, when the name of the true owner has been forged, or the grantor was under a disability, or when, for any reason, the deed conveyed no title. The defendants in the former suit, who are complainants here, derived the true title from the State of North Carolina. It was of a fee simple absolute, the highest and best title known to the law. The owner of property cannot be deprived of it without some fraud or fault on his part, by a bona fide purchase of it by another from some other party than the owner. In 2 Pomeroy's Eq. Jur., Sec. 735, the author says: "A subsequent holder, even for a valuable consideration and without notice, has certainly no higher right than a prior holder equally innocent and with an equally meritorious ownership. American courts seem sometimes to have acted upon exactly the opposite notion, and to have assumed that a subsequent title was necessarily the better one. When the original legal owner has done or omitted something by which it was made possible that his property should come into the hands of a bona fide holder by an apparently valid title, it may be just to regard him as estopped from asserting his ownership, and thus to protect the subsequent purchaser. But when the prior legal owner is wholly innocent, has done and omitted nothing, it certainly transcends, even if it does not violate, the principles of equity to sustain the claims of a subsequent and even bona fide purchaser," and again, after an extended discussion of the subject, he says at the close of Sec. 739: "The foregoing description shows that it is wholly unwarranted by the settled principles of equity for a court to sustain and enforce the subsequent legal estate acquired by A in any kind of property or thing in action, merely because he is a bona fide purchaser for a valuable consideration without notice, against the prior legal and equally innocent owner, B, or even to sustain A's defense as a bona

fide purchaser in a suit brought by B." It seems to me that the doctrine rests upon a fundamental principle and is indispu-
510 table. It has been recognized and enforced by the Federal Courts in several cases. Vatier vs. Hinde, 7 Pete., 252. Boone vs. Chiles, 10 Pet., 212. Smith vs. Orton, 131 U. S. Appendix lxxciii. Texas Lumber Mfg. Co. vs. Branch, 8 C. C. A., 562. Lindblom vs. Rocks, 77 C. C. A., 86. Judge Gilbert, in this last case, puts the matter in a nutshell when he says: "The doctrine of bona fide purchaser without notice does not apply where the purchaser buys no title at all. His good faith cannot create title." In the case of Texas Lumber Mfg. Co. vs. Branch, supra, the deed to the bona fide purchaser for a valuable consideration stated that the grantors were the heirs of the deceased owner, and the purchaser supposed that to be so. But it turned out that another was the lawful heir, and the property was decreed to him. See also Latham vs. Barney, 14 Fed., 433, 446. The doctrine concerning bona fide purchaser has been built up and has always rested upon the assumption that the purchaser paying value, has acquired a title, in the enjoyment of which a court of equity will protect him. At one time the Court of Chancery pressed the rule so far as to permit the purchaser to get hold of the title by seizing the evidence of it by any means in his power, even by trespass if he could. This excess was subsequently disallowed. But the requirement that the purchaser must have a title in order to enable him to call for the protection of the court has always continued to be regarded as an essential condition; and indeed upon sound reason, it must be so.

The cases of Rector vs. Fitzgerald, 8 C. C. A., 277, and Ohio R. Co. vs. Fisher, 53 C. C. A., 411, which are relied on by the defendants, decide nothing opposed to this. In the first of these cases it appears from Judge Thayer's statement that the bona fide purchaser had acquired the legal title. And the references which Judge Thayer makes indicate that Rector had been seeking to defeat the title which the defendant who was the grantor of the bona fide purchaser, had acquired, and to obtain a declaration that he was himself entitled to it. The case finally turned on the question of the laches of the plaintiff in filing his bill. The other case, that of the Ohio River R. Co. vs. Fisher, was not one of a bill of review, but it involved facts and proceedings occurring after an original decree and the filing of a bill of review. The Railway Company had become a purchaser for value through a sale and conveyance by the trustees under a will. The trustees held the legal title and the Railway Company had acquired it by their deed. Judge Simonton
511 referred to the case of Bank vs. Ritchie, 8 Pet., 146, where Chief Justice Marshall distinguished such a case from one where the title had not been acquired by the purchaser, at least that was the interpretation of it by the learned judge. The same observations apply to the case of Perkins *vs.* Pfalzgraff, reported in 60 W. Va., 121.

The notion that, because at the time these lands were purchased of the complainant in the original suit he had obtained a judgment in his favor which precluded the defendant from asserting title to

the lands, he might ever afterwards rely upon the estoppel by which the defendant was then bound, is unsound. On the contrary the true rule is that when the ground on which the estoppel of the judgment rests is removed and the truth is let in, the estoppel collapses and the structure built upon it falls to the ground, whereupon there must be restitution of that which by the previous error of the court the party has been unjustly deprived of. 2 Foster's Federal Practice (4th Ed.) 1132. Mitford's Ch. Pl. 107, *89. Cases where judicial sales made in pursuance of decrees and before the reversal of such decrees have been protected in the hands of purchasers at such sales, rest upon the security which must be afforded to the purchaser in relying upon the action of the court. It is necessary that the purchaser should have such confidence or sales could not be made for the proper value. Moreover, the price enures to the benefit of the true owner. What would be thought of such a case, if the court in addition to divesting the owner of his title should also deprive him of the proceeds? The rule itself results from a balance of inconveniences, the one which the owner suffers from a forced sale of his property and the other in depriving the purchaser of the necessary safeguard which the general interest of the public requires. Such cases have no application to an ordinary sale made after the court lets go its hold, and leaves the property to the ordinary incidents of business transactions. The distinction is stated by Gilgillan, C. J., in Lord vs. Hawkins, 39 Minn., 73, as follows: "The second question in this case is does a purchaser in good faith from a successful party in a judgment determining the title to real estate, come within the rule which protects a bona fide purchaser under a judicial sale, that is, a sale made pursuant to a judgment or to enforce a judgment, from the effect of a subsequent reversal or vacation of the judgment? The reason for the rule is obvious, and
suggests the answer to the question. It is founded upon
512 considerations of public policy, which require that property
shall not be sacrificed at sales that the law makes, that at such sales, purchasers shall be encouraged to bid a fair price. And this cannot be effected if the title they acquire is subject to be defeated in consequence of errors or irregularities in the judgment under or pursuant to which the sale is made. This is no such case. Here was no sale, nor anything equivalent to a sale. The judgment did not assume to pass any title. It passed on only the previously existing title like an action in trespass or ejectment. The appellant purchased from the party and took only the title that he had." In 24 Cyc., 6, it is said: "A sale is not a judicial sale, properly speaking, unless it is made under an order of the court, and subject to confirmation of the court," citing a number of cases. This distinction is highly important in the present case.

Another ground taken in defense but not alluded to by the other judges, is that the bill of review is barred by a statute of limitations of the State of Tennessee which is as follows: "No bill of review shall be brought, or a motion made therefor, except within three years from the time of pronouncing the decree; saving to infants, married women, persons of unsound mind, imprisoned or beyond the limits

of the United States, a right to a bill of review within three years after such disability has been removed." Shannon's Code, Sec. 4848. I should suppose that this statute was intended to apply only to bills of review for errors appearing of record. For if it be applicable to bills filed because of newly discovered evidence, the result would be that parties who have no knowledge of such evidence would be cut off at the end of three years, and many cases might arise where the new evidence might not have been discovered before the period of this limitation should elapse, and yet be of such a character as to show that great injustice had been done. It has always been a favorite doctrine in courts of equity that the time for limiting recourse to those courts should begin when the cause of action is discovered, and some of the states have enacted statutes extending this rule to all cases whether at law or equity. But I am of opinion that if it be conceded that this statute was meant to include all bills of review, it is not a law which binds the courts of the United States. It was enacted for the regulation of the procedure in the courts of the state. The legislature of the state had not the power to regulate the procedure of the courts of equity of the United States. Nor indeed has it the power by its own authority to regulate the
513 procedure in any actions in the Federal Courts. Congress has power to adopt such legislation and has done so in respect to actions at law. But the Act expressly excludes suits in equity and in admiralty from the rules prescribed by State legislation for actions at law. Nor can a State prescribe a law which restricts the equitable jurisdiction of the Federal Courts. It may indirectly extend the jurisdiction of those courts by supplying new conditions wherein the Federal Courts, without departing from their own fundamental principles, may exercise equitable jurisdiction. The consequence of applying the statute of Tennessee to cases such as this would defeat the exercise of jurisdiction by the equity court of the United States in all cases of bills of review filed after three years from the original decree, although the courts of equity have hitherto and through a long period of time taken jurisdiction and decreed relief in many cases where a much longer period had elapsed. And this further result would happen, that the power of the court existing in other states would be restricted in the State of Tennessee to a part only of its familiar jurisdiction. As we said in Kentucky Coal & Timber Co. vs. Kentucky Union Co., 187 Fed., 948.

"State statutes of limitation are prescribed for the tribunals of the state. They are not ex propria vigore, of any force in the courts of the United States. They may be, and in many instances have been, adopted by Acts of Congress as laws of the United States. There is no general statute of limitations in the laws of the United States relating to suits in equity. But, speaking now of the equity courts of the United States, there has been for the sake of conformity, a disposition to accept the statutory regulations of the states prescribing the time within which suits may be brought. And this practice has ripened into a rule which will be enforced whenever by observing it the court is not required to abrogate its own principles, in which case, it will protect its own jurisdiction. Alsop vs.

Riker, 155 U. S. 448, 460; Patterson vs. Hewitt, 195 U. S. 309. Instances are found where those courts have enforced the doctrine of laches in favor of defendants where the lapse of time has been shorter than that prescribed by State laws, but where the peculiar circumstances gave rise to an equity which the court was bound to protect. By the same token it would allow a longer period for bringing suit than that prescribed, when by fraud or concealment of the cause of action had not been discovered, or would not by reasonable diligence have been discovered."

514 This brings us to the last defense which the defendants make, which I think it material to notice. This is that the complainants have been guilty of laches in taking measures to obtain leave to file the bill. There is no statute of the United States which limits the time for filing a bill of review. The general rule is that the party should move within a reasonable time after discovering the new evidence. It is a question of laches. In many cases it has been tested by the analogy of statutes fixing the time for taking an appeal from the original decree. But this has never been regarded as an absolute rule in applying the doctrine of laches. But by whatever rule the matter is to be tested, I think there was in this case no such delay as should bar the remedy. The complainants were non-residents. They had an agent in Cherokee County, North Carolina, who had charge of lands they held in that State, and apparently of those in Tennessee. He testified that he first heard a rumor that the map had been found in February, 1906; that he at once set about verifying it; that in March of that year he obtained a copy of the map; that he tried to find out whether the field notes of the commissioners could be found at Nashville; that he made trips to Raleigh, North Carolina, and made thorough search of the State archives there, for the map, the report and the field notes of t-e North Carolina commissioners, which he hoped to find there, but failed to find them; that when he had secured all that he could find, the matter was placed in the hands of local attorneys. The details of his search are stated more at length in his testimony. It appears that subsequently counsel at Cincinnati was employed to assist. The petition for leave to file the bill of review was filed by the counsel at Cincinnati, August 6, 1907. It does not appear that any change of conditions occurred meantime.

Reference is also made in the opinion of the majority of the court to the character of the appeal, and it is suggested that it is the appeal of the "assignees." But I think when construed by the whole record, it may properly be regarded as the appeal of the original parties. The privilege of prosecuting the suit in the court below would seem to carry with it the right to appeal if there should be occasion. As elsewhere said, the bill presented only a controversy to which the original defendants were parties plaintiff, and it is plain that that was the controversy intended to be removed to the Appellate Court. Evidently the parties have so understood it.

515 There has been no motion to discuss the appeal, and it has been argued and submitted without any controversy on that point. This court has, instead of dismissing the appeal as it

should have done if it was deemed fatally defective, entertained it, considered the case on its merits and now affirms the decree.

Restoration of the premises is, as I have said, an incident to the remedy. The remedy of the grantee of the baseless title in such a case would seem to be an action against his grantor to recover the consideration paid.

The proper order would be to reverse the decree of the Circuit Court and to direct that the original decree be reversed and the original bill dismissed and for a restoration of the possession of the premises.

Clerk's Certificate.

United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing (together with Exhibits A and YY attached hereto) is a true and correct copy of record and proceedings in the cases of (D. W. Belding et al. vs. Charles Hebard No. 783 and) William R. Hopkins, et al., vs. Charles Hebard, No. 2031, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 15th day of April, A. D. 1912.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

(Here follow blue prints marked page 516 and page 517.)

518 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Being informed that there is now pending before you a suit in which William R. Hopkins, Benjamin P. Pole, Edward I. Leighton, Fred W. Bruch, George Reeves, and John Matthews are appellants, and Charles Hebard is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the Circuit Court of the United States for the Eastern District of Tennessee, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme
519 Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 2d day of May, in the year of our Lord one thousand nine hundred and twelve.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

United States Circuit Court of Appeals for the Sixth Circuit, ss:

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the transcript of record of the proceedings in this Court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the 20th day of May 1912, there was filed in my office a stipulation in the above entitled case in the following words towit:

In the United States Circuit Court of Appeals for the Sixth Circuit.

No. 2031. In Equity.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, Fred W. Bruch, George Reeves, and John Matthews, Appellants,

vs.

CHARLES HEBARD and THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY, Appellees.

Stipulation.

It is hereby stipulated that the transcript already filed in the Clerk's office of the Supreme Court of the United States with the petition for the writ of certiorari be taken as a return to said writ dated the 2nd day of May, 1912.

C. B. MATTHEWS,
Counsel for Appellants.
JOHN FRANKLIN SHIELDS,
Counsel for Appellees.

I have further stipulated that a map, the second one in the back of the printed record upon the Bill of Review in this case and purporting to be a copy of the Commissioners' map of 1821 certified to by Wm. W. Goodloe at Nashville, Tennessee, on August 17th 1909, shall be eliminated from the record on this writ of Certiorari as improperly incorporated therein.

C. B. MATTHEWS,
Att'y for the Appellants and Petitioners.

May 20th, 1912.

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof.

Witness my signature and the seal of said Circuit Court of Appeals at the City of Cincinnati, Ohio, in said Circuit, this 20th day of May, 1912.

[Seal United States Circuit Court of Appeals, Sixth Cirucit.]

FRANK O. LOVELAND,
Clerk U. S. Circuit Court of Appeals for the Sixth Circuit.

520 [Endorsed:] File No. 23,163. Supreme Court of the United States, October Term, 1911. No. 1087. William R. Hopkins et al. vs. Charles Hebard. Writ of Certiorari. #2031. Filed May 3, 1912. Frank O. Loveland, Clerk.

521 [Endorsed:] File No. 23,163. Supreme Court U. S., October Term, 1911. Term No. 1087. William R. Hopkins et al. vs. Charles Hebard. Writ of certiorari and return. Filed May 22, 1912.

Office Supreme Court, U. S.
FILED.
APR 17 1912
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

No. [redacted] 30

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, FRED W. BRUCH, GEORGE REEVES AND JOHN MATTHEWS,

Petitioners,

vs.

CHARLES HEBARD AND THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF THE SIXTH CIRCUIT.

C. BENTLEY MATTHEWS,
Solicitor and Counsel for Petitioners.

IN THE

Supreme Court of the United States.

No.....

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, FRED W. BRUCH, GEORGE REEVES AND JOHN MATTHEWS,

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CHARLES HEBARD AND THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF THE SIXTH CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES, SITTING AT WASHINGTON, IN THE DISTRICT OF COLUMBIA.

Your petitioners William R. Hopkins, Edward I. Leighton, Frederick W. Bruch, George Reeves, John Matthews and Benjamin P. Bole, who petition in the name of David W. Belding, Milo M. Belding, Alvah N. Belding, Henry Stix,

Nathan Stix, David M. Hyman, Eugenia H. Bragg, Marion B. Laws, and Caleb S. Bragg, a minor, by Eugenia H. Bragg, his next friend, heirs at law of Mary Bragg, Henry Cooper and Emily Cooper, heirs at law of R. L. Cooper, W. N. Cooper, T. J. Cooper, Amanda Bryson, Mary Jackson and Hester Ferguson heirs at law of J. W. Cooper, and Robert N. Archer, make known to the court that on June 10th, 1895, one Charles Hebard, a citizen of the State of Michigan, filed a suit in the Chancery Court of Monroe County, State of Tennessee against R. N. Archer, D. S. Ballew, William Jenkins, John Jenkins, T. C. Carringer and Robert Orr in which the complainant claimed to own about thirty thousand acres of land in the 17th Civil District of Monroe County, Tennessee, upon the waters of Citico, by grants from the State of Tennessee. It was alleged that the defendants were trespassing upon said lands and about to remove timber therefrom. The complainant prayed for the issuance of process against the defendants and upon final hearing that his title be declared valid and that the defendants be enjoined from trespassing and destroying and taking away the timber and in the meantime that they be enjoined from committing the same trespasses. An amended bill was filed in that case on June 28th, 1895, correcting the name of one of the defendants; preliminary injunction was issued and process served on August 31st, 1895. A petition for removal of said suit on the ground of diversity of citizenship was filed by the defendants and it was removed into the United States Circuit Court for the Eastern District of Tennessee, Northern Division. The transcript was filed on January 13th, 1896, and thereafter on January 16th, said Charles Hebard, filed his bill on the equity side of the said Circuit Court of the United States against D. W. Belding, Nathan Stix, D. W. Hyman, Henry Stix, Louis Krohn, Mary Bragg and R. N. Archer, Citizens of the State of Ohio, and R. L. Cooper and J. W. Cooper, Citizens of the State of North Carolina and M. M. Belding and A. N. Belding, Citizens of

the State of New York, wherein he alleged that he was the owner of about forty thousand acres of land in the eastern portion of Monroe County, State of Tennessee, south of the Little Tennessee River and adjoining the North Carolina State line which State line is the eastern boundary of said lands for about ten miles; that said lands were wild and mountainous and not valuable except for their timber; that complainant derived his title by grants regularly issued by the State of Tennessee which by mesne conveyances became vested in complainant.

The complainant further alleged that the defendants claiming under grants from the State of North Carolina, claimed title to and were occupying about eight thousand acres of said lands in what was known as the Slick Rock Basin and between the Slick Rock Creek, which emptied into the little Tennessee River, and the ridge known as the Hangover ridge, which reached the river about one-half mile east of the said creek and that the dividing or state line between said States was on said Hangover ridge, so that the lands in dispute which were west of said ridge were and always had been in the State of Tennessee and not in the State of North Carolina.

Complainant states that in the year 1821, the States of North Carolina and Tennessee by legislative acts provided for a joint commission to locate and establish the dividing State line, that joint commissioners were duly appointed who did locate and establish the line,

> "Beginning at a stone set up on the north side of the Chattahoochee turnpike road marked on the west side 'Ten' and on the east side 'N. C. 1821'; running thence southwestwardly to the Bald Rock on the Summit of the Great Iron or Smoky Mountain and continuing southwestwardly on the extreme height thereof to where it strikes Tennessee River, about seven miles above the old Indiana town of Tallassee, crossing Tennessee River at a distance of sixty-five (65) miles from the beginning. From the Tennessee River to

Main ridge and along the extreme height of same to the place where it is called Unicoi or Unaka Mountain."

The bill proceeds to state that the line running southwestwardly from the beginning crosses Tennessee River about one-half a mile above and nearly east of the mouth of Slick Rock Creek and there crosses the river and following a leading ridge reaches the main ridge at a place called the Hangover; thence runs along the extreme heights of the Hangover mountain and passing Stratton's Ball some six (6) miles or more from the river; and thence continuing on top of mountain, same course southwestwardly, runs to where the ridge is called Unicoi or Unaka Mountain. But that the defendants contend that the State line crosses the river from one-half to one mile below the mouth of Slick Rock and thence following low ridges and spurs, first northwest, then west, southwest, south and southeast until it strikes the main ridge at Stratton Ball, intercepting the line as contended for by the complainant, and by this line including all the lands in the Slick Rock basin and tributary to its waters, within the boundary of North Carolina.

After further allegations relating to the claim of title and trespassing by the defendants and those claiming under defendants the complainant prays that the court will locate and establish the true State line between said States, establish the complainant's title and quiet the same, enjoin preliminarily and on final decree perpetually enjoin the defendants from trespassing, award the complainant a writ of possession and for general relief. The defendants filed answers responsive to the allegations of the bill denying the title of complainant, denying the allegations of the bill as to the proper location of the State line, alleging that all of said disputed lands are in the State of North Carolina, sets out their title to the same from said State and that they are in rightful possession of said lands and generally deny the equities of the

bill and the right of complainant to any relief. Complainant filed a general replication.

The case was referred to a master who after taking a great quantity of evidence reported in favor of the complainant; exceptions were heard, but the report was confirmed by the court and the following decree entered on June 10th, 1899, to-wit:

> "Bt it remembered that this cause came on to be heard and determined before the Honorable C. D. Clark in the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee on this 10 day of June, 1899, upon the report and supplemental report of the Special Commissioners T. A. Wright, as to the location of the State line, the exceptions to said reports filed by the respondents, and the court being of the opinion that the said exceptions are not well taken and the court concurring with the Special Commissioner in his reasons and conclusions, it is pleased to disallow and overrule the said exceptions, and said reports are in all things confirmed.
>
> And the cause coming on to be further heard upon the original bill, pleading answer and proof and upon the whole record, from all of which it appears that it is a contention, as to the true location of the State line between Tennessee and North Carolina running South or Southwest from the Little Tennessee River, and between the said river and the junction of the Hangover and Fodder Stack Ridges, said junction being about ten miles southwest of the river.
>
> After hearing the cause, argument of counsel and mature deliberation, the court is of the opinion, and doth so adjudge and decree that the State line between the States of Tennessee and North Carolina as run and located by the Commissioners of said states in 1821, is as found by Special Commissioner T. A. Wright, is as follows: Crossing Little Tennessee River at the point where it reaches the river on the Northeast side, and about one-half mile above where Slick Rock Creek empties in said river; and from the river runs up the Hangover Ridge or lead and along the extreme height of the same, passing the black oak or red oak, passing Slick Rock Gap, Cold Springs Knob, Big Fat Knob, Hangover

Ridge, Hao, Grassy Gap, and Stratton Bald to a Junction of the Hangover Ridge with the Fodder Stack Ridge; and all the lands lying west or northwest of said Hangover Ridge, including Slick Rock basin, is in the State of Tennessee.

And it, further appearing to the court, that complainant Chas. Hebard, acquired title to the lands in dispute in Slick Rock Creek basin by and through grants from the State of Tennessee, and that said lands are within the lines and boundaries of said state; and that the defendants, D. W. Belding, M. M. Belding, Henry Stix, Nathan Stix, Levi Kohn, D. W. Hyman, Mary Bragg, R. L. Cooper and J. W. Cooper acquired title to the lands in dispute in said Slick Rock Basin by and through the grants from the State of North Carolina and that said lands are not within the lines and boundaries of said state.

It is therefore judged and decreed that the titles of the complainant to said lands are valid and that the titles of defendants are void, and that the defendants have established no defense to the suit, either by adverse possession or otherwise, and that complainant is entitled to the relief sought.

And it is further adjudged and decreed that complainant have and recover of said defendants all the lands in Slick Rock Creek basin more particularly described as follows: Beginning on the Tennessee River now called the Little Tennessee River, at the point where the line between the states of Tennessee and North Carolina crosses, opposite a marked Spruce Pine now blocked out about one-half mile above the mouth of Slick Rock Creek; running thence up the Hangover Ridge or lead, and along the extreme height of the same passing the black oak or red oak, passing Slick Rock Gap, Cold Springs Knob, Big Fat Knob, Hangover, Hao, Grassy Gap and Stratton Bald to the junction of the Hangover Ridge with the Fodder Stack Ridge; thence along Big Fodder Stack Ridge to Little Fodder Stack Ridge to the point called Stiff Knee; thence along Stiff Knee Ridge to the ridge turning eastwardly towards the mouth of Slick Rock Creek; thence along said ridge to the point where it reaches the Tennessee River below and near the mouth of Slick Rock Creek; thence up to the river to the beginning.

"And upon demand of complainant a writ of execution or possession will issue to put complainant in possession of said lands."

That afterwards said case was taken on appeal to the United States Circuit Court of Appeals for the Sixth Circuit, and on July 13th, 1900, the following judgment was entered in the Circuit Court of Appeals, to-wit:

"UNITED STATES CIRCUIT COURT OF APPEALS, for the Sixth Circuit. No. 783, *D. W. Belding vs. Charles Hebard.*

APPEAL from the Circuit Court of the United States for the Eastern District of Tennessee.

THIS CAUSE CAME ON TO BE HEARD ON THE TRANSCRIPT OF THE RECORD from the Circuit Court of the United States for the Eastern District of Tennessee and was argued by counsel.

IN CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this court, that tht decree of the said Circuit Court, in this cause be and the same is hereby affirmed with costs.

O. K. LURTON."

On the 25th day of September, 1906, these petitioners filed a petition in the Circuit Court of Appeals asking leave to file a bill of review in the name of the original defendants upon newly discovered evidence; upon this petition leave was granted to apply to the Circuit Court to file it, by the following entry made on the 13th day of April, 1907:

"On consideration of the petition for leave to file bill of review herein and upon arguments of counsel thereupon had, as well in support as against the same by C. B. Matthews, and Mr. E. P. McQueen on behalf of the petitioners and by Mr. T. E. H. McCroskey on behalf of the Smoky Mountain Land, Lumber and Improvement Company, it is now hereby ordered by the court that permission be, and the same is hereby granted the petitioners to apply to the Circuit Court of the United States for the Eastern District of Tennessee for leave to file such bill as counsel may be advised."

Thereupon application was made to the court below and granted on the 17th day of December, 1907, by the following entry:

> "This cause came on to be heard before the Honorable C. D. Clark, at Chambers on this the 17th day of December, 1907, upon petition for leave to file bill of review and exhibits thereto, and also upon the answer to said petition and exhibits thereto, from all of which the court is of the opinion, and doth decree, that said petition be granted and that the bill of review tendered with the petition for leave to file the same may be filed, which has been done.
>
> Upon application the respondents have 30 days from this date, within which to demur, plead or answer said bill of review."

And thereupon on the 17th day of December, 1907, said bill of review was filed in the name of the original defendants and the heirs of Mary Bragg and J. W. Cooper, deceased against Charles Hebard. That said bill, after setting out the previous proceedings and points of contention in the case made these allegations, to-wit:

> "Your orators say that the original field notes report and the map of the Commissioners who ran and established said State line in 1821, were all lost, and the said defendants after the most diligent search were unable to find any of the said papers in the archives of the State of North Carolina, or of the State of Tennessee, and evidence was given of the search that had been made therefor, which satisfied this court, and the said Circuit Court of Appeals, that none of said papers were then in existence. That about 1835 the State house at Raleigh, North Carolina, had been burned, and it was supposed that said papers had been lost at that time, and destroyed by the fire. But a most exhaustive search among the archives at Nashville, Tennessee, where such papers, if preserved, would have been filed, failed to reveal the existence of any of them, and in the opinion of the Circuit Court of Appeals on appeal in the 103 Federal Reporter (page 532), it is stated that none of said papers were then in existence.

Your orators allege, however, that about two years since by the Legislature of Tennessee as your orators are informed and believe, a law was passed, ordering that the rubbish which had accumulated in the basement of the State house at Nashville should be cleared out and destroyed and at some time during the year 1905, as your orators are further informed and believe, but at what particular date they are ignorant, some of the employes of the State of Tennessee, started to clear out this rubbish, and in a barrel, where it had been put loosely and carelessly, and as if it were of no value, the map made by the original commissioners of the States of North Carolina and Tennessee, who ran the line in pursuance of the Cession Acts passed prior thereto was discovered and a certified copy thereof is attached to this bill of review.

That while this suit was pending, the interest of the defendants in the said lands was for a valuable consideration sold and conveyed by the original defendants, excepting the Bragg and Cooper interests, on December 9th, 1899, and by subsequent conveyances all of said interests came to Edward I. Leighton, Fred W. Bruch, George Reeves, John Matthews and William R. Hopkins, and that said conveyance was for the purpose of finally vesting title, and said title has been vested in the persons just above named. That in the latter part of February, 1906, one M. E. Cozad, whose affidavit is filed herewith, heard a rumor for the first time that said map had been discovered in Nashville. That the said M. E. Cozad resided at Andrews, in the State of North Carolina, and was a representative of the said grantees just named as a caretaker of the said property, but immediately and with due diligence set about ascertaining whether said map in fact had been found, and made two trips to North Carolina to Raleigh, to ascertain whether or not its counterpart could be found in Raleigh, but failed to find it there, but obtained as soon as he could, a certified copy of the Tennessee record which is hereto attached which he obtained on the 26th day of March, 1906.

And further attempts were made to find said written report accompanying said map and the field notes of said survey. But after the most diligent

search no other papers connected therewith could be found, but none of the said grantees had had any information concerning the finding of said map and none of the defendants herein knew of it until on or about July 20th, 1906, and the existence or contents of said report could not have been proven at the trial of the original cause.

That the said map shows that the said line crosses the Little Tennessee River at or near the mouth of Slick Rock Creek as contended herein by the defendants, and that it includes all of the lands and more than were claimed by the said defendants. That said map is new and decisive evidence of the contention of the defendants in the original case, and if it had been found and presented to the court would have been decisive in favor of the defendants, and would have resulted in a decree in their favor. That it was found in a place where no one would have thought it to be, and your orators and their grantees have exercised true and perfect diligence and could not have ascertained the existence thereof sooner than is above alleged."

Thereafter a large amount of testimony was taken bearing upon said newly discovered map and the other allegations of the bill of review which, with a certified copy of the map and the report of the Commissioners of 1821, was presented to the court upon the hearing of said bill of review.

Thereafter McCall, J., who heard said bill, dismissed it by the following entry made on September 20th, 1909:

"In this cause it appearing that the Honorable Edward T. Sanford, was disqualified to try the same, because of the fact that he was of counsel in the original suit, the Honorable John E. McCall was designated to hear and dispose of the case in the room and stead of the Hon. Edward T. Sanford.

And thereupon, the bill of review came on to be regularly heard before the Hon. John E. McCall, on this ..... day of ..... 1909, upon the petition for leave to file bill of review, the bill of review, the answers of the defendants and

all of the proof in the cause, from all of which after consideration the court is of the opinion that the petitioners, W. R. Hopkins, et al., are not entitled to relief sought in their bill of review and the same is therefore dismissed; the court being of the opinion that the newly discovered evidence upon which it was sought to reverse the decree in the original suit is not sufficient to change the original decree:

It is therefore ordered, adjudged and decreed that the relief prayed for by petitioners be denied and both the petition for leave to file the bill of review and the bill of review be dismissed and the petitioners, Wm. R. Hopkins, Benjamin H. Bole, Edward S. Leighton, Fred W. Bruch, George Reeves and John Matthews, and the sureties on their prosecution bond pay all the costs of the cause incident to the bill of review, for which execution will issue.

September ....., 1909.

Enter this. JNO. E. MCCALL, *Judge.*"

That thereafter to-wit, on the 6th day of November, 1909, an appeal was allowed and perfected, and on the 18th day of December, 1909, a transcript of all the proceedings was filed in the United States Circuit Court of Appeals for the Sixth Circuit, sitting at Cincinnati and said cause was entered and docketed in said Court of Appeals, entitled *William R. Hopkins, Benjamin P. Bole, Edward I. Leighton, Fred W. Bruch, George Reeves and John Matthews, Appellants, vs. Charles Hebard, Appellee,* and numbered 2031 on said docket. That the assignment of errors filed in said cause was as follows:

Assignment of Errors on Appeal.

"And now on the 29th day of October, 1909, came the said plaintiffs, William R. Hokins, Benjamin P. Bole, Edward I. Leighton, Fred W. Bruch, George Reeves and John Matthews, prosecuting a bill of review herein in the name of the original defendants, to-wit: D. W. Belding, M. M. Belding, A. N. Beilding, Henry Stix, Nathan Stix, Louis Krohn, D W. Hyman, Mary Bragg, R. L. Cooper, J. W. Cooper

and R. N. Archer; by C. B. Matthews, their solicitor; and say that the decree in said cause is erroneous and against the just rights of said plaintiffs, for the following reasons: (The said assignment of error to be taken in connection with original record.)

1. Because the newly discovered evidence, to-wit: the map and report of the Joint Commissioners of the States of North Carolina and Tennessee, respectively, showed that the State line between said states, which was in contention herewith, struck the Tennessee River opposite the mouth of Slick Rock Creek, and crossed said river just below the said creek, and ran with said creek about five miles, and thence to the Big Fodderstack Range, and thence to the junction of Hangover and said Big Fodderstack Range.

2. That said newly discovered evidence mentioned in the first assignment of errors, together with the explanatory evidence of D. B. Burns, W. E. Chambers, Ed. Mayfield, C. Z. Denton and M. E. Cozad, all of which evidence, including the map of said Commissioners of 1821, and their report, were in evidence in this cause—showed that the former decree of this court was erroneous and mistaken, and that said line struck the Tennessee River opposite the mouth of Slick Rock Creek, and crossed said river just below the said creek, and ran with said creek about five miles, and thence to the Big Fodderstack Range, and thence to the junction of Hangover and said Big Fodderstack Range.

3. That the newly discovered evidence, together with the other evidence on the bill of review and the evidence in the original record, showed that the said State line did not reach the Tennessee River opposite the Hangover Range and thence proceeded along said range to its junction with the Big Fodderstack Range, as found by the court on this bill of review, but on the contrary crossed the river at the point and ran on the line as designated in the first and second assignments of error.

4. That the newly discovered evidence, together with the other evidence on the bill of review, and the evidence in the original record, showed that the State line did not reach the Tennessee River about opposite the Hangover Range, as assumed by the court, and therefore the court erred in that regard.

5. That the evidence offered on the bill of review showed that the Hangover Range or ridge, as adopted by the court as the line in the original decree, was not the main ridge.

6. Because the evidence offered on the bill of review showed that the main ridge was the Unicoy, and the Unicoy in connection with the Big Fodderstack Range, and that the Hangover from that point to the river was a spur.

7. Because the evidence offered on the bill of review showed that while there were three peaks on th Hangover Range or ridge between the Tennessee River and the Unicoy Ridge that were higher than the peaks of the Big Fodderstack, yet that the latter had a greater average height than the Hangover.

8. Because the evidence offered on the bill of review showed that the line mentioned in the first and second assignment of errors, to-wit: from near or below the mouth of Slick Rock Creek; was the only line that bore conclusive evidence of having been marked by the State Line Commissioners in 1821.

9. Because the evidence offered on the bill of review showed conclusively that the stream marked 'Creek' at the point where the map of 1821 shows that the line crossed the Tennessee River, was Slick Rock Creek and not the Cheoah River.

10. Because the map of 1821, which is the official map of the Commissioners who ran the boundary line aforesaid, shows that the said line did not cross the river at right angles to the river from a point opposite Hangover Ridge.

11. Because the map of 1821, mentioned in assignment No. 10, and the Commissioners' report, together with the evidence explanatory thereof, considered with the evidence in the original case were sufficient to change the original decree in favor of the complainants in the bill of review; and the evidence showed that complainants were not guilty of laches.

12. Because the court found that there were other grounds on which relief sought by the bill of review should be denied, but without specifying any of said grounds.

13. That the evidence showed that the bill of review should have been sustained and the relief

granted, and it was error for the court to deny the said relief nad dismiss said bill.

14. Because the evidence on this bill of review showed that the lands claimed by the plaintiff in the original case were to the east of the true boundary line between said states of North Carolina and Tennessee, and within the State of North Carolina, and not within the boundaries of the State of Tennessee.

15. Because the evidence showed that the plaintiff in the original cause had no title to the lands in controversy.

16. Because the evidence showed that said lands in controversy were in the State of North Carolina, and that the court had no jurisdiction over the same, or to determine the title to same.

17. Because the newly discovered evidence, together with the evidence explanatory thereof, showed that the plaintiff in the original suit had no title, and that on the contrary the title of the defendants was good and valid.

18. Because the newly discovered evidence introduced on this bill of review, taken in connection with the evidence in the original case, shows that each of the above assignments of error is good and valid.

19. Because the newly discovered evidence, and the evidence explanatory thereof, showed that the following assignments of error made in the original cause and found at page 463 of the Printed Record of this court, and the proceedings therein, upon which record this court affirmed the original decree, should have been sustained, to-wit: the first, second, third, fourth, fifth, six and ninth.

Wherefore, these complainants in said bill of review pray that the said order and decree, whereby the court below denied the relief asked for in said bill of review and dismissed the same, be reversed, and that the said court may be directed to enter a decree, in favor of these complainants, and dismissing the original bill, with such order as to costs as to this court may seem just and right.

C. B. MATTHEWS,

Solicitor and Attorney for Complainants in Bill of Review."

That afterwards, to-wit, on the 5th day of October 1910, the case came on to be heard in the Circuit Court of Appeals before the Hon. Henry F. Severns, the Hon. Loyal E. Knappen, and the Hon. A. M. J. Cochran and on the 2nd day of October, 1911, a decree was entered in said cause by the Circuit Court of Appeals of the Sixth Circuit, as follows:

> "UNITED STATES CIRCUIT COURT OF APPEALS, for the Sixth Circuit. No. 2031, William R. Hopkins, et al., vs. Charles Hebard.
>
> APPEAL from the Circuit Court of the United States for the Eastern District of Tennessee.
>
> THIS CAUSE came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Tennessee, and was argued by counsel.
>
> IN CONSIDERATION WHEREOF, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court, in this cause be and the same is hereby affirmed with costs."

Your petitioners are advised that said judgment of the Circuit Court of Appeads is final and is erroneous and that this Honorable Court should require the case to be certified to it for its review and determination, under the Act of Congress permitting causes made final in the Circuit Court of Appeals to be certified for revision.

The grounds upon which this application and petition are predicated are these:

1. The case below involved the title and ownership of a large amount of very valuable timber lands and involved the proper location of the State line between the States of North Carolina and Tennessee. The controversy hinged upon that single issue. The determination of that issue was of great public importance so much so that there is now pending in this court for hearing, and almost ready for hearing, a case of original jurisdiction number 5, on the docket of this court brought by the State of North

Carolina against the State of Tennessee, in which case it is sought to have this court determine the very line that was in controversy in this case.

2. If this court should find in favor of the State of North Carolina in the original proceeding now pending in this court this curious and anomalous result would follow, to-wit: The Smoky Land, Lumber and Improvement Company would be holding lands in North Carolina under grants from the State of Tennessee and yet the State of North Carolina not being bound by the judgment in this case could regrant said lands because as to the original grantees those grants have been held void and nullified herein, which would create confusion and further litigation.

3. That in the original case of *Hebard vs. Belding* and others, it appeared by the allegations of the pleadings and the evidence in the case that the defendants in that original bill were in possession of the disputed lands and not the complainant and there was therefore, no jurisdiction of the court or a bill in equity to entertain the case and render judgment therein for the remedy at law was complete and the title should have been tried at law; and furthermore it appeared by conclusive testimony that in fact the disputed lands were in the State of North Carolina, and for that additional reason the Federal Court in the Eastern District of Tennessee had no jurisdiction.

4. The case was one of great doubt originally. Clark, J., who decided the case upon the original report of the Master said:

> "After careful consideration of this case, I reach the conclusion that I am not warranted upon the facts in differing from the Commissioner in the view which he takes of the case. It is a very close one on the facts, and the equity of the case is rather with the defendants in view of the fact that they obtained their grants earlier and have been paying taxes on the property while the plaintiff's grant was only re-

> cently obtained. If there was a basis for estoppel, or if the doctrine of estoppel could be applied to the State of Tennessee a different question might arise growing out of the fact that the state has, through the District Commissioners established its line at Slick Rock Creek and has sectionalized all of the territory supposed to belong to the state."

And in the opinion of the Circuit Court of Appeals for the Sixth Circuit on appeal from the decree of Clark J., found in 103 Fed. Rep., at page 546.

> LURTON, Circuit Judge, delivering the opinion, says:
>
> "The case on the whole is not one free from doubts engendered by the existence of the marked line on Slick Rock and its apparent recognition by the Tennessee Surveyor General as the State line. The result reached by the Special Master and confirmed by a most careful and conscientious trial judge is a result which on the whole is most consonant with the calls in the cession act and the subsequent confirmatory boundary acts. The evidence relied upon to deflect the boundary line from the line so plainly described by both acts settling the boundary is not so conclusive as to require us to reverse the action of the Circuit Court."

That on the original appeal, the court of appeals found that the Slick Rock Creek line as claimed by the defendants in their evidence was the better marked line showing in the distance of about nine miles southwest of the Tennessee River forty-one trees apparently showing original state line marks while there were only two on the so-called Hangover ridge line and it also found that the original map and commissioner's report of the survey of 1821 could not be found and also found that the State of Tennessee by its official surveyors had assumed that the Slick Rock Creek was the true dividing line when the Land District in Monroe County, Tennessee, had been surveyed and platted and had made fractional sections at that line. That your petitioners by the evidence of tradition adduced in the original cause also

pointed to the same line as did also the topographical survey of the United States Government which adopted that line.

5. That on the hearing upon the bill of review the finding of the report of the Commissioners and map of the survey of 1821 and due diligence and interest of the petitioners were shown. That the evidence showed that the State line northeast of the Tennessee River was undisputed down to the end of the sixty-fourth mile which was about six-tenths of a mile or a little more from the Tennessee River at the point where the original complainant claimed that the line crossed that river to a high bluff and the 65th mile would take you to a point about two-fifths of a mile south of the river. That the map of 1821 when produced in evidence showed that the line ran from the sixty-fourth line circle on a straight line south 75 degrees west to the mouth of a stream marked on said map "Creek" 65 miles from the beginning. The evidence of the most competent surveyors identified that "Creek" as Slick Rock Creek and that there was only a high bluff and no stream at the point where the complainant claimed that the line crossed, and the courses and distances as taken from said map by said competent surveyors identified the line as mapped with the Slick Rock Creek line although the creek itself was incorrectly sketched as to its exact course, but said courses and distances took the line up said creek as it was actually on the ground.

6. That after said bill of review had been argued and submitted to the said United States Circuit Court of Appeals by the merest accident the original field notes of one William Davenport one of the original surveyors who made the survey of said State line in the year 1821 for the joint commissioners were discovered in an old Secretary in the possession of descendants of the said Davenport who prior to the discovery did not know of their existence. That said notes with evidence of their identity and with evidence of competent surveyors that said notes showed conclusively that the Slick

Rock Creek line was the one actually located by said commissioners, were presented to said Circuit Court of Appeals with a motion suggesting a diminution of the record and asking the said court to remit the record to the lower court with permission to your petitioners to make said evidence a part of the record which motion was denied.

7. That it was stipulated in the original case that the defendants and those under whom they claim had paid taxes on said lands continuously to the State of North Carolina since 1860 and there was uncontradicted evidence that the grants from said State to said predecessors in title were made in the year 1860, and there was evidence showing possession of and exercise of dominion over said lands by defendants and by those whose title defendants obtained ever since said year while plaintiff claimed under grants dated in 1892. That there was no question involved of estopping the State of Tennessee for that assumed the very question to be decided, but it was a question whether or not long continued possession in accordance with a certain line was not convincing proof of its proper location and in this aspect the judgments below do not follow the rule laid down in *Louisiana vs. Mississippi*, 202 U. S., 1, as to the influence of long acquiescence.

And in *Moore vs. McGuire*, 205 U. S., 214, and other cases as to the application of the doctrine to controversies between private parties.

8. That the Smoky Mountain Land Lumber and Improvement Company defender of the title as against the allegations of Bill of Review made many points all of which these petitioners are advised are untenable but the majority of the Circuit Court of Appeals, in passing upon the Bill of Review rested their decision solely upon the ground that the Smoky Land Lumber and Improvement Company was an innocent purchaser in reliance upon the original decree sought to be set aside which might have been a good reason for a denial of the right to file the Bill of Review at all, but could not have

any bearing upon the question whether at the time it was rendered the decree was right or wrong. That in such cases there could be no other rule than that laid down in Pomeroy's Equity Jurisprudence, Sec. 735:

> "When the original legal owner has done or omitted something by which it was made possible that his property should come into the hands of a bona fide holder by an apparently valid title, it may be just to regard him as estopped from asserting his ownership and thus to protect the subsequent purchaser. But when the prior legal owner is wholly innocent, has done and omitted nothing, it certainly transcends, even if it does not violate the principles of equity to sustain the claims of a subsequent and even a bona fide purchaser."

The original owners in this case only gave up when the law compelled them to, they did nothing to estop themselves but fought to the last ditch. Every case that has protected a purchaser under a decree will be found to be one where the owner has omitted some remedy like an appeal or has estopped himself or where the petition for a bill of review has been defective or the newly discovered evidence merely cumulative. That in said majority opinion no mention is made of the effect of the newly discovered evidence but the inference is that it was sufficient. While Severns, J., who delivered a dissenting opinion sustaining the petitioner's contentions on every point found that the evidence was conclusive.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued under the seal of the court, directed to the United States Circuit Court of Appeals for the Sixth Circuit sitting at Cincinnati, commanding the court to certify and send to this court on a day to be designated a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the Act of Congress approved March

3rd, 1891, establishing the Circuit Court of Appeals and defining and regulating their jurisdiction, and that the said judgment of the Circuit Court of Appeals be reversed by this Honorable Court, and for such further relief as may be proper, and your petitioners will ever pray.

C. BENTLEY MATTHEWS,
Solicitor and Counsel for Petitioners.

STATE OF OHIO, HAMILTON COUNTY, SS.

C. B. Matthews, having been first duly sworn, says that he is the Solicitor and Counsel for petitioners in the foregoing petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit, that he is conversant with the matters and things set forth in the foregoing petition and that the allegations and facts therein set forth are true, as he verily believes.

C. BENTLEY MATTHEWS,

Sworn to before me and subscribed in my presence this 6th day of April, A. D., 1912.

(Seal)

HARRY T. KLEIN,
Notary Public, in and for Hamilton County, Ohio.

Office Supreme Court,
FILED.
APR 17 1912
JAMES H. McKEN

IN THE

Supreme Court of the United States.

No. [redacted]

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, FRED W. BRUCH, GEORGE REEVES AND JOHN MATTHEWS,
Petitioners,

vs.

CHARLES HEBARD AND THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY,
Respondents.

BRIEF OF PETITIONERS FOR A WRIT OF CERTIORARI.

C. B. MATTHEWS,
Solicitor and Counsel for the Petitioners.

IN THE

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BRIEF OF PETITIONERS FOR A WRIT OF CERTIORARI.

The petitioners, WILLIAM R. HOPKINS and others, petitioning in the name of DAVID W. BELDING and others, all of whose names are fully set out in the petition filed herewith by said petition have represented and made known to the court, that on or about the 10th day of June, 1895, a bill in chancery was filed by one Charles Hebard,

in the Chancery Court of Monroe County, State of Tennessee, seeking to enjoin trespassing and cutting of timber upon certain tracts of land which were claimed to be a part of Monroe County, Tennessee, and which the plaintiff claimed to own by reason of grants made by the State of Tennessee in 1892 to one McCrosky and by subsequent deeds of conveyance to the said Charles Hebard. This bill was originally against Robert N. Archer, and two or three other defendants and set out that Archer and his agents were committing these wrongs and in addition to the injunction prayed for, it was sought by the prayer to have the title of the complainant quieted. Afterwards to-wit, on the 13th day of January, 1896, this suit was removed into the Federal Court for the Eastern District of Tennessee, Northern Division at Knoxville on the ground of diverse citizenship, and thereupon a new bill was filed on the equity side of that court on behalf of the said Charles Hebard against David W. Belding and others, the most of whom were citizens of the State of Ohio, and the others of the State of New York. In this bill it was set out that the complainant was the owner of certain large tracts of land consisting of about eight thousand acres, and a part of a larger tract of forty thousand acres, which the said Hebard through grants from the State of Tennessee, and by *mesne* conveyances had become the owner of, and that the defendants in this bill in equity were trespassing upon said lands claiming title thereto and the purpose of that bill generally was to clear the complainant's title from all claims of any of the defendants. The defendants claimed under grants from the State of North Carolina and the sole contention in the case related to the true location of the state line between North Carolina and Tennessee. The defendants answered setting up their title under grants from the State of North Carolina and denying the complainant's title. The said state line had been located, established and marked in 1821 by a joint

commission of the two states, but the line they established was in doubt.

The case was referred to a master who after taking a great quantity of evidence reported in favor of the complainant. Exceptions were filed and heard, but the report was confirmed by the court, and a decree was entered in favor of complainant on June 10th, 1899. Afterwards this case was appealed to the United States Circuit Court of Appeals for the Sixth Circuit and the judgment there affirmed.

On the 20th day of September, 1906, these petitioners filed a petition in the Circuit Court of Appeals asking leave to file a bill of review in the name of the original defendants upon newly discovered evidence. Upon this petition leave was granted to apply to the Circuit Court to file it by the following entry made on the 13th day of April, 1907.

> "On consideration of the petition for leave to file bill of review herein and upon arguments of counsel thereupon had, as well in support as against the same by Mr. C. B. Matthews, and Mr. E. P. McQueen on behalf to the petitioners and by Mr. T. E. H. McCroskey on behalf of the Smoky Mountain Land, Lumber and Improvement Company, it is now hereby ordered by the court that permission be, and the same is hereby granted the petitioners to apply to the Circuit Court of the United States for the Eastern District of Tennessee for leave to file such bill as counsel may be advised."

Thereupon application was made to the court below and granted on the 17th day of December, 1907, by the following entry:

> "This cause came on to be heard before the Honorable C. D. Clark, at Chambers on this the 17th day of December, 1907, upon petition for leave to file bill of review and exhibits thereto, and also upon the answer to said petition and exhibits thereto, from all of which the court is of the opinion, and doth

decree, that said petition be granted and that the bill of review tendered with the petition for leave to file the same may be filed, which has been done.

Upon application the respondents have 30 days from this date, within which to demur, plead or answer said bill of review."

And thereupon on the 17th day of December, 1907, said bill of review was filed in the name of the original defendants and the heirs of Mary Bragg and J. W. Cooper, deceased, against Charles Hebard. That said bill after setting out the previous proceedings and points of contention in the case made these allegations, to-wit:

"Your orators say that the original field notes report and the map of the commissioners who ran and established said state line in 1821, were all lost, and the said defendants after the most diligent search were unable to find any of the said papers in the archives of the State of North Carolina, or of the State of Tennessee, and evidence was given of the seach that had been made therefor, which satisfied this court, and the said Circuit Court of Appeals, that none of said papers were then in existence. That about 1835 the State house at Raleigh, North Carolina, had been burned, and it was supposed that said papers had been lost at that time, and destroyed by the fire. But a most exhaustive search among the archives at Nashville, Tennessee, where such papers, if preserved, would have been filed, failed to reveal the existence of any of them, and in the opinion of the Circuit Court of Appeals on appeal in the 103 Federal Reporter (page 532), it is stated that none of said papers were then in existence.

Your orators allege, however, that about two years since by the Legislature of Tennessee as your orators are informed and believe, a law was passed, ordering that the rubbish which had accumulated in the basement of the State house at Nashville should be cleared out and destroyed and at some time during the year 1905, as your orators are further informed and believe, but at what particular date they are ignorant, some of the employes of the State of Tennessee, started to clear out this rubbish, and in a barrel,

where it had been put loosely and carelessly, and as if it were of no value, the map made by the original commissioners of the States of North Carolina and Tennessee, who ran the line in pursuance of the Cession Acts passed prior thereto was discovered and a certified copy thereof is attached to this bill of review.

That while this suit was pending, the interest of the defendants in the said lands was for a valuable consideration sold and conveyed by the original defendants, excepting the Bragg and Cooper interests, on December 9th, 1899, and by subsequent conveyances all of said interests came to Edward I. Leighton, Fred W. Bruch, George Reeves, John Matthews and William R. Hopkins, and that said conveyance was for the purpose of finally vesting title, and said title has been vested in the persons just above named. That in the latter part of February, 1906, one M. E. Cozad, whose affidavit is filed herewith, heard a rumor for the first time that said map had been discovered in Nashville. That the said M. E. Cozad resided at Andrews, in the State of North Carolina, and was a representative of the said grantees just named, as a care taker of the said property, but immediately and with due diligence set about ascertaining whether said map in fact had been found, and made two trips to North Carolina to Raleigh, to ascertain whether or not its counterpart could be found in Raleigh, but failed to find it there, but obtained as soon as he could, a certified copy of the Tennessee records which he obtained on the 26th day of March, 1906.

And further attempts were made to find said written report accompanying said map and the field notes of said survey. But after the most diligent search no other papers connected therewith could be found, but none of the said grantees had had any information concerning the finding of said map and none of the defendants herein knew of it until on or about July 20th, 1906, and the existence or contents of said report could not have been proven at the trial of the original cause.

That the said map shows that the said line crosses the Little Tennessee River at or near the mouth of Slick Rock Creek as contended herein by the

defendants, and that it includes all of the lands and more than were claimed by the said defendants. That said map is new and decisive evidence of the contention of the defendants in the original case, and if it had been found and presented to the court would have been decisive in favor of the defendants, and would have resulted in a decree in their favor. That it was found in a place where no one would have thought it to be, and your orators and their grantees have exercised true and perfect diligence and could not have ascertained the existence thereof sooner than is above alleged."

Thereafter a large amount of testimony was taken bearing upon said newly discovered map and the other allegations of the bill of review ~~which~~ a certified copy of the map and the report of the Commissioners of 1821 was presented to the court upon the hearing of said bill of review.

Thereafter McCall, J., who heard said bill, dismissed it by the following entry made on September 20th, 1909.

"In this cause it appearing that the Honorable Edward T. Sanford, was disqualified to try the same, because of the fact that he was of counsel in the original suit, the Honorable John F. McCall was designated to hear and dispose of the case in the room and stead of the Hon. Edward T. Sanford.

And thereupon, the bill of review came on to be regularly heard before the Hon. John R. McCall, on this ..... day of ....., 1909, upon the petition for leave to file a bill of review, the bill of review, the answers of the defendants and all of the proof in the cause, from all of which after consideration the court is of the opinion that the petitioners, W. R. Hopkins, et al., are not entitled to relief sought in their bill of review, and the same is therefore dismissed; the court being of the opinion that the newly discovered evidence upon which it was sought to reverse the decree in the original suit is not sufficient to change the original decree:

It is therefore ordered, adjudged and decreed that the relief prayed for by petitioners be denied and both the petition for leave to file the bill of review

and the bill of review be dismissed and the petitioners, Wm. R. Hopkins, Benjamin H. Bole, Edward S. Leighton, Fred W. Bruch, George Reeves and John Matthews, and the sureties on their prosecution bond pay all the costs of the cause incident to the bill of review for which execution will issue.

September ....., 1909.

Enter this. JNO. E. MCCALL, *Judge*."

That thereafter to-wit on the 6th day of November, 1909, an appeal was allowed and perfected, and on the 18th day of December, 1909, a transcript of all the proceedings was filed in the United States Circuit Court of Appeals for the Sixth Circuit, sitting at Cincinnati and said cause was entered and docketed in said Court of Appeals, entitled William R. Hopkins, Benjamin P. Bole, Edward I. Leighton, Fred W. Bruch, George Reeves and numbered 1031 on said docket. Errors were assigned in said cause proper to bring the question at issue fully before the Court of Appeals.

That afterwards, to-wit, on the 5th day of October, 1910, the case came on to be heard on the Circuit Court of Appeals before the Hon. Henry F. Severns, the Hon. Loyal E. Knappen, and the Hon. A. M. J. Cochran and on the 2nd day of October, 1911, a decree was entered in said cause by the Circuit Court of Appeals of the Sixth Circuit, as follows:

"United States Circuit Court of Appeals, for the Sixth Circuit. No. 2031, William R. Hopkins, et al., vs. Charles Hebard.

APPEAL from the Circuit Court of the United States for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Tennessee, and was argued by counsel.

IN CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court, in this cause be and the same is hereby affirmed with costs."

The eight thousand (8,000) acres of land which the complainant Hebard claimed to own, and which he claimed that the defendants were trespassing upon, were situated in what was known as the Slick Rock basin immediately east of, and adjoining Monroe County, in Tennessee. From the statement of facts, and from the statement of the petition in this case for a writ of *Certiorari*, it will be seen that the sole contention was about the true location of the State line at that place between the states of North Carolina and Tennessee. This line was run in 1821 by a joint commission provided for by the Legislatures of the two states respectively and after they completed their work they made the following report:

> To his Excellency, Joseph McMinn, Governor of the State of Tennessee:
>
> "The undersigned, Alexander Smith, Isaac Allen and Simeon Perry, Commissioners on the part of the State of Tennessee; and James Mebane, Montford Stokes and Robert Love, Commissioners on the part of the State of North Carolina, duly appointed under the authority of the Acts of the Legislature of the said states respectively:
>
> Having met at the town of New Port in the State of Tennessee on the 16th day of July, A. D. 1821, to settle, run and mark the dividing line between the two states, from the termination of the line run by McDowell, Vance and Matthews in the year of our Lord, 1799, to the Southern Boundary of the said States, Respectively Report, that we proceeded to ascertain, run and mark the said dividing line as designated in the XIth Article called the Declaration of Rights, of the Constitution of the State of Tennessee, and in the Act of the General Assembly of the State of North Carolina; 'An act for the purpose of ceding to the United State of America, certain Western lands therein described, passed in 1789; Which said dividing line as run by us, Begins at a stone set upon the North side of the Catalochoe Turnpike road, and marked on the West side Ten. 1821; and on the East side N. C. 1821, running thence Southwestwardly course to the Bald Rock on

the summit of the Great Iron or Smoky Mountain, and continuing Southwestwardly on the extreme height thereof to where it strikes Tennessee River about seven miles above the old Indian Town of Tallassee, crossing Porters Gap at the distance of twenty-two miles from the beginning; passing Meigs' boundary line at thirty-one and a half miles; the Equinottly path at fifty-three miles; and crossing Tennessee River at the distance of Sixty-five miles from the beginning. From Tennessee River to the main ridges and along the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain, striking the old trading path leading from the Valley Town to the Overhill Towns, near the head of the West fork of Telico River, and at the distance of Ninety-three miles from the beginning. Thence along the extreme height of the Unicoy or Unaka Mountain to the Southwest end thereof at the Unicoy or Unaka Turnpike road, where a corner stone is set up, marked Ten. on the West side and N. C. on the East side; and where a hickory tree is also marked on the South side Ten. 101 m. and on the North side N. C. 101 m. being one hundred and one miles from our beginning. From thence a due course south two miles and two hundred and fifty-two poles to a spruce pine on the north bank of the Hiwassee River, below the mouth of Cave Creek; thence up the said river the same course about one mile, and crossing the same to a Maple marked W. D. and R. A. on the south bank of the river; thence continuing the same course due south eleven miles and two hundred and twenty-three poles to the Southern boundary line of the States of Tennessee and North Carolina; making in all One Hundred and Sixteen miles and two hundred and twenty-three poles from our beginning; and striking the Southern Boundary line twenty-three poles west of a tree in said line, marked 72 m.— Where we set up a square post marked on the West side Ten. 1821; and the East side N. C. 1821; and on the South side G. The said dividing line run by us in its whole length is distinctly marked with two chops and a blaze on each fore-and-aft tree, and three chops on each side line tree; and mile marked at the end of each mile; agreeably to

the plats which accompanies this Report, and which said plats and Report are certified by us in Duplicate, one for each of the said States, in the same words, marks and figures; which we respectfully submit to the Governors of the said States of Tennessee and North Carolina.

Given under our hands at Knoxville in the State of Tennessee on the 31st day of August, A. D. 1821.

A. SMITH,
ISAAC ALLEN,
SIMEON PERRY,
Commissioners of Tennessee.
JAMES MEBANE,
M. STOKES,
R. LOVE,
Commissioners of North Carolina."

The same kind of a report was made to the Governor of the State of North Carolina, and is supposed to have been filed in the Archives of North Carolina but in 1835, the State house at Raleigh was burnt, and it is supposed that all of these records were then destroyed. It was also assumed that the report of these commissioners to the respective states was accompanied by a map and the field notes of the surveyors but at the time of the trial of this case below neither field notes, map or report of the commissioners could be found, even at Nashville, Tennessee, after the most diligent search, and that fact was proven to the satisfaction of the court who tried the case, as is mentioned in the opinion of Lurton, Circuit Judge, on appeal, reported in the 103rd Fed. Rep., at page 532.

In the trial of the original case below before the Master who was ordered to report the testimony, and his conclusions of fact, he filed his report in favor of the complainant. The matter then came up on exceptions before Clark, J. The exceptions were overruled. In delivering the opinion, Judge Clark said:

> "After careful consideration of this case, I reach the conclusion that I am not warranted upon the facts in differing from the Commissioner in the view which he takes of the case. It is a very close one on the facts, and the equity of the case is rather with the defendants in view of the fact that they obtained their grants earlier, and have been paying taxes upon the property while the plaintiff's grant was only recently obtained. If there was a basis for estoppel, or if the doctrine of estoppel could be applied to the State of Tennessee, a different question might arise growing out of the fact that the State has, through the Ocoee District Commissioners established its line at Slick Rock Creek, and has sectionized all of the territory supposed to belong to the State. In the absence, however, of any ground on which an equitable view might be taken of the situation, I am constrained to believe that the weight of evidence is with the plaintiff as to the true location of the state line. I do not under-estimate the great force found in the better marked line of the defendant."

The pertinency of these remarks becomes apparent when it is known that the contention between the parties was this: The line Northeast of the Tennessee River was undisputed down to the 64th mile circle, which was about 6/10th of a mile Northeast of the River. The question then was whether or not the line proceeded directly across the Tennessee River to a bluff upon the other side, and thence to a spur onto the Hangover and thence to the junction of the Hangover range so-called and the Big Fodderstack range a distance of about nine (9) miles Southwest of the Tennessee River or whether the line was the 64th mile circle to the mouth of Slick Rock Creek about ½ mile further down the Tennessee River and thence up that creek to a spur and thence on to the Big Fodderstack and thence to the junction before named. When the original case came on appeal to the Circuit Court of Appeals of the Sixth Circuit where the judgment of the court below was affirmed

Lurton, Circuit Judge, delivering the opinion of the court, consisting of Lurton, Taft and Day, affirmed the case manifestly with some doubt and said this: 103 Fed. Rep., p. 546.

> "The case, on the whole, is one not free from doubts engendered by the existence of the marked line on Slick Rock Creek and its apparent recognition by the Tennessee surveyor general as the state line. The result reached by the special master, and confirmed by a most careful and conscientious trial judge, is a result which on the whole is most consonant with the calls in the cession act and the subsequent confirmatory boundary acts. The evidence relied upon to deflect the boundary from the line so plainly described by both acts settling the boundary is not so conclusive as to require us to reverse the action of the Circuit Court. The decree will therefore be affirmed."

During the course of the opinion, page 545, the court says the commissioners evidently ran two lines one on Hangover and the other up Slick Rock Creek, the latter of which is the better marked line. Two State line trees were found on the Hangover line, while forty-one were found on the other. And further the commissioners' line ran and marked a line along Slick Rock which ultimately joined the Hangover line at the junction of the Fodderstack with Hangover, also in 1836 Tennessee caused the lands ceded to her to be surveyed and sectionized, and platted to Slick Rock Creek, recognizing it as the line, and bounded the survey by Slick Rock, and between 1853 and 1882 Grantees under Tennessee, conveying fractional sections within the Ocoee District described Slick Rock as the State line and after the Ocoee survey in 1836 and down to 1882 the marked line on Slick Rock was reputed to be the State line.

It is stated during the course of the opinion that the Slick Rock line in the 9 or 10 miles from the river to the junction of Hangover and Fodderstack ranges had 41 marked State line trees on it.

The Hangover ridge line claimed by the complainant Hebard is to the East of the Slick Rock Creek line claimed in that case by the defendants and at the greatest distance is about 3½ miles therefrom.

After the affirmance of said original judgment by the Circuit Court of Appeals of the Sixth Circuit, quite accidently at a place and at a time and in a manner set out in the petition for leave to file a bill of review in this case the report of the commissioners and the original map of the survey were found in a barrel of rubbish in the basement of the State house in Nashville, thereupon in due time a petition ~~was~~ filed by your petitioners here, to file a bill of review in the names of the original defendants grounded upon this newly discovered evidence was granted and it was claimed that the newly discovered evidence conclusively showed that the claim of the original defendants that the State line crossed the Tennessee River to the mouth of the Slick Rock creek up that creek to a spur which led to the Big Fodderstack and thence to the junction with the Hangover. And that the alleged title of Hebard did not exist and thereafter leave was granted by the Court of Appeals to apply to the lower court for leave to file such bill of review, a copy of which bill of review accompanied it. Said application was made which was also granted on the following dates in the respective courts to-wit: On the 13th day of April, 1907, and on the 17th day of Dec., 1907. Thereafter a great deal of evidence was taken upon this bill of review which with the report of the commissioners and the map which was before the court together with the testimony of expert surveyors on the application of the map and report and their pertinency in determination of the line, but the bill of review was dismissed, and an appeal taken to the Circuit Court of Appeals. Afterward the case came on regularly for hearing and was submitted to the Circuit Court of Appeals and was under consideration;

merely by an accident an authenticated copy, or possibly the original of the field notes of Davenport, one of the original surveyors in 1821 of the line who accompanied the joint commission, were discovered in an old secretary by the descendants of the said Davenport in the home of said Davenport which were duly authenticated, and an application was made to the Circuit Court of Appeals suggesting a diminution of the record and asking leave to put in these field notes which in every way corroborated the Slick Rock line; that application with additional testimony proving the authenticity of the notes and what they proved was refused Afterwards on the 2nd day of October, 1911, the Circuit Court of Appeals of the Sixth Circuit affirmed the judgment of the court below on the bill of review solely on the ground expressed in the opinion that the Smoky Land, Lumber and Improvement Company having purchased the property in reliance upon the decree in favor of Hebard they were innocent purchasers and could not be disturbed. Severns, J., dissented, deciding every proposition in favor of the applicants and held that the newly discovered evidence settled beyond controversy that the true line was on Slick Rock Creek. The majority of the court were silent on that proposition and we are justified in assuming that they thought on that point of fact the proof was sufficient.

FACTS.

Having in view the fact that the only contention in the case was the proper location of the State line, and the doubts that were expressed by the courts, we deem it hardly necessary to more than call the attention of the court to the result of the testimony in the original case, and the changes made in it by the newly discovered evidence. Originally three surveyors,—Hale, Mueller and Wilson,—were the expert witnesses for complainant, Hebard. Their testi-

mony commences at page 67 and runs to page 112 of the Original Record. Hale was examined again (page 169), and Hale and Wilson were re-examined (pages 215 and 223). The result of Hale's testimony, who was the leading witness for complainant, was that the line Northeast of the river, down to a point at the end of the 64th mile from the beginning, was undisputed; and this is true. That at the 64th mile he was about six-tenths of a mile from the river. It appears that a tree between that and the river in a direct line, and not far from the bank of the river, was evidently marked by the Joint Commission. The court below, in the absence of the Commissioner's Report and map and in the absence of any other marked trees, thought that it was unreasonable to suppose that the line took a turn there and went off toward a point opposite the mouth of Slick Rock Creek. Since the testimony below was taken, and in the testimony on the Bill of Review, it now appears that other marked trees, containing State Line marks of the requisite age, have been discovered, leading off on the northeast bank of the river towards Slick Rock Creek. The Cession Act and the Commissioner's Report, which have already been quoted, according to Hale confined the line to the tops of the ridges, but he says in his original testimony that when he got to the river on the northeast side, that the running of his lines did not affect his location at all, but he relied on the Commissioner's Report and the topography. (Original Record 86.) In other words, he took a look over the country southwest of the river and picked out what he considered the main ridge, and that took him directly across the river to a high bluff and thence over what is called the Hangover Ridge, although it was a section of hills and gaps to the Hangover, about 3½ miles from the river. Whereas the testimony now on the bill of review is strongly in favor of the contention that the main ridge does not commence until Hangover and Fodderstack ridge join, about 6½ or 7

miles southwest of the river, and when the Commissioners' Report speaks of going, "thence from the Tennessee river to the Main Ridge," it does not mean along a ridge, or with a ridge, but to a ridge, and it would not be proper to say "From the Tennessee river to the Main Ridge" if that ridge formed a part of the bank of the river itself, as the bluff mentioned does.

Hale claimed to have discovered two marked trees on Hangover, whereas there were 41 on the Slick Rock line, with State Line marks of sufficient age. The subsequent testimony of Burns, commencing in the new record on the bill of review, at page 64, says that there are no State Line trees on Hangover ridge; that one of the trees that was testified to as being a State Line tree was decayed on the inside, and its age could not be determined; and the other, if marked as a State Line tree at all, was too recent. The balance of the testimony of complainant's experts, when taken on the bill of review, was confined to testimony that the newly discovered map could not be fitted to the ridges that their preconceived ideas had picked out as the ridges which the State Line ought to follow. The report of the Commissioners also sets out that they marked the line, and surely the Slick Rock line is a marked line. The court originally found that it must have been marked by the Commissioners. The anomaly of going from the point where the last tree is marked northeast of the river, is now explained. From the end of the 64th mile, in a straight line to the mouth of Slick Rock, the intervening country is utterly inaccessible. All of the witnesses agree that the map shows that they crossed at some stream running into the Tennessee river, and they all agree that there is no stream directly across the river from the end of the 64th mile, but only a bluff. It is sought to identify this stream as the Cheoah river, but the stream at which this map shows the crossing was made, is to the right as you come down on

the north side, at an angle south 74 degrees 25 minutes west, whereas the Cheoah river is to the left about a mile and a quarter, a much larger stream and in a direction east, and runs along at right angles to the line even as claimed by Tennessee, and the further you go up the Cheoah, the further away you get from any line that is claimed. In fact, Cheoah river on that map looks like a continuation of the Tennessee river itself. Burns, who is a very competent engineer, on page 72 of the record on bill of review, gives the bearings of the line up Slick Rock and on to the junction of Big Fodderstack and Hangover. These bearings—which Hale agrees with—could never reach that junction over the so-called Hangover Ridge, nor is the mileage correct by that route, taking the length of the whole line. It is true that the map is on a small scale, and as it is largely along the mountains, each little deviation is not noted. It would be impossible to do so, and our experts say that in making mountain surveys the only way it can be done is to survey along the top, but when you plat it, to draw your lines between natural objects or monuments. It is also an established fact that in going down the undisputed line on the northeast side of the river, when you get to the end of the 64th mile following that line, you are looking directly at the Big Fodderstack range, which stands right up before you, and that you only look at the Hangover ridge by turning to the left, and that the Fodderstack Range on the average is more of a main range than the Hangover Ridge, although in the latter there are higher points, for instance at the Hangover itself and at Stratton Bald. From the Hangover Peak, going towards the river, two spurs go off, one to the right and one to the left; the one to the right goes to the mouth of Cheoah river, and the one to the left goes to the mouth of Slick Rock Creek, and the surveyors agree that looking to the south of the river from the north altitudes, these seem to be fingers of a hand, and that both of the ridges, Cheoah and Slick

Rock, are higher than the first 3½ miles of the so-called Hangover ridge, starting from the bluff. Notwithstanding the surveyors who accompanied the Commissioners in 1821 marked a tree near the bank of the river, and then two trees at least on the way to Slick Rock, when they came to plat it they drew a straight line from the end of the 64th mile across to the mouth of Slick Rock which is just 65 miles from the beginning, whereas 65 miles on the other line would land you about two-fifths of a mile south of the river. It is true that the stream at which, according to the map, the Commissioners landed on the south side of the river, is not correctly sketched as it is on the ground by actual survey, but this is explained by our surveyors by the fact that it is usual to attain as much accuracy as possible in the courses and distances, and merely sketch in the topography. So that in sketching the creek it is drawn away from the line. The line in fact, according to Burns and our other surveyors, goes up the Slick Rock Creek about 5 miles, and thence up a spur on to the Big Fodderstack, and thence to the junction. The drawing of the straight line by the Commissioners' Surveyors, from the end of the 64th mile to the Slick Rock Creek, and yet marking a tree down to the river, is exactly what the complainant's witness, Mueller, says would be done if they attempted to cross at the bluff; that in those days the Tennessee river was not capable of being crossed right at the bluff, because there was an eddy there, but that they would go down and cross over but draw their lines as if they had made a direct crossing. It is quite evident that the Commissioners who were to "settle, run and mark" a line did not cross the Tennessee river at a bluff, and this is admitted by both Hale and Mueller. (See Record on Bill of Review, page 190 and 193, and Hale's testimony, page 213.)

Hale and Mueller make the attempt to degrade the map of 1821, but without success. They say that it will not fit

any of the ridges south of the river, but of course it was not intended to. In the next place, that it would be impossible to take that map and run the line. This is in direct contradiction of the testimony of Burns, who is the best educated, most experienced and ablest surveyor of them all, and our other surveyors; and Hale's testimony goes upon the ground that the map does not show courses and distances, and yet on page 155 of the record on the bill of review, he states that the general course is correct, but on page 148 that the scale is so small that only an approximate course and distance can be obtained, and on page 152 he proceeds to give in detail, until stopped by counsel, the angles, courses and distances as shown by that map, and on pages 205 and 206 he gives quite accurately the mileage, courses and angles south of the river to Unicoy, a distance of about 15 miles, and it is needless to say that these courses and distances as given by him, starting over the Hangover, would never reach the junction of Fodderstack by that route, nor the Unicoy.

There was abundant testimony from tradition that the Slick Rock line was the true line.

The State of Tennessee officially surveyed fractional sections in the eastern part of Monroe County, and stopped the line and assumed the line to be at Slick Rock; and the occupation and payment of taxes by the defendants in the original case for about 35 years, under grants from the State of North Carolina, should have led the court—we think—to find Slick Rock as the true boundary line.

It is testified to by Chambers, one of our witnesses, that the entries under which the Hebard grants were made, were taken out in 1882, but that for ten years the governors of the State of Tennessee refused to issue grants upon these entries, because there was no unoccupied territory belonging to the State of Tennessee over there.

A line crossing the river at the bluff would be south from 8 to 10 degrees west, instead of the 74 degrees mentioned.

I have already called the attention of this court to the doubts expressed by the courts below originally in deciding the case, and to the fact that the Court of Appeals on this Bill of Review presumably thought the proof of fact as to the true location of the line was sufficient. Judge Severens, dissenting judge used this language in connection therewith:

> "The report and map of the Commissioners above mentioned were put in evidence in the court below in this proceeding and are now before us. The authenticity of them is not disputed. The map shows the line run by the Commissioners, in distinct color and it shows the line as it was contended to be by the defendants in the original case, and is the line running over the Fodderstack Ridge, and is on the line of the 41 marked trees above mentioned. *The inevitable conclusion is that the original decree was erroneous.* The appellees contend vigorously that these documents are not conclusive and still insist that the true line runs over by Hangover Rock. But it is, as I think, a hopeless contest, and my conviction that the map shows the true line is in no wise shaken. What is the result of this conclusion if it is correct? It must be that these lands lie in North Carolina, that the appellees had no title, and that the appellants are the lawful owners of them."
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> * * * * * * * * * * * * *
>
> "*The only question in the case at the original hearing was that of the location of the boundary line between the States. The new evidence seems to be conclusive of that question.* It is difficult to conceive of a case more suitable for the remedy now invoked."
>
> * * * * * * * * * * * * *
>
> "The proper order should be to reverse the decree of the Circuit Court and to direct that the original decree be reversed and the original bill dismissed and for a restoration of the possession of the premises."

The Cession Act of 1789, in describing the line, uses these words, after reaching the Great Iron or Smoky Mountain northeast of the river, to-wit:

> "Thence along the extreme height of said mountain to the place where it is called Unicoy or Unaka Mountain between the Indian town Cowee and Old Chota; thence along the main ridge of the said mountain to the southern boundary of this state."

And furthermore:

> "The report of the Commissioners, as made, was confirmed by Acts of the State of Carolina, and the State of Tennessee, in 1821."

POINTS OF LAW.

Upon the hearing of this bill of review certain technical objections were presented to the court by the Smoky Mountain Land, Lumber and Improvement Company, which had entered its appearance and had defended the case all along as to the interest originally acquired by Charles Hebard, the original complainant. These objections were the same that had been presented when the petition for leave to file the bill of review was asked.

1. That an assignee could not file a bill of review.

2. That the three (3) years limitation of the state law of Tennessee presented the filing of the bill of review. That limitation being three (3) years after the rendition of the judgment.

3. That the Smoky Mountain Land, Lumber and Improvement Company, was an innocent purchaser, and it would therefore be inequitable to allow a bill of review to be filed. When these objections were made on the original application to file the bill of review both courts allowed the bill to be filed notwithstanding.

Taking these in their order. The question of the right of an assignee is simply a technical rule of equity preceedure.

While it is true that it is said that an assignee may not file a bill of review, it is not said that an assignee may not file a bill of review in the names of the original parties, nor is it said that assignees may not file a bill in the nature of a bill of review. In fact, it is said otherwise.

While it is true that the petition in this case is filed by Hopkins et al., the court will notice that the bill which we seek to file is in the name of the original parties, so that as assignees we are not seeking to file a bill of review in our own name.

In Story's Equity Pleading, Sec. 409, the author says:

> "No persons, except the parties and their privies in representation, such as heirs, executors and administrators can have a bill of review strictly so-called. But other persons in interest and in privity of title or estate, who are aggrieved by the decree, such as devisees and remaindermen, are, as we shall presently see, entitled to maintain an original bill in the nature of a bill of review, so far as their own interests are concerned."

So that leaving out the proposition whether the assignees, and these were practically assignees, during the pendency of the suit, may prosecute a bill in the name of the original party, it is only a question as to an original bill of review, or a bill in the nature of a bill of review. There is also in equity a supplemental bill in the nature of a bill of review, so that the only proposition in this case is whether a bill which we tender should be filed in this original suit, or whether it shall be docketed as an original case in the nature of a bill of review.

In Sec. 357 of Foster's Federal Practice, under the head of "Bills in the Nature of Bills of Review," the author says:

> "Only parties to the decree impeached, or their privies by operation of law, as heirs, executors and

> administrators, are entitled to file a bill of review; but other persons in interest and in privity of estate, who are aggrieved by the decree, are entitled to have the same relief by means of a bill in the nature of a bill of review; such are assignees, devisees and remaindermen of the original unsuccessful parties."

See also,

Beach on Modern Equity Practice, Sec. 843.

In *Pierce vs. Brady*, 23 Beavan, 64, a decree was made in favor of a *cestui que* trust upon an original bill, and without a bill of review, upon the discovery of fresh evidence, although a decree had previously been made, as to the same matter, against their trustees, but in a suit to which *cestui que* trust were not parties. The statement of facts in this case are: A. insured his life and assigned the policy to B. A. became bankrupt and died, having bequeathed the policy in trust for C. In a suit between the assignee of A. and the trustee, and in consequence of the trustees not having proved that notice of the assignment had been given to the officer the fund was ordered to be paid to A's assignee, as being within the order and disposition of the bankrupt. Parties claiming under C. afterwards filed an original bill against the assignee, and having proved that notice had been given, recovered the fund. It was suggested in this state of the case that the proper mode of proceeding would have been to have allowed or to have applied to Mr. Brady the legal representative of the assignee Christopher Emmett, to file a bill of review, and for that purpose as a necessary preliminary step, to have applied to this court and obtained leave necessary for filing a bill of review.

> "If Mr. Brady had adopted that course, and it had appeared that the evidence which is now before the court was new evidence, which he had not been able to obtain, (and which appears now from his evidence to be the fact), and that it was material to the matter in issue, then, no doubt the court would have given

leave to file a bill of review, and the question would have been brought forward in that manner, but I am of the opinion, that Mr. Maund (purchaser of the children's interest) is not precluded by the omission to adopt that course of proceeding, and that it is open to him now to file a bill. And assuming everything done in the case of *Brady vs. Morgan* to have been correctly done, which seems to have been the case, and not disturbing anything done in that case, I am of the opinion that the present plaintiffs may now by bringing forward proper evidence, arrest the fund in the hands of Patrick Johnson, (the assignee of Mr. Emmett) for persons other than the creditors of William Emmett (the insured) who may be entitled to receive the money, not meaning thereby to express my opinion who those persons are, but assuming Mr. Maund, or rather the plainiff in this case, his representatives, to have made out a title to at least a portion of the fund. It would be a very unfortunate result if this court were compelled to come to an opposite conclusion, because it could scarcely do so without giving Mr. Brady leave now to file a bill of review, which would only be to occasion considerable delay and expense, and the effect would ultimately be to raise upon the same evidence exactly the same point as is now before the court. I am of the opinion in this particular case that the plaintiffs are entitled to get over the point of form, and that the court is bound to say, that if they establish their case upon the merits, they are entitled to arrest the funds in the hands of Mr. Patrick Johnson."

This decision was by Sir John Romilly, Master of the Rolls.

Noble vs. Stowe, 29 Bevan, 415, in a way discusses the same proposition.

In *Whiting vs. The Bank of the United States*, 13 Pet., 5, at page 13, the court says:

"Being a bill brought by the original parties and their privies in representation, it is also properly a bill of review, in contradistinction to an original bill, in the nature of a bill of review, which latter bill

> brings forward the interest affected by the decree, other than those which are found in privity of representation."

Speaking further of the nature of the document filed in that case, the court proceeds:

> "It is therefore a compound bill of review of supplement and of revivor, and it is entirely maintainable as such if it presents facts which go to the merits of the original decree of foreclosure and sale."

In *Thompson vs. The Schenectady Railway Co.*, 119 Fed. Reporter, at page 634, the court says:

> "Where the rights of persons who are not parties to the suit in equity are affected by the decree entered therein, and they seek to obtain a modification of such decree by setting up matters which occurred pending the suit, but which were not presented to the court, the proper practice is by the filing of a supplemental bill in the nature of a bill of review."

A supplemental bill after decree, in the nature of a bill of review, can not be filed without leave of court, but it is discretionary with the court whether to require notice to the defendants therein, or the parties to the decree, before granting such leave. There is much learned discussion of this subject on pages 637 and 638. The application was made by persons who were not parties to the original suit.

Under Section 1099 of Rose's Code of Federal Procedure, Note A., he states:

> "Bill of review is maintainable by parties to the decree of their privies," etc. "Strangers to the decree must proceed by supplemental bill in the nature of bill of review; or by original bill."

Citing,

> Thompson vs. Schenectady R. R. Co., 119 Fed. Rep., 634.
>
> Kingsbury vs. Buckner, 134 U. S., 675.

In truth, these parties are not altogether strangers to the original litigation for the reason that the trust mortgage already mentioned, was made during the pendency of the case in the Circuit Court of Appeals, and they bought under that.

See also,

Street's Federal Equity Practice, Sec. 2187.
Thompson vs. Schenectady R. R. Co., 119 Fed., 634.

This last case was a case where parties outside of the record, who were aggrieved by the decree, filed a bill in the nature of a bill of review.

The case has taken on the aspect that it now presents, simply from the fact that the Smoky Mountain Land, Lumber and Improvement Company asked to be permitted to come in and defend the decree, which was permitted to it, and treat the petitioners, who petitioned to file a bill in the name of the original parties, as the real parties in interest.

In relation to the second point, it is said in Rose's Code of Federal Procedure, Section:

> "The laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules or decisions in trials at common law in courts of the United States, in cases where they apply."

In Section 870, the author makes this statement:

> "While Congress might validly have prescribed the time within which all actions or controversies should be cognizable in the Federal Courts, independently of the state laws, it has chosen instead to require the Federal Courts to apply state statutes of limitations in common law causes, unless some federal statutes otherwise requires in a particular case. In equity, the Federal Courts are not strictly bound by any statutory provision, though they will usually follow the analogy of the statute of law."

Section 900:

> "The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."

In Note "C," on page 835, in commenting upon this section, the author (says) goes on:

> "The distinction between laws and equity is fundamental in federal practice and numerous cases have affirmed the inapplicability in Federal Courts, of state laws as to equity procedure. Both in equity and admiralty, the practice and procedure of Federal Courts are uniform throughout the United States. The fact that a state has adopted the reformed procedure, abolishing the distinction between law and equity, does not permit any such blending of legal and equitable proceedings in the Federal Courts. The distinction persists in the Federal Court which will conform to the state reform procedure only in actions upon the law side."

And in Note "D," page 386:

> "The mode of appealing a case in the Federal Court is not required to conform to the state practice upon that subject. The manner and time of taking the proceedings which constitute the foundation of the right of review are regulated by Congress and not governed by local practice. The state law as to time for filing the bill has no application nor as to the mode of settling it. The bill of exceptions in the Federal Court should conform to the federal and not to the local state practice. Where jury has been waived, the mode of securing review is not governed by the state law and a rule adopting a state law denying the right in a given case is void," etc.

In *Chateaugay Iron Co., Petitioner,* 128 U. S., 555, it is held that:

> "The manner or time of taking proceedings as foundation for review or judgment of Federal Courts is regulated by Congress, and not to be governed by the local rules of state practice."

In *Beers vs. Haughton,* 9 Pet., 359, it is said that:

> "State laws can only affect the operation of process of procedure in the United States Courts when they are adopted by Congress or by rules of Federal Courts in conformity therewith."

In *United States Bank vs. Hapstead,* 10 Wheaton, 54, it was decided that:

> "Provisions of the judiciary act, adopting local law as rule of decision, do not apply to the local law of procedure."

And *Fitch vs. Creighton,* 24 How., 162, decides similarly.

In *Boyle vs. Zacharie,* 6 Pet., 658, the court rules that:

> "Federal Courts, in exercise of chancery jurisdiction, are not governed by state practice, but that of the English courts of equity as modified by Congress and rules of court."

In *Livingston vs. Story,* 9 Pet., 656, it was said:

> "Equity jurisdiction and practice of the Federal Courts are not governed by the practice in the State Courts; where the rules prescribed by the Supreme Court do not apply, the practice of the High Court of Chancery, in England, is to be followed."

And *Payne vs. Hook,* 7 Wall., 430, is a like case.

In *Russell vs. Southard,* 12 How., 147:

> "Equity practice and jurisdiction of the Federal Courts is uniform throughout the United States, and can not be varied by state laws."

And in *Pennsylvania vs. Wheeling, etc., Bridge Co.*, 13 How., 563:

> "The rules of the High Court of Chancery of England have been adopted by the courts of the United States, and the latter are not limited by the chancery system adopted by any state."

In *Bleaze vs. Carlington*, 92 U. S., 8, the court says:

> "Act of 1782, requiring pleading and procedure in civil causes in Circuit and District Courts to conform, as near as may be, to practice in State Courts, has no application to equity or admiralty causes."

In *Bayard vs. Lombard*, 9 How. 551, the court says:

> "The Circuit Court by adopting forms of process of the State Courts and state laws and practice for taking lands on execution and disposing of the proceeds, has not adopted the state mode of reviewing decisions. State legislation can not give jurisdiction to Federal Courts."

Indianapolis Railroad vs. Horst, 93 U. S., 301:

> "Motions in new trials in Federal Courts are within their discretion, and can not be reviewed by the Supreme Court. Their practice is unaffected by state law on the subject."

Henderson vs. Parker, 156 U. S., 281, decided that:

> "The congressional act requiring procedure of Circuit and District Courts to conform as may be to that of the state in which they sit, does not include the manner of bringing cases from the lower Federal courts to the Supreme Courts."

The time within which a Federal Court may exercise authority over its decrees is not a matter subject to state legislation, nor could it be made subject to state legislation even by a rule of the court. In other words, a Federal Court would have no right to abdicate its chancery jurisdiction and split the chancery system up into as many diverse sub-systems as there are Federal Courts in the country. It

is not a matter of applying state laws, which are rules of property, or state statutes which inhere in a cause of action when it is first brought into court, nor is it a procedure, but it is a case of federal jurisdiction and authority over the records and decrees of its own courts.

There is no authority, so far as I have been able to discover in the books, for the proposition that is made by the defendant. Under Section 1099 of Rose's Code of Federal Procedure and under the Note "D," "Time for Filing," and which was published in 1907, and presumably would state the law correctly, there is no mention whatever of conforming to state statutes of limitations, but the rule there laid down is that: Where the error complained is law arising upon the record, the bill must be filed within the time for an appeal. Where the proceeding is sought to be reviewed on the ground of newly discovered evidence, it is entirely within the discretion of the court, but in all probability the rule is that it must be filed within time for an appeal, after discovery of the new evidence, provided diligence has been used in making the discovery.

The argument that there was no time for an appeal in the original cause would simply mean that this matter was entirely within the discretion of the court, and the only analogy that could apply, would be the appeal time from the Circuit Court of Appeals to the Supreme Court, if it had been a case that was by right appealable to the Supreme Court, but the intimation from the bench when it was heard before the Circuit Court of Appeals was that as it was not an appealable case, the matter was entirely discretionary.

In the case of *Francisco vs. Erie & Chicago R. R. Co.*, 149 Fed. Reporter, 354, the court says:

> "The act of conformity (Section 914, Rev. St.) has no application to the practice or proceedings of appellate courts, or to matters relating to bills of exceptions, motions for new trials, or any other means

adopted to secure a review of the judgments or decrees of the Circuit or District Courts. Its effect is limited to the practice and proceedings in the trial courts to secure their judgments."

Our contention in this matter is also borne out by the fact that in filing bills of review for new matter, it is wholly within the discretion of the court. See:

Street on Federal Eq. Prac., Sec. 2156.
Ricker vs. Powell, 100 U. S., 104-107.
Craig vs. Smith, 100 U. S., 233.
Street on Federal Eq. Prac., Secs. 2195, 2159; Note 34.
Dewey vs. Stratton, 114 Federal Reporter, 179.

By statute in the State of Ohio, motions for a new trial have to be filed within three days after the verdict of a jury, and yet although this is a statute of limitations relating to court procedure, it does not apply to the Federal Court.

INNOCENT PURCHASE.

The question of Innocent Purchaser, we desire to consider more at length.

My investigation of this subject has shown to my satisfaction that there is no question in the case regarding an innocent purchaser. In the first place, if our contention as to the facts is correct, the court had no jurisdiction. I am quite well aware of the proposition of law that where the jurisdiction of the court depends upon a state of facts, a finding of the court upon these facts one way or the other may determine that in a manner that is binding upon the parties to the case. If an innocent man is convicted of a crime, in the eye of the law he is guilty, though in fact he may be perfectly innocent. Here, in fact the lands in controversy may be in the State of North Carolina, though if

this court, as an indirect consequence of the location of the state line, finds them to be in Tennessee and covered by the grants which finally came to Hebard, that finding may bind the parties to this case. We do not dispute that proposition, but we are reviewing that decree. Upon this question of review, the *res adjudicata* of that decree does not bind us, because the question is one of original inquiry.

I have said that this is a unique case; it is unique in this respect. The State of North Carolina has filed a bill in the Supreme Court of the United States against the State of Tennessee, to determine the location of this boundary. Of course, the State of North Carolina is not bound by the decree in this case. This result will come about—if the Supreme Court of the United States should decide in favor of the State of North Carolina, the State of North Carolina may go ahead and grant these properties to somebody else. Now, what would be the answer to that? Hebard and his grantees may say; you granted these to Peet and Gilbert, and we recovered them from Peet and Gilbert's grantee. The obvious answer to that is that they were not recovered from Peet and Gilbert's grantees by reason of any contract or obligation on the part of these grantees to convey their title to Hebard, but simply on the ground that Peet and Gilbert got no title, because the lands were not in North Carolina, and therefore the situation is that the decree establishes that the grants of the State of North Carolina to Peet and Gilbert were invalid. If it now turns out that the lands were really in the State of North Carolina, therefore that state has the right to make those grants to anybody, because their former grants, as between the grantees of the State of North Carolina and Hebard, had been declared invalid, and the result is that the title remains in the State of North Carolina.

With reference to the doctrine covering the right of innocent purchasers, Pomeroy in the Third Edition of his Equity Jurisprudence, Sec. 679, says this:

"Among purely legal titles to the same subject-matter successive legal conveyances of and legal estates in the same tract of land, the equitable doctrine of priorities growing out of the presence or absence of notice, or of a valuable consideration, or of any other incident, has absolutely no application nor effect; such legal title, estates, and interests are, in the absence of any statutory modification completely controlled, with respect to their priority by the order of time. (1) Even the mere want of a valuable consideration in the earlier conveyance would not, at the common law, affect the priority of legal right given by the priority of time."

In Section 735, he reiterates the same doctrine in the following words:

"General Meaning, Scope, and Limitations of the Doctrine. This section will deal with the equitable doctrine of *bona fide* purchase for a valuable consideration and without notice. The doctrine in its original form was exclusively equitable. Questions of priority cannot, as has already been stated, arise between successive adverse estates which are purely legal, and therefore cannot, independently of statutory premission, come before courts of law for settlement; such estates must stand or fall upon their own intrinsic merits and validity. A contest concerning priority or precedence properly so called can only exist where one of the two claimants holds a legal and the other an equitable title, or where both hold equitable title, and must therefore belong to the original exclusive jurisdiction of equity. Courts of equity do not have jurisdiction of suits brought merely to establish one purely legal title against another and conflicting legal title. In the United States these elementary notions seem to have been sometimes overlooked, and the courts sometime seem to have extended the doctrine of bona fide purchase farther than the acknowledged principles of equity would warrant. The tendency is marked and strong in the courts of many states, even when acting as tribunals of law, to make the doctrine a legal rule of property, and to apply it alike to persons who have acquired either a legal or an equitable title to chattels and things in action, as well as to those who have ac-

quired any legal or equitable interest in land. A subsequent holder, even for a valuable consideration and without notice, has certainly no higher right than a prior holder equally innocent and with an equally meritorious ownership. American courts seem sometimes to have acted upon exactly the opposite notion, and to have assumed that a subsequent title was necessarily the better one. When the original legal owner has done or omitted some thing by which it was made possible that his property should come into the hands of a *bona fide* holder by an apparently valid title, it may be just to regard him as estopped from asserting his ownership, and thus to protect the subsequent purchaser. But when the prior legal owner is wholly innocent, has done and omitted nothing, it certainly transcends, even if it does not violate, the principles of equity to sustain the claims of a subsequent and even *bona fide* purchaser."

Sec. 739. "The doctrine is not a rule of property or of title. In applying the doctrine of *bona fide* purchase—and this is the very essence of the doctrine—equity does not intend to pass upon and decide the merits of the two litigant parties; it does not decide that the title of the defendant is valid; and therefore intrinsically the better and superior to that of the plaintiff. On the contrary, the protection given by way of defense theoretically assumes that the title of the purchaser is really defective as against that of his opponent; at all events, the court of equity wholly ignores the question of validity, declines to examine into the intrinsic merits of the two claims, and bases its action upon entirely different considerations. If a plaintiff holding some equitable interest of right, sues to enforce it against a defendant who has in good faith obtained the legal estate, the court simply refuses to interfere and do an unconscientious act by depriving him of the advantage accompanying such an innocent acquisition of the legal title. On the other hand, if the plaintiff is the legal owner, and sues to obtain some equitable relief against a defendant who is the innocent holder of some equitable estate or interest, the court in like manner simply refuses to do an unconscientious act by giving any aid to the plaintiff, but, without at all deciding or even examining the intrinsic merits of their claims, leaves him to

> whatever rights would be recognized and whatever reliefs granted by a court of law. It is thus seen that the doctrine of bona fide purchaser as administered by equity is not in any sense a rule of property. Whenever the relations between the litigants are of such a nature, and the suit is of such a kind, that a court of equity is called upon to decide, and must decide, the merits of the controversy and determine the validity and sufficiency of the opposing titles or claims, then it does not admit the defense of *bona fide* purchase as effectual and conclusive. The foregoing description shows that it is wholly unwarranted by the settled principles of equity for a court to sustain and enforce the subsequent legal estate acquired by A. in any kind of property or thing in action, merely because he is a *bona fide* purchaser for a valuable consideration without notice, against the prior legal and equally innocent owner, B, or even to sustain A's defense as a *bona fide* purchaser in a suit brought by B."

These quotations are pertinent to this case, because the contest on this bill of review arises as if it were being originally tried, with the exception that the effect of the newly discovered evidence only is in question, and because in the original case there was no issue except as to legal titles. The original complainant had no title except by grant from the State of Tennessee, and the defendants had no title except by grant from the State of North Carolina, or by adverse possession.

In *Louisiana vs. Mississippi*, 202, U. S. page 1, the Supreme Court of the United States, commencing at the bottom of page 53, says:

> "The question is one of boundary, and this court has many times held that, as between the states of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive, whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both."

Citing,

Virginia vs. Tennessee, 148 U. S., 503.
Indiana vs. Kentucky, 136 U. S., 497.
Missouri vs. Kentucky, 11 Wall., 395.
Rhode Island vs. Massachusetts, 4 How., 591.

In the case of *Moore vs. McGuire*, 205 U. S., 214, at page 220, where the question was between private parties as to a boundary, the court says:

> "In view of these conditions, to-wit, (the exercise of dominion by one state), there may be a doubt whether courts should go beyond them in a private controversy, rather than leave it to the State of Mississippi, if dissatisfied, to bring a suit in its own name."

Citing,

Jones vs. United States, 137 U. S., 202.
Foster vs. Neilson, 2 Pet., 253.
Filhiol vs. Torney, 194 U. S., 356.
Bedel vs. Loomis, 11 N. H., 9.
State vs. Dunwell, 3 R. I., 127.
State vs. Wagner, 61 Maine, 178, 184.

See also,

Williams, etc., Bridge Co. vs. Hatch, 125 U. S., 1.

In the case of the *State (Chaffee, Com'r.) vs. Leander W. Dunwell*, 2 R. I., 127, the court's opinion is as follows:

> "This exception assumes to bring in question the eastern boundary line of this state. Where that line is dejure is a political question, with which the courts of the state will not intermeddle. Sufficient for them is it that the state has already claimed jurisdiction up to and 'along the easterly side or bank' of the Sekonk river, and exercised it in fact. The courts are bound to take cognizance of the boundaries in fact claimed by the state;"

The syllabus of this case reads:

"What is the boundary line of the state is a political question, with which the courts will not intermeddle.

"The courts are bound to take cognizance of the boundaries in fact claimed by the state."

In the case of the *State of Maine vs. Louis H. F. Wagner*, 61 Me., 178, at page 184, the court says:

"Under this condition of things, the presiding judge assumed to decide the question as one of law for the court; and therein we think he did right. Neither the construction of charters or grants, nor the effect of previous acts or jurisdiction as shown by records can be a matter for the jury to determine. The force and effect of charters, grants and records are for the court. Wherever the question of jurisdiction depends upon their construction and effect, it is purely a question of law for the court. And in cases where the political authorities of a state have actually claimed and exercised jurisdiction over particular localities, the doctrine of the law seems to be that the courts are thereby concluded, and have only to declare the fact and conform themselves accordingly undertaking to pass upon the validity of such claim."

Foster vs. Elam & Neilson, 2 Pet., 254.

State vs. Dunnell, 3 R. I., 127.

The first paragraph of the syllabus in the case of *Bedel vs. Loomis, etc.*, 11 N. H., 9, is as follows:

"Where the legislature of the state has asserted a right of jurisdiction within certain limits, it is not competent for this court to examine into the matter and circumscribe the jurisdiction by a decision that the boundaries of the state do not extend so far."

In its opinion in this case, the court says:

"One question which has been made in this case is whether the land described in the deed from the plaintiff was at the time within the limits of this state. Perhaps the limits of the earlier grants might not embrace the territory in question, and the provin-

cial authorities could not have exercised any jurisdiction over it; but upon the revolution and the treaty which followed it, defining the boundary line between the Canadas and the States, this territory was supposed and must be deemed by us to have fallen within the limits of the State of New Hampshire, as the United States have never claimed title to any tract of land lying between this state and Canada; and the state itself, after much investigation upon the subject, asserted a title and jurisdiction in 1820 by a resolution directing the attorney general to proceed against intruders; and again in 1824 by an express declaratory act.

"There has been no pretense of any grant by which the state acquired a title subsequent to the separation from Great Britain, and these acts must be taken and deemed to be an assertation of title and a right of jurisdiction from that period, and the question therefore whether the land is within the limits of the state is here no longer open.

"We can not undertake to limit the jurisdiction which the government has thus asserted, by a decision that the boundaries of the state do not extend so far."

The fourth paragraph of the syllabus of the case of *James Foster and Pleasants Elam vs. David Neilson*, 2 Pet., 253, reads:

"In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights; and if they can not adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous."

The court must be mindful of the fact that its decree is liable to vest in an alleged innocent purchaser, lands in the State of North Carolina, which are now in controversy, so far as the location of the bounary line is concerned, in the Supreme Court of the United States, as between two states.

When we talk about innocent purchaser, we must not forget the doctrine of equity that where both parties are equally innocent, one can not get any rights by reason of merely being an innocent purchaser. The true principle is this (Pomeroy on Equity Juris., last edition, Section 735):

> "When the original legal owner has done, or omitted something by which it was made possible that his property should come into the hands of a *bona fide* holder, by an apparently valid title, it may be just to regard him as estopped from asserting his ownership, and thus to protect the subsequent purchaser. But when the prior legal owner is wholly innocent, has done and omitted nothing, it certainly transcends, even if it does not violate the principles of equity to sustain the claims of a subsequent and even a *bona fide* purchaser."

In other words, an innocent purchaser takes nothing as against a man who is equally innocent, and who neither by act or representation, nor by neglect, has rendered it possible for the subsequent purchaser, who obtains a title and expends his money for it, without notice, to be deceived. Of course, we will go further and say that if the original owner has put it in the power of anybody else to convey an apparently good title, he is cut off as against an innocent purchaser, but as between equally innocent people, there is no exception to the proposition that a person may not convey any more title than he has. The proposition as laid down in the books, for instance in Daniell's Chancery Practice (star page 1577), and the cases cited in note, is not so much one of innocent purchase as it is that a bill of review for newly discovered evidence is within the discretion of the court, and the court

will not exercise that discretion if it be unconscionable or inequitable, but it does not become unconscionable or inequitable unless the party complaining has done something, or said something, or been guilty of some neglect or laches. These propositions are evident from an examination of the cases.

In *Rector vs. Fitzgerald*, 59 Fed. Rep., 808, it is said on page 811, that there is a conflict in the authorities as to whether a voluntary purchaser from a party to a suit, during the period allowed after final judgment or decree to take an appeal or to sue out a writ of error, would be regarded as a purchaser *pendente lite*, and would hold the property subject to the outcome of the litigation. It is also said that there is a conflict of opinion as to whether a person who purchases property from a party to suit after final decree therein, and within the time limited by law for filing a bill of review is a purchaser *pendente lite*, and is bound by a decree of *reversal on a* bill of review subsequently filed. It was decided in the affirmative in *Earle vs. Couch*, 3 Metc. (Ky.), 450, and in *Clarcy vs. Marshall's Heirs*, 4 Dana, 95, 96; but the contrary is held in *Ludlow vs. Kidd*, 3 Ohio, 541. It is also stated that the decision in *Lee Co. vs. Rogers*, 7 Wall., 181, is in harmony with the case last cited, but the case in the 7th Wallace was a case of negotiable bonds and in the case of *Presidio County vs. The Noel-Young Company*, 212 United States, 58, and many prior cases, it is held that the doctrine of *lis pendens* has no reference whatever to negotiable securities prior to maturity. The distinction is made between the date of maturity and before and after that date, because after maturity a purchaser can not be an innocent purchaser, because he takes it by a rule of law subject to all equities. In the case in the 59th Fed. Reporter, the ground of the decision that an innocent purchaser should be protected, is that the losing party can always guard

against risks by sale to an intermediate purchaser, and by proper diligence, so that the question, even in that case, depends upon the losing party exercising diligence to protect himself by the means within his power. In this case, however, the court goes off and decides the case on the ground that there was no reason to change the original decree even if the question of innocent purchase was out of the case. It will be seen in this case that the real ground of the decision is that an appeal was taken to the Supreme Court and then abandoned, and that the claim to review the case arose from something upon record; that the complainant in the bill of review could not say it was not within his knowledge all along.

Eight suits had been brought by Rector in all of which answers had been filed. Subsequently by stipulation which was made a part of the record in each case, these answers were withdrawn and demurrers filed. These stipulations provided that the result of one case should determine all of them. In one case the demurrer was sustained and judgment entered, but on appeal, in this case, to the Supreme Court of the United States that judgment was reversed. In one of the other cases the demurrer was also sustained in the lower court and judgment entered. In this second case an appeal was taken to the Supreme Court, but abandoned. Thereupon, sometime afterward, the defendant in this second case conveyed the property in it and his grantee mortgaged that property and obtained a loan of $5,000 on it, from a man by the name of Fitzgerald. Some three years after the judgment and after all of these transactions, Rector filed a bill of review but did not make Fitzgerald a party to it until some four years after he filed it. In this case the reason for the denial of the right to file the bill of review, which was grounded upon the failure of the lower court on motion to set aside the judgment in the second after the reversal of the judgment in the first case

by the Supreme Court, was that the stipulation having been made a part of the record and the only error complained of in the bill of review being, that the lower court had misconstrued that stipulation and Rector having abandoned his appeal to the Supreme Court, had so neglected his remedies as to give him no standing as against Fitzgerald.

In *Ohio Company vs. Fisher*, 115 Fed. Rep., 529, where a son contested a will, and it was set aside and certain trustees were directed to convey the property to the son as heir at law, which they did, and thereafter the son sold all the property, his wife joining in the deed for the purpose of relinquishing her right of dower; it was held that she could not afterwards bring a bill of review because she was estopped.

In the case in the 59th Federal Reporter, *supra*, it is noticed that twice the Court of Appeals of Kentucky have decided against the proposition, but on the other hand it is stated that the Supreme Court of Ohio, in the case of *Ludlow vs. Kidd*, 3 Ohio Reports, 541, has decided otherwise. We have looked for the grounds upon which the application of the heirs of Ludlow was made but failed to find them; it is back of any report of court proceedings in the State of Ohio, but we may make this comment, that the sole ground for the application seemed to be that there was a statutory allowance made of five years after certain minors became of age, to make application to set aside the decree, without regard to the merits of it.

It is laid down in the books, as heretofore cited, that if it be unconscionable to allow a bill, it will not be done. Our claim is that it can't be unconscionable, unless the applicant is guilty of some neglect, or has said something or done something that has estopped him.

We have examined all the cases that are cited under 2 Daniell's Chancery Practice, 1577, and the first case is *Dexter vs. Arnold*, 5 Mason, 315; in this case the grounds

presented by the petition for review were the discovery of new facts showing that several sums of money had come into the hands of the defendant, belonging to Jonathan Arnold, which were not entered in Thomas Arnold's accounts, nor allowed by the Master, and that several claims made by Thomas Arnold and allowed by the Master, were without foundation and erroneous. The court found in this case (page 319), that the petition for review was utterly defective in the essential ingredients of usch a petition, in not stating with exactness the nature of the new evidence, and when it was first discovered, and the court was of the opinion that the effort made by the bill of review was simply to rehear the case upon the original testimony.

In *Thomas vs. Brockenbrough*, 10 Wheaton, 146, the court below decided in the original cause that the title to the land in controversy was vested in the heirs of John Harvey, and decreed the appellant to convey the same to them. The court says in the last few lines of its opinion:

> "If Thomas, then, had no title to the land, of what consequence was it to him that the conveyance was decreed to be made to all the complainants in that cause, as being the heirs of Harvey, rather than to two of them, who he alleged were entitled to the land as devisees. If they did not complain of the decree (and that they did not is proved by their plea and demurrer to the bill of review), and if the plaintiff in this bill was not injured by it, the court is at a loss to conceive upon what legal or equitable ground that decree could have been reversed for error growing out of the after discovered evidence. These observations apply to the second and third errors assigned."

Wood vs. Mann, 2 Summer, 316. In this case they held that the court would not open the decree to admit merely cumulative testimony, but that the rule ought to be confined to the discovery of new evidence of a documentary nature.

Hollingsworth vs. McDonald, 2 Har. & J., 230. In this case they held that a bill of review can not be supported for matter existing at the time of the decree and discovered since, without affidavit of such matter and the existence of it at the time of the decree, to lay a foundation for applying to the chancellor for his leave to file a bill of review and obtaining such leave.

In *Jenkins vs. Eldredge*, 3 Story, 323, the court said:

> "There is no new evidence now offered which in truth, if of any value, ought not to have been originally produced in the cause, and there is none which with ordinary diligence might not in due season have been produced."

In *Massey vs. Grant*, 3 Md., 41, it is said to authorize a review the evidence must not only be newly discovered, but it must appear that by the use of reasonable diligence, it could not have been discovered. A miscalculation in the amount of the decree by which the defendant is charged with a larger sum than he should be, may be corrected, and the ground of review obviated, by entering a credit for the amount of the unsatisfied decree. Application for leave must present a *prima facie* case for review.

In *Bank vs. Dundas*, 10 Ala., 661, there was no ground alleged except error in the finding of the court in the evidence that was before it.

Hughes vs. Jones, 2 Md. Ch. Dec., 289. In this case the court held that any laches or negligence by the party making the application would destroy his title to relief by bill of review.

The syllabus in the case of *Harris, Amx., vs. Edmondson, et al.*, 3 Tenn. Ch., 211, reads as follows:

> "The granting of leave to file a bill of review for new matter rests in discretion, and ought not to

be granted to the injury of innocent parties; and therefore, where a wife had joined her husband in mortgaging her separate property for his debts, in which mortgage was included certain choses in action of the husband, and in a suit to adjust the equities between the wife and the mortgagee, the latter had been charged with these notes shown to have been collected by her, the court refused to grant leave to the mortgagee to file a bill of review upon subsequently filed receipts of the husband showing that the proceeds of these notes had been paid by the mortgagee to him.

"To sustain an application for leave to file a bill of reveiw for new matter, it must appear that it could not have been produced on the former hearing by the exercise of reasonable diligence; but it seems that this rule would be complied with by showing that a personal representative, having no knowledge of the facts, had twice examined the books and papers of the deceased without success, to find evidence on the subject, and afterwards, and after the rendition of the decree, had accidentally fallen upon the evidence in searching among the same papers for another purpose."

In *Winchester vs. Winchester*, 1st Head (Tenn.), at page 485, the court says:

"It is said in regard to the new matter and new proof, by the complainants, that two of them are married women, that they were so at the time of the decree and have since so remained; that the other is an idiot, and has been such since her birth, and that no laches can be imputed to them. Certainly it is always a consideration, where a demand is made after a great lapse of time, that the party making it has been, during the whole time, laboring under a legal disability. Parties in such situations, however, do not in many instances wholly escape the consequences of neglect or inattention on the part of those whose duty it was to protect their interests. We feel fully the difficulty of attempting to eliminate any general principle from the multitude of cases to be found in the books on the subject of laches," etc.

But the case was a case of laches.

In the case of the *United States vs. Samperyac, et al.* 27 Fed. Cases, page 932 (Hempstead, 118), Mo., 16216a, the syllabus reads:

"1. It rests in the sound discretion of the chancellor to award a feigned issue, or not; and it is done to enable him to obtain additional facts and to arrive at a satisfactory conclusion on the facts of the case.

"2. The verdict of the jury on a feigned issue is not conclusive, for the chancellor may have tried again and again, and may even decree against a verdict.

"3. Where there is sufficient proof to enable the chancellor to decide, the parties should not be subjected to the delay and expense of a trial at law.

"4. The act of May 26, 1824 (4 Stat., 52), confers on this court the powers of a court of chancery, for the purpose of trying the validity of claims mentioned in that act, and a bill of review may be maintained therein.

"5. A bill of review lies either for error in law, appearing on the face of the decree, or for new material matter that has come to light afterwards, and which could not have been used at the time the decree was made.

"6. The bill must be founded on new matter to prove what was before in issue, for a party can not be entitled to a bill of review on new matter, to prove a title which was not in issue.

"7. Where a fraudulent claim was set up, and sustained by false testimony, the decree may be reversed and annulled, on a bill of review, and no rights can be acquired under such former decree.

"8. When the allegations of a bill are distinct and positive, they are taken as true, without proof, after a decree *proconfesso;* which, in its effect, is like a judgment by *nil dicit* at law.

"9. But where the allegations are so defective or vague, that a precise decree can not be rendered upon them, proof must necessarily be adduced before a decree can be made.

"10. A refusal to deny, where a party is legally bound to speak, is equivalent to an admission of the

charges against him. What is admitted need not be proved.

"11. The general denial of allegations, by one uninformed as to their truth, will not be sufficient to dissolve an injunction.

"12. A bill of review will be barred by the lapse of a reasonable time, after discovery of the new matter; but what shall be considered reasonable time depends upon the sound discretion of the chancellor, under all the circumstances of the case.

"13. Fraud, deduced from circumstances, may be sufficient to outweigh positive proof to the contrary.

"14. Starting frauds and forgeries proved and commented on.

"15. Judgments and decrees are not assignable at law, so as to vest the legal title in the assignee, and the latter takes only an equitable interest, which is subject to every equity and charge which attached to them in the hands of the assignor.

"16. A purchaser for a valuable consideration, without notice, must be clothed with the legal title and not a mere equity in order to protect himself.

"17. No one can occupy the attitude of an innocent purchaser, under a forged claim and conveyance.

"18. Construction of the Act of Congress at the 8th of May, 1830 (4 Stat., 399), and held not to require the observance of all the technical rules in the ordinary rules of chancery practice on a bill of review under that act.

"19. Almost every law providing a new remedy, affects causes of action existing at the time the law is passed; but such a law is not for that reason invalid. (Cited in brief, *Rich vs. Glanders*, 39 N. H., 365.)

"20. It is incontestable, that a grantee can convey no better title than he possesses, and hence, those who come in under a void grant acquire nothing."

The court, in its opinion in this case, says in part, as follows (page 938):

"In the case of a bill of review for new matter, recently discovered, no laches or neglect can, we think, be properly imputed to the party filing the

bill. It is allowed only on the ground of his ignorance of the existence of the new matter before the former decree; and it is incumbent upon him to file his bill in a reasonable time after the discovery is made; all this is alleged in the present bill. The bill could not be filed within one year after the decree, because the new matter had not then come to light, but was subsequently discovered. If then, laches or neglect are not imputable, has so great a time intervened that it may justly be denominated a state demand? Two years and four months can scarcely be considered in that light. It would not bar an action of assumpsit upon a parol contract, and can not be considered an unreasonable delay in bringing a bill of review. In England, twenty years is allowed; and in the case decided in 10 Wheat. (23 U. S.), 146, before cited, five years was allowed.

"We do not think that, to a bill of review for new matter, no lapse of time ought to bar the remedy. Upon the principle of repose, we think the lapse of a reasonable time ought to present a bar; what that reasonable time should be considered, and it is well settled to be in the sound discretion of the chancellor, it is unnecessary for us to decide, since we are clearly of opinion that two years and four months is not an unreasonable time for filing a bill of review. Whether the principle settled by the Supreme Court of the United States, in several cases, that laches are not imputable to the government, ought to apply in this case, we need not decide. The second inquiry which arises in this case, and which has been ably argued at the bar, is whether a case is made out for a bill of review according to the established principles of equity."

Page 942:

"The question arises (of innocent purchase) what effect is this answer entitled to have in the decision of this cause? The defendant, Stewart, in our judgment, does not occupy the attitude of an innocent purchaser without notice, so as to stand on any higher ground than the defendant, Samperyac, himself. The interest which he has purchased in the land decreed by this court, is an equitable and not a legal right.

"It is well settled that a judgment or decree is not assignable at law, so as to vest a legal title in the assignee. The Act of Congress of 1824 does not authorize the assignment or transfer of the decree of this court, and, under that act, the land decreed to the claimant could be entered or located only in his name, or in the name of his legal representatives, in a case of his death, and the patent could issue only to the claimant or his legal representatives, and to his assignees. Stewart, then, can only be considered as the purchaser of an equity; and it is an established principle that a purchaser for a valuable consideration without notice, in order to protect himself, must be clothed with the legal title and not a mere equity. 2 Brown Ch., 66; 2 Madd., 258; 1 Atk., 571; 3 Atk., 377. The defendant, Stewart, having only an equitable title under the former decree of this court takes it subject to all equities which attached to it in the hands of his assignor. It can not be asserted that Stewart is a purchaser under the former decree of this court. This can be true only when there has been a judicial sale, in which case the purchaser is protected, though the judgment or decree is erroneous. Upon this ground alone, we think it is obvious that the defendant, Stewart, stands on no other or different ground than the original petitioner, in whose favor the former decree was made."

This case went to the Supreme Court, and is reported in 7 Pet., 241. While it is true that in this case it was found that the conveyance upon which the innocent purchase argument was predicated was forged, yet the court said, under the fourth proposition considered, commencing at the foot of page 240:

"The next inquiry is whether the appellant, Stewart, has acquired a right to the land by reason of his standing in the character of a *bona fide* purchaser. The record contains an admission on the part of the United States that he purchased the grants from John G. Bowie, by deed, for a valuable consideration, in good faith, sometime in November or December of 1828, and the interest of Stewart, whatever it might be, was acquired long after the original decree was

entered. He was therefore a stranger to that decree. But Stewart acquired no right whatever under the deed from Bowie, the latter having no interest that he could convey."

"In the case of *Holt's Lessees vs. Wendell*, 5 Wheaton, 308, it is said by this court, that on general principles it is incontestable that the grantor can convey no more right that he possesses."

In concluding this branch of the subject, and alluding again just for a moment to *Ludlow's Heirs vs. Kidd*, 3 Ohio, *supra*, it is proper to say that the original of that case seems not to have been reported. The grounds of the original decree are unknown. We know it first as a bill of review, grounded upon a statute allowing minors five years after coming of age to file a bill of review grounded upon the same or any other evidence discoverable—an absolute right to have a re-examination of the original case, but a mere act of grace, which has since been abolished. It may be that such mere act of grace allowed by the law should be so moulded as to suit the chancellor's idea of the mere abstract justice of each case. But if we are right upon the facts of this case, it would be a misapplication of the doctrine, assuming that the property was ours, and that no laches, no act or word on our part, and no neglect of any means by appeal or otherwise, have contributed to the making of Hebard or his grantees, innocent purchasers.

It will be observed that in each of the cases discussed the unconscionable or inequitable feature was some act of negligence or estoppel or some technical neglect in the allegations of the review papers, or it was some effort to review a case simply on the original evidence or records where the party, with full knowledge, had unduly waited. Whereas in our case, the property was only wrested from the defendants after every available effort had been made in the fight to keep it, and there was no estoppel or neglect or

informality. In allowing the filing of the bill of review in this case, the preliminary questions and particularly the question of diligence in discovering the new testimony are thereby determined.

Kelley Bros. vs. Diamond Drill Co., 142 F., 868.

Dumont vs. Railroad Co., 131 U. S., cix.

Street's Fed. Eq. Prac., Sec. 2866,

so that it can readily be seen that there is nothing that militates against these applicants or that would create any right in an innocent purchaser.

At the hearing below, counsel for the respondents cited *Dunfee vs. Childs*, 59 W. Va., 239, and *Virginia Iron Company vs. Roberts*, 103 Va., 661, on the question of the right of a purchaser. These cases are inapplicable for several reasons. In the first place they were judicial sales made in the cases themselves in which case a different rule prevail's. In the later of the above mentioned cases, the Coal Company had purchased from the ancestor of certain heirs coal rights. These heirs were parties to the suit and received under decree of the court allotments of the lands on the theory antagonistic to the claim that they set up against the Coal Company. On page 677 of the opinion of the court it is said that the allegations of the bill filed by the Coal Company were sufficient to estop those heirs from claiming any rights prejudicial to the Company and on that the decree of the court below dismissing the appellant's bill of review was dismissed because not in time.

The testimony of Mr. Peck (record on bill of review, commencing on page 264), shows that he purchased the title, which afterwards went to the Smoky Mountain Company, under an option taken eight (8) months before the original case was decided on appeal, to-wit: in November, 1899. (Record, 277.) And that the deed subsequently made was a quit-claim deed, and therefore did not make

the purchaser an innocent purchaser. (Record, page 35.)

Again, if this decree is upheld, assuming that we are right on the facts, a very curious and anomalous result may be produced. It may turn out that lands situated in North Carolina and belonging to its grantees, have been decreed against their protest and utmost resistance, to grantees of the State of Tennessee, and if the State of North Carolina is successful in its suit, that this has been done by a court utterly devoid of jurisdiction. Until the decree is finally affirmed, it has no binding force as an adjudication of jurisdiction even as to the parties in the case.

Respectfuly submitted,

C. B. MATTHEWS,
Solicitor and Counsel for the Petitioners.

NO. [redacted] OCTOBER TERM, 191[redacted]

IN THE

Supreme Court of the United States

EASTERN DISTRICT

Office Supreme Court, U. S.
FILED.
APR 20 1912
JAMES H. McKENNEY

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, FRED. W. BRUCH, GEORGE REEVES and JOHN MATTHEWS

Petitioners

vs.

CHARLES HEBARD, and THE SMOKY MOUNTAIN LAND, LUMBER and IMPROVEMENT COMPANY

Respondents

Answer of The Smoky Mountain Land, Lumber and Improvement Company to the Petition of William R. Hopkins, Benjamin P. Bole, Edward I. Leighton, Fred. W. Bruch, George Reeves and John Matthews, for writ of Certiorari to the Circuit Court of Appeals for the Sixth Circuit

JOHN FRANKLIN SHIELDS
WILLIAM A. STONE
T. E. H. McCROSKEY
Counsel for Respondents

P.O.



IN THE

Supreme Court of the United States

October Term, 1911. No.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, FRED. W. BRUCH, GEORGE REEVES AND JOHN MATTHEWS
Petitioners

VS.

CHARLES HEBARD, AND THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY
Respondents

ANSWER TO PETITION FOR CERTIORARI

The Answer of The Smoky Mountain Land, Lumber and Improvement Company to the Petition of William R. Hopkins, Benjamin P. Bole, Edward I. Leighton, Fred. W. Bruch, George Reeves and John Matthews, for Writ of Certiorari to the Circuit Court of Appeals for the Sixth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of United States:

Respondent answers said petition and respectfully shows:

The questions involved in this case are of gravity and of general importance ONLY AS BETWEEN THE PARTIES. No new principle of law of great importance to the community

has been laid down in the case. We submit that the petition and the record accompanying it show that the original case was fully considered with due care by the Master, the Circuit Court and by the Circuit Court of Appeals, under rules of law and equity that have been well settled for many years in the Courts of the United States.

The decree of June 10, 1899, of the Circuit Court at Knoxville, Tenn., adjudged and decreed that the title of Charles Hebard, plaintiff in the original case (under whom the Smoky Mountain Land, Lumber & Improvement Company claims), to the lands in dispute was valid and the title of Belding *et al.*, defendants in the original case (under whom the petitioners claim) to said lands was void.

Upon an appeal from this decree, made to the United States Circuit Court of Appeals for the Sixth District, decree was entered by said Circuit Court of Appeals July 13, 1900, affirming the decree of the Circuit Court below.

After this final decree of July 13, 1900, was entered and prior to any proceedings in bill of review, said Charles Hebard conveyed the lands in dispute, together with other lands, to Blaisdell *et al.*, and Blaisdell *et al.* to the Smoky Mountain Land, Lumber & Improvement Company, the respondent in this case, which therefore claims the disputed land under grants from the State of Tennessee, and UNDER final decree of the United States Circuit Court of Appeals for the Sixth Circuit.

After title to the disputed lands was decreed, as aforesaid, to be vested in Hebard, and prior to any proceedings in bill of review, Belding *et al.*, or those claiming under Belding *et al.*, conveyed such "right and title" as they might have to the land in dispute, together with other lands, to Hopkins *et al.*, the petitioners in this case. Therefore, Hopkins *et al.*, claim the disputed land under grants from the State of North Carolina, and AGAINST the said final decree of the United States Circuit Court of Appeals for the Sixth Circuit.

On September 25, 1906, over six years after the final decree of the Circuit Court of Appeals of July 13, 1900, application for petition for leave to file bill of review was first made by petitioners to the United States Circuit Court of Appeals of the Sixth Circuit, and leave was granted to said petitioners to file their petition for bill of review in the United States Circuit Court at Knoxville, Tenn.

On August 6, 1907, said petitioners presented their petition for leave to file bill of review to the United States Circuit Court at Knoxville, Tenn., and the Court, in the opinion of Judge CLARK (who was the same Judge Clark who heard the original case in the said Circuit Court), said:

> "It does seem, upon examination of this case, that there is no ground on which the success of the proposed bill of review might finally be expected. The objections which are made to permitting this bill to be filed go to the very merits of the bill, and can, and, in my opinion, should more properly be taken up by demurrer to the bill if filed. If, in the exercise of discretion I refuse to allow the bill of review to be filed, it is not certain that my refusal to do so would be subject to review. On the contrary, if the bill is filed and a demurrer should be sustained to it on the same grounds that are now urged against its filing, the action of the Court would be subject to easy review, and so the petitioners for review would suffer no error at the hands of this Court that could not be readily corrected.
>
> "In view of these considerations I have determined to allow the bill of review to be filed, subject, of course, to all legal objections, by demurrer, answer, plea, or otherwise, as the defendants may be advised and it is ordered accordingly."

The case coming on to be heard upon bill of review in the United States Circuit Court at Knoxville, Tenn., the prayer of said bill was denied and bill dismissed September, 1909, by said Court in a full opinion by Judge John E. McCall.

From an appeal made to the United States Circuit Court of Appeals for the Sixth Circuit, from the said decree entered by Hon. John E. McCall, the case came on to be heard in the said Circuit Court of Appeals on the 5th day of October, 1910, and on the second day of October, 1911, a decree was entered in said cause by the Circuit Court of Appeals of the Sixth Circuit again affirming the decree of the said Circuit Court below. The decisions in all these hearings turned upon questions of fact and, as stated before, were important only as between the parties.

In reply to statement of petitioners concerning what they allege to be the facts of the case, and alleged errors in considering which petitioners set forth as the basis of their application, respondent replies, *seriatim*, as follows:

First.—Respondent admits that the original case, as distinguished from the bill of review proceedings, involved the title and ownership to a large amount of timber lands, and involved the proper location of a portion of the State Line between the States of North Carolina and Tennessee. Respondent admits that there is now pending in this Court for hearing a case of original jurisdiction on the docket of this Court, brought by the State of North Carolina against the State of Tennessee, in which case it is sought to have this Court determine the very line that was in controversy in this case; but respondent denies that the determination of the issue in this case was or is of great public importance and declares that the determination of this case was of no importance to anyone except to the parties themselves.

After the final decree of July 13, 1900, in the original suit (as distinguished from the subsequent bill of review proceedings), no petition of *certiorari* to this Court was made (there was no right of appeal to this Court in the case).

After said final decree of July 13, 1900, and claiming under said decree, respondent became vested with the title

to the lands in dispute through conveyances by Charles Hebard to Blaisdell *et al.* and Blaisdell *et al.* to the respondent.

Also, after said final decree of July 13, 1900, was entered, Belding *et al.*, or those claiming under them, conveyed such right, and title as they might have to the lands in dispute, together with other lands to petitioners in this case, and with notice in said deed of the decree against Belding *et al.* title or claim to the lands in dispute.

The bill of review subsequently filed by petitioners, therefore, was for the purpose of securing a reversal of the decree in the original case by the United States Circuit Court, at Knoxville, Tenn., and by the United States Circuit Court of Appeals for the Sixth Circuit. From the decree of the United States Circuit Court of Appeals in the bill of review proceedings petitioners now seek to have the matter reviewed in this Court.

The question then is: will this Court review the decision of the Circuit Court of Appeals, denying and dismissing a bill of review, the purpose of which bill of review was to have said Circuit Court of Appeals reverse a decree entered by said Court as a final decree many years ago, or is the matter one which this Court considers should rest in the sound discretion of the Circuit Court and of the Circuit Court of Appeals? This in no manner concerns the case of original jurisdiction on the docket of this Court, brought by the State of North Carolina against the State of Tennessee as to the location of their common boundary line. The case of North Carolina vs. Tennessee *is as to jurisdiction and sovereignty*, not as to title to land.

Second.—Respondent denies that

> "If this Court should find in favor of the State of North Carolina in the original proceedings now pending in this Court, in the case of North Carolina vs. Tennessee, a curious and anomalous result would follow, to wit, that the Smoky Mountain Land, Lumber

& Improvement Co., the respondent in this case, would be holding lands in North Carolina under grants from the State of Tennessee, and that the State of North Carolina not being bound by the judgment in this case, could regrant said lands, because as to the original grantees those grants would have been held void and nullified herein, which would create confusion and further litigation."

The Smoky Mountain Land, Lumber & Improvement Company now has title to the lands also by virtue of the decree of the United States Circuit Court of the Sixth Circuit, and the matter is now *res adjudicata* as to the original parties.

Further, the State of North Carolina having granted said lands, those grants would be superior to any junior grant, and while the State of North Carolina might regrant said lands a dozen times, we fail to see the reasoning whereby a judgment in this case would make void older grants and not have any effect as to junior grants. Surely the State of North Carolina if bound on one horn of this dilemma must be bound on the other horn of the dilemma.

Third.—As to the facts recited in this paragraph 3, respondent cannot admit that the same are correctly stated or that the conclusions drawn therefrom are proper conclusions. The report of the Master, the opinion of the Circuit Court and Circuit Court of Appeals, set forth in the record as well as the evidence itself, demonstrate that petitioners' statements in paragraph 3 are not statements of fact, but a statement of petitioners' erroneous conclusions or deductions.

Fourth.—Respondent admits the statements quoted from the opinions of Judge Clark and Judge Lurton in paragraph 4, but not the conclusions drawn from these isolated quotations, as set forth by petitioners in said paragraph. Respondent declares that the full opinions of Judge Clark of the said Circuit Court and of Judge Lurton of the

Circuit Court of Appeals, in the original case, show no uncertainty in their minds as to the correctness of their decisions. We simply ask your Honors to read the opinions of Judge Clark and Judge Lurton as set forth in the record. Respondent also calls attention to the fact that after fully considering all the facts set forth in paragraph 4, and other facts not set forth by petitioners, each Court twice decided in favor of respondent, or the party under whom it claims.

Fifth.—That as to paragraph 5, respondent states that the facts are not fully and correctly stated and that conclusions of petitioners are mixed with the facts. The purported map of the survey of 1821, alleged as newly discovered evidence, was shown upon the bill of review proceedings and placed in evidence by petitioners. The report of the Commissioners (newly discovered evidence) was placed in evidence by respondent. Respondent denies that the hearing upon the bill of review showed due diligence and interest of the petitioners, as to petitioning for said bill of review. Respondent admits evidence showed that the State Line northeast of the Tennessee River was undisputed down to the end of the 64th mile, which was about 6/10ths of a mile from the Tennessee River at a point where the original complainant claims the line crosses that river to a high bluff. But respondent states also that the evidence showed that the State Line northeast of the Tennessee River was not only undisputed down to the 64th mile tree, but that it was undisputed down to a marked hemlock practically on the north bank of the Tennessee River, which marked hemlock was admitted to be a fore and aft State Line tree, and directly opposite to the point where respondent claimed the State Line to cross the Tennessee River to the South side of said river. Respondent denies that the evidence of the most "competent" surveyors identified the "creek" on the map as Slick Rock Creek. Competent surveyors testified that the creek marked on the map could not be Slick Rock Creek and that it was the Cheoah River,

which Cheoah River was east of the line claimed by respondents. Petitioners claimed the State Line was running up Slick Rock Creek for five miles. The map shows no such creek and speaks for itself in that it does not conform to the contention of petitioners.

Sixth.—Respondent denies that after said bill of review had been argued and submitted to the United States Circuit Court of Appeals, the original field notes of one William Davenport, one of the original surveyors who made the said State Line survey in the year 1821 on behalf of North Carolina for the joint Commissioners, were discovered, &c. Certain purported field notes were discovered as set forth in said paragraph 6th, but the evidence did not show them to be the original field notes of said William Davenport, and in fact, showed them to be copies of some field notes, but from what they were copied was not shown. Respondents admit that certain field notes or copies of field notes were presented to the said Circuit Court of Appeals of the Sixth Circuit with a motion suggesting diminution of the record, and asking the said Court to admit the record to the lower Court with permission to your petitioners to make such evidence a part of the record, which motion was denied by the said Circuit Court of Appeals.

Seventh.—Respondent admits the facts set forth in paragraph 7, that it was stipulated in the original case that the defendants and those under whom they claimed, paid taxes on said lands on the whole to the State of North Carolina. Respondent states, also, that the land in dispute is comparatively a small part of the entire land claimed by petitioners in the State of North Carolina as shown by their deeds placed in evidence. Respondent admits that there was evidence intended to show possession of and exercise of dominion over said lands, but respondent denies that said evidence was favorable in any sense to the contention of petitioners or those under whom they claim. These facts were thoroughly taken up in the opinion of the Courts, and

his Honor, Mr. Justice LURTON, in his opinion, 103 Fed. Reporter, page 532, devotes several pages to this question and finds as a fact:

> "There has been, of the evidence in this record, no such long and continued recognition or acquiescence in the tentative line on Slick Rock Creek as to justify this Court in saying that it has been adopted as the actual line so long as to stand for a definition of the true and ancient boundary."

Also:

> "There was conflicting evidence locating the line by reputation. There was little in all this of any moment. The line at the point ran through an uninhabited wilderness, almost inaccessible. The fact of a visible line of marked trees on Slick Rock Creek, observed by a few adventurous hunters, would naturally start the tradition that the state line was on the creek. The same fact doubtless influenced the surveyor general, and his omission to plat the lands east of the creek would confirm the reputation of that line. Not more than half a dozen persons are shown to have ever lived within the disputed lines, and there is a conflict as to whether they regarded themselves as living in Tennessee or North Carolina until after 1882, when they, or the greater number, being mere squatters, began to hold under one or other the contending titles, and to locate the line to suit their landlords. None of them go back beyond the North Carolina grant under which appellants claim, which bears date in 1860. Since 1882 when appellees obtained their grant from Tennessee, most of these inhabitants, if not all, have attorned to appellees, and have since voted in Tennessee, and hold themselves out as citizens of the Seventeenth civil district of Monroe county, Tenn. No active exercise of jurisdiction over the disputed territory is shown by either state, aside from the issuances of entries or grants to any who chose to apply."

Under the facts found by the Master in the said Circuit Court and the said Circuit Court of Appeals, the conclu-

sions of petitioners, that the judgment of the said Courts do not follow the rules laid down in the cases quoted in said paragraph 7, is not a correct statement.

Eighth.—Respondent declares that as to the facts set up in paragraph 8, they are so mixed with deductions of petitioners that the full facts are not correctly stated. In allowing the bill of review to be filed, the opinion of Judge CLARK, of the U. S. Circuit Court at Knoxville, Tenn., who had heard the original case, was as follows:

> "It does seem, upon examination of this case, that there is no ground on which the success of the proposed bill of review might finally be expected. The objections which are made to permitting this bill to be filed go to the very merits of the bill, and can, and, in my opinion, should more properly be taken up by demurrer to the bill if filed. If, in the exercise of discretion I refuse to allow the bill of review to be filed, it is not certain that my refusal to do so would be subject to review. On the contrary, if the bill is filed and a demurrer should be sustained to it on the same grounds that are now urged against its filing, the action of the Court would be subject to easy review, and so the petitioners for review would suffer no error at the hands of the Court that could not be readily corrected.
>
> "In view of these considerations I have determined to allow the bill of review to be filed, subject, of course, to all legal objections, by demurrer, answer, plea, or otherwise, as the defendants may be advised, and it is ordered accordingly."

We submit said opinion clearly showed that Judge Clark, who was familiar with the original case, merely allowed the bill of review to be filed in order that the petitioners might have the opportunity of appealing to the U. S. Circuit Court of Appeals.

The opinion of Judge John E. McCall, after hearing upon bill of review, found as a fact that the newly-discov-

ered map, together with the newly-discovered Commissioners' report were, in fact, in confirmation of the contention of respondents as to location of the State Line between North Carolina and Tennessee at the point in dispute.

His Honor, Judge JOHN E. MCCALL, said in his opinion as follows:

> "As indicated above, there are other grounds upon which the relief sought by the Bill of Review should be denied, but I prefer to base my action upon the ground that the newly discovered evidence if it had already been before the Court at the original hearing would not have led the Court to a different conclusion than the one reached."

The majority of the said Circuit Court of Appeals in passing upon the bill of review, respondent admits, found as a fact that the Smoky Mountain Land, Lumber & Improvement Company was an innocent purchaser in reliance upon the original final decrees sought to be set aside, and that there was no ground in equity which would allow petitioners to prevail upon their bill of review. Respondent denies the deduction of petitioners as set forth in paragraph 8, that the text book law quoted therein is applicable to this case before this Court.

Respondent denies that it is a correct inference that petitioners draw from the majority Court's opinion, to wit: that the newly-discovered evidence was to their minds conclusively in favor of the petitioners, but respondent asserts that the finding of fact by the majority Court, to wit: that the Smoky Mountain Land, Lumber & Improvement Company was an innocent purchaser for value after final decree of the proper Court, together with the fact that petitioners were without equitable grounds to ask that the bill of review filed by petitioners should prevail, was so controlling and absolute that it was unnecessary to consider any other grounds, and for equity and justice in the case it was im-

material to discuss the matter of newly-discovered evidence or any other grounds for dismissing the bill of review urged by respondent.

Wherefore respondent prays that the petition may be dismissed at the cost of the petitioner.

SMOKY MOUNTAIN LAND, LUMBER & IMPROVEMENT CO.

By J. Newton Peck.
Secretary and Treasurer

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss:*

J. NEWTON PECK, being duly sworn according to law, deposes and says that he is the Secretary and Treasurer of the Smoky Mountain Land, Lumber and Improvement Company, the respondent above named, and that the matters set forth in the foregoing petition are true to the best of his knowledge, information and belief.

J. Newton Peck

Sworn to and subscribed before me this 17th day of April, A. D. 1912.

Charles A McClure

NOTARY PUBLIC,
Commission Expires Feb. 21st, 1915.

Supreme Court of the United States

OCTOBER TERM, 1914

No. 30

Office Supreme Court, U. S.
FILED
MAR 2 1914
JAMES D. MAHER
CLERK

DAVID W. KELDING AND OTHERS,
PLAINTIFFS,

vs.

CHARLES HEBARD,
DEFENDANT.

WILLIAM R. HOPKINS AND OTHERS,
APPELLANTS,

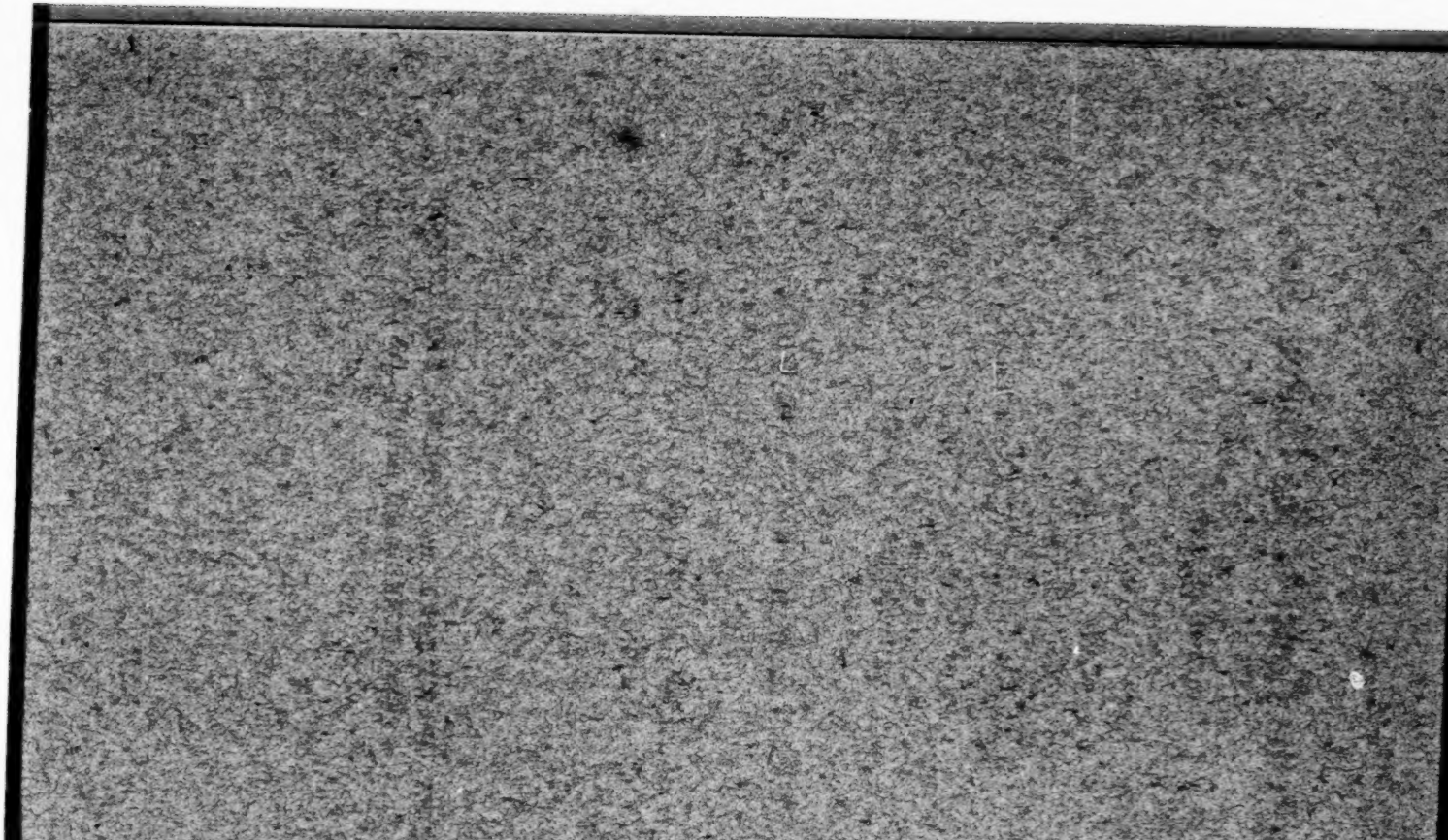
vs.

THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY,
APPELLEE.

BRIEF OF WILLIAM R. HOPKINS AND OTHERS, PETITIONERS AND APPELLANTS.

C. R. Matthews,
Solicitor and Attorney.

E. B. TOOTHAKER, Law Printer, 1-15 N. Third St., Columbus, O.



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Supreme Court of the United States

OCTOBER TERM, 1913,

No. 282.

DAVID W. BELDING AND OTHERS,

PLAINTIFFS,

VS.

CHARLES HEBARD,

DEFENDANT.

WILLIAM R. HOPKINS AND OTHERS,

APPELLANTS,

VS.

THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY,

APPELLEES.

BRIEF OF WILLIAM R. HOPKINS AND OTHERS, PETITIONERS AND APPELLANTS.

This case comes up on certiorari from the Circuit Court of Appeals of the Sixth Circuit, the case having come into the Circuit Court of Appeals on appeal from the United

States Circuit Court, Sixth Circuit, Northern Division of the Eastern District of Tennessee, where it was tried. The case was originally brought by Charles Hebard against David W. Belding et al., in the State Court, and removed into the aforesaid United States Circuit Court and tried there. The bill in the case was filed by Charles Hebard against David W. Belding et al., claiming under certain grants from the State of Tennessee, a large acreage of land as a part of Monroe county, Tennessee, which was in the occupancy of the defendants under grants from the State of North Carolina; in other words, it was an action to quiet title, and depended upon the true location of the boundary line between the States of North Carolina and Tennessee. If that boundary line was located where Hebard claimed it was located, then his title was good so far as the defendants were concerned. If, on the other hand, it was where the defendants claimed it to be, then he had no title. The jurisdiction of the court and the title of the parties, in other words, depended upon the true location of the state line between North Carolina and Tennessee. In the present situation of the case it is unique in that respect, because title results to the one side or the other indirectly from the proper location of that state line.

The point in dispute arose in this way: In 1821 the joint commission of the States of North Carolina and Tennessee ran the line and platted it, and filed their report and map, and presumably, their field notes, at Nashville and at Raleigh. When this case was tried, after the most diligent search, as appears by the original record thereof, the map filed by the commissioners, and their report, could not be found. The Circuit Court of Appeals of this Circuit was satisfied, as a perusal of their opinion in the 103 Fed-

eral Reporter, page 532, will show, that this report and map could not be found and no evidence could be produced of their contents. The surveyors, who testified for Hebard in the original case, found certain marked trees running down towards the Tennessee river from a point about a half a mile to a mile northeast of the Tennessee river, from the top of the ridge of the Great Iron or Smoky mountain ridge. There was nothing but these trees to show how these commissioners had reached the river. It was assumed, therefore, that they reached it at that point. This point was about a half a mile southeast of the mouth of Slick Rock creek, and about a mile and a quarter or a mile and a half northwest of the mouth of the Cheoah river, both of which streams ran into the Tennessee. Getting to that point, the surveyors overlooked the country southwest of the river, and determining in their own minds that the Hangover ridge was the principal range southwest of the river, and that it was in the general course of the state line on the north of the river, which was practically undisputed, that therefore, these commissioners must have come out on the Tennessee river about a half a mile to the southeast of the mouth of Slick Rock creek; and that it was abnormal to go along with the thread of the stream of the Tennessee river to the mouth of Slick Rock creek, and as it were, back upon their tracks, as defendants contended, and thence to go on southwest up the creek, and along the ridge of the Fodderstack to the junction of the Fodderstack and Hangover, about ten miles from the river. This junction is an undisputed point. The difficulty lies right at the Tennessee river. The Hangover, running to the north from that junction, makes a curve around to the right. At the Hangover Peak, about a mile

and a half from the Tennessee river, a ridge which is really the principal ridge, runs off still further to the right, and reaches the Tennessee river at or about the mouth of the Cheoah river, but the so-called Hangover ridge, by gaps and peaks, getting lower, however, all the time it does this, in an irregular manner, reaches the Tennessee river, where it terminates by a bluff. It is about three and a half miles from the Fodderstack to the Hangover.

We think it will be abundantly shown that the Hangover, while it is higher at points, has not as great an average height as the Fodderstack. We think we will show that the Fodderstack, rather than the Hangover, is in the course of the undisputed survey north of the river; and we think we will show beyond controversy that the commissioners' map, which has since been found—and it seems that a copy of the report of the commissioners has been found, but not the field notes,—will show that they crossed the Tennessee river at the mouth of Slick Rock, and that the marking of trees down to a point on the Tennessee river about a half a mile southeast of Slick Rock creek, was merely a tentative marking, because the country between a point about a mile north of the river and the mouth of Slick Rock, or a point on the Tennessee river opposite the mouth of Slick Rock, was utterly inaccessible. Hebard claimed the Hangover line. Defendants the Slick Rock creek line.

This states in a nut-shell the point of difference.

A SHORT JUDICIAL HISTORY OF THE CASE.

The case was referred to a Master to take the testimony and report his conclusions. The Master's report is found in the record, commencing on page 335. We quote from that report, as follows:

Page 335:

> "I think the reasons given by both surveyors of the Ocoee district for stopping at Slick Rock creek are incompetent, nor do I regard as competent the testimony of the witnesses living in the disputed territory as to what state they live in. I think this matter is too recent to be proved by general reputation and that the general reputation sought to be established by this evidence, has been made very largely, if not wholly, since the dispute as to the true location of this line has existed."

Page 336:

> "For complainant's contention the proofs show: That the Hangover ridge is the main ridge of the mountain between the river and the junction of the Hangover and Fodderstack; that is from 300 to 500 feet higher than the Fodderstock ridge, and that a person standing on top of the mountain where these two ridges come together and looking northeast could see no ridge except the Hangover, and would have to descend the mountain side some two or three hundred feet before he could discover that there was another ridge leading off from the main ridge. Southwest of their junction there is only one ridge leading down to the Unicoy or Unaka mountain. It also appears that this ridge bluffs up to the river immediately opposite the point where it is agreed the state line reaches the river on the northeast side, and that it is a continuation of the ridge along the extreme height of which the line is running until it reaches the river. And to anyone approaching the river on the northeast side along the state line and looking southwest in the direction the state line was running it would readily

appear to be the main ridge. It is true that the defendants show that a ridge runs off from the Hangover ridge at the Hao several miles from the Tennessee river down to the Cheoah river, and that it is as large or larger than the Hangover from there on to the Tennessee river, but as this ridge does not reach the Tennessee river, it of course could not be thought of as the 'main ridge' so far as the state line is concerned. It also appears that this mountain being high and poor, the timber on top and along the height of it is very poor and scrubby, and would not be good to hold line marks, but complainant's surveyors insist that they found at least two trees along the top of this ridge, a black or water oak and a sourwood, which show two chops above a blaze (the state line mark), and that these marks were of the proper age for the state line. The surveyors for the other side contend that these trees do not bear the state line marks. I am of the opinion that these two trees bear marks similar to those used in marking the state line and that they were marked about the year 1821."

Page 337:

"The surveyors who laid out the Ocoee land district in Tennessee in 1886 evidently understood that the state line run up Slick Rock creek and up this particular spur to the Fodderstack, and thence along it, for they stopped at Slick Rock creek, and at a line substantially in accordance with the line as contended for by defendants. It also appears that since 1853, parties have been obtaining grants from the State of North Carolina for land in this Slick Rock creek basin, both on the east and west side of Slick Rock creek, and that deeds and conveyances made by parties in Tennessee and in complainant's claim of title have called for Slick Rock creek since 1853, as the state line."

Page 338:

"I have endeavored to state as fully as practicable in the limits of this report, the evidence sustaining the contention of each party, but after all, in deter-

mining the location of a line, the most important thing to look to is the report of the party locating it. And in this case, the report of the commissioners of the States of North Carolina and Tennessee who run the line in 1821, for I am to report the true state line from the Little Tennessee river to the junction of Fodderstack and Hangover leads as run and located by these commissioners. I understand that calls for natural objects, if reasonably certain, must control the location of a line, unless it is shown that a different line was actually run and marked at the time, and in this character of case, unless it is shown that the line so run and marked was actually adopted as the line by the parties in making their report.

"After a careful consideration of the whole case, I am of the opinion, and so report, that the line between the States of Tennessee and North Carolina from the Little Tennessee river to the junction of the Hangover and Fodderstack ridges, as run and located by the commissioners of said states in 1821, and confirmed the Little Tennessee river at the point where it reaches the little Tennessee river at the point where it reaches the river on the northeast side, and from the river runs up the Hangover lead, as shown on complainant's map, and along the extreme heights of this ridge, passing the black or red oak, Slick Rock Gap, Cold Springs Knob, Big Flat Knob, Hangover, Hao, Grassy Gap and Stratton Bald, to the junction of the Hangover with the Fodderstack.

"The contention of the defendants has been presented in the record, and before me, with much learning and ability and with great earnestness. In deference to which I will give some of the reasons for my conclusion.

"The Act of North Carolina of 1789 ceding to the National Government the territory now comprising Tennessee, fixes the eastern boundary line as follows: 'Beginning on the extreme heights of Stone mountain at the place were the Virginia line intersects it, running thence along the extreme height of said mountain to the place where the Watauga river breaks through it; thence a direct course to the top of the Yellow

mountain where Bright's road crosses the same; thence along the ridge of said mountain, between the water of Doe river and the waters of Rock creek to the place where the road crosses the Iron mountain; from thence along the extreme heights of said mountain to where Nolichucky river runs through the same; thence to the top of the Ball mountain; thence along the extreme height of said mountain to the Painted Rock on French Broad river; thence along the highest ridge of said mountain to the place where it is called Great Iron or Smoky mountain; thence along the extreme height of the said mountain to the place where it is called Unicoy or Unaka mountain between the Indian towns Cowee and Old Chota; thence along the main ridge of the said mountain to the southern boundary of this state.' It is very evident that the intention was to fix the western boundary line of the State of North Carolina and the eastern boundary of the ceded territory along the top of the mountain range, which run across the state from northeast to southwest, so that the extreme top of the mountain should be the boundary. The line now in question is included in the following call of the Cession Act. After getting on the Great Iron or Smoky mountains: 'Thence along the extreme height of said mountain to the place where it is called Unicoy or Unaka moun tain.'"

Page 339:

"In 1796, the Legislature of North Carolina passed an act appointing commissioners to meet a commission from Tennessee to fix the line as described in the Cession Act, and again in 1819, the Legislature of North Carolina passed an act constituting a commission to meet a similar commission from Tennessee to 'settle, run and mark the boundary line between this state and the State of Tennessee agreeably to the true intent and meaning of the act of the General Assembly of this state, entitled, "An Act for the purpose of ceding to the United States of America certain western lands therein described."'"

"This is the act under which the North Carolina commissioners, who assisted in the survey of 1821, were appointed.

"Commissioners on the part of Tennessee were appointed, and acting in connection with these North Carolina commissioners, the survey of 1821 was made, and each set of surveyors reported to their respective states and their reports were adopted. They are identically the same in description with the exception of some few differences in the spelling of proper names, and with the further exception that the North Carolina commissioners' report, after the description, the following: 'The whole distinctly marked with two chops and a blaze on each fore and aft tree, and three chops on each side line tree and mile marked at the end of each mile.' The full description of the survey as adopted by both legislatures, was as follows: 'Beginning at a stone set up on the north side of Cataloochee turnpike road and marked on the west side "Ten. 1821," and on the east side "N. C. 1821," running thence on a southwestwardly course to the Bald Rock on the summit of the Great Iron or Smoky mountains, and continuing southwestwardly on the extreme heights thereof to where it strikes Tennessee river, about seven miles above the old Indian town of Tallahasse, crossing Porter's Gap at a distance of 22 miles from the beginning, passing the Meigs boundary line 31½ miles, the Equovettly path at 53 miles and crossing Tennessee river at the distance of 65 miles from the beginning, from the Tennessee river to the main ridge and along the extreme height of the same to the place where it is called the Unicoy or Unaka mountain, striking the old trading path leading from the valley towns to the over-hill towns near the head of the west fork of Tellico river, and at the distance of 93 miles from the beginning; thence along the extreme heights of the Unicoy or Unaka mountain to the southwest end thereof at the Unicoy or Unaka turnpike road where a cornerstone is set up, marked "Ten." on the west side and "N. C." on the east side, and where a hickory tree is also marked on the south side "Ten. 101 M." and on the north side "N. C. 101

M.," being 101 miles from the beginning; from thence a due course south two miles and 252 poles to a spruce pine on the north bank of the Hiawassee river below the mouth of Cane creek; thence up the said river the same course about one mile and crossing the same to a maple marked "W. D. & R. A." on the south bank of the river; thence continuing the same course due south 11 miles and 273 poles to the southern boundary line of the State of Tennessee and North Carolina, making in all 116 miles and 228 poles from the beginning, and striking the southern boundary line 23 poles west of a tree in said line, marked "72 M." where was set up by said commissioners a square post marked on the west side "Ten. 1821," and on the east side "N. C. 1821," on the south side "G." ' "

Page 341:

"The first reference to the Tennessee river is 'to Where it strikes the Tennessee river,' and the next is 'crossing the Tennessee river,' and then the report says, 'from the Tenn. river,' and yet if the line was run up Slick Rock creek, as contended for by defendants, then either before crossing the river or afterwards, the line would have had to run down the river one-half a mile, and this not in the general course the line was running (southwestwardly), but back at an acute angle to the line run and in a northwest course, and in running down the river and up Slick Rock creek they would not have been running as the line called to run in the Cession Act, along the extreme height of the mountain to where it is called Unaka, but for one-half a mile would have been running down a large river in the deep gorge cut through the mountain, and for more than five miles up Slick Rock creek in a basin or valley six miles long and three miles wide, surrounded by mountains from one to three thousand feet high. In would certainly not have been in compliance with the Cession Act. It is true that it is my purpose to determine where they actually run and located the line and not whether they complied with the Cession Act, but I can not believe that they would abandon the line called for in the Cession Act,

and be diverted from their course in this way, and make no mention of it in their report. They had just paused in their report to make particular mention of many objects, less prominent and less noteworthy, than either the Tennessee river or Slick Rock creek. They mention the fact that they reach the Tennessee river, that they cross it and that they leave it, and I do not believe that they would have run down the river for one-half a mile and made no mention of that fact, nor do I believe that they would have run for five miles up Slick Rock creek, a creek with numerous tributaries, apparently of considerable size, so large in fact, that there is another creek in the same basin called Little Slick Rock creek, and not have mentioned it in their report. After this call has reached Unaka mountain they are particular to call attention to every object that could give permanency and notoriety to the location and when they reach the Hiawasseee river, which at that point is running the same course as the line they were running, and they go up the river about one mile they call attention to the fact. (See Gov. Map, Exhibit G, to Dep. H. S. Hayes), and if necessary to call attention to the fact when the river was in direct course, how much more necessary it would have been when by following it the line is deflected and caused to turn back at an acute angle." •

Page 342:

"But again, the line runs 'from the Tennessee river to the main ridge and along the extreme height of the same to the place where it is called the Unicoy or Unaka mountain.' How shall it get to the main ridge, by running down the river and up Slick Rock creek to a spur of Fodderstack and thence to its junction with Hangover?

"This main ridge was on the southwest side of the river higher than it was on the northeast side and run in the general course of the line they were running.

"There are more marked trees on the Slick Rock creek line than on the Hangover, but I am inclined

to believe from the record that it would not be safe to attempt to pull this line away from the well defined natural objects to follow marks as shown on either line. This section of country was inhabited by Indian tribes until 1836 or 1837, and it is crossed by numerous trails and paths, and numerous marks are found similar to these state line marks."

Page 343:

"Upon the whole the conclusion I have herein announced is one I believe is warranted by the record. A number of questions are raised in the pleadings and arguments, such as adverse possession, estoppel, etc., but I have not considered them, because I do not understand that they are included in the matter referred to me."

The Master found in favor of the plaintiffs.

When this came on for argument before Judge CLARK, a very painstaking, conscientious and able judge of this court, he said: (Pages 369 and 370 of the Record.))

"After careful consideration of this case, I reach the conclusion that I am not warranted upon the facts in differing from the commissioner in the view which he takes of the case. It is a very close one on the facts, and the equity of the case is rather with the defendants in view of the fact that they obtained their grants earlier, and have been paying taxes upon the property while the plaintiff's grant was only recently obtained. If there was a basis for estoppel, or if the doctrine of estoppel could be applied to the State of Tennessee, a different question might arise, growing out of the fact that the state has, through the Ocoee district commissioners established its line at Slick Rock creek, and has sectionized all of the territory supposed to belong to the state. In the absence, however, of any ground on which an equitable view might be taken of the situation, I am constrained to believe that the weight of evidence is with the plaintiff as to the true location of the state line. I do not underestimate the great

force found in the better marked line of the defendant. It must not be forgotten, however, that the commissioners in surveying and making the line, followed the mountain range down to the Tennessee river, and that according to the calls actually made, they would cross that river and proceed along the mountain crest where complainants contend the line is. It was the crest of this same mountain range which brought them to the river and it was the obvious and conspicuous range to have followed by directly crossing the river and keeping up the previous course. It is extremely difficult to believe that the commissioners at this point would have dropped down the river for half a mile and then followed Slick Rock creek for a distance of five or six miles without ever making the slightest reference to this water stream. Granting, as argued, that the creek may, at that time have had no name whatever, nevertheless it would have been so natural and so necessary to avoid misleading for the commissioners to have said that they changed their course, and instead of going directly across the river went down and then followed a creek or water stream up the valley and then to the ridge which led out to junction, that it is next to impossible to think that such a deviation as this would have been made without a word to give any indication of the fact. Following the calls as actually given, it would be impossible to run the line as claimed by the defendants.

"Looking at the case, then, from the legal point of view (and no other, it seems permissible), I am certain that by the weight of the evidence the case is with the complainants.

"As I concur with the Commissioner in the reasons which he gives, as well as the conclusion at which he arrives, it is not necessary that I should go over the grounds separately. It results, therefore, that the exceptions to the Commissioner's report are overruled, the report confirmed and the decree will go accordingly.

"I think the costs of the Commissioner's report should be divided and the general cost should follow the result of the suit, and it is adjudged accordingly."

When the case came to the Circuit Court of Appeals, it was argued and submitted, and the court delivered the opinion (Record, 400), found in the 103 Federal Reporter, 532. At page 545 of that decision, the court says:

"To sum up the case:

"1. The calls of the Cession Act of 1789, if followed, would locate the line on the Hangover ridge.

"2. The legislation of both states, providing for the survey and marking of the line, required the commissioners to locate the line described by the Cession Act.

"3. The calls of the confirmatory acts of 1821 of both states, if followed, locate the line of Hangover.

"4. The commissioners did run and mark a line on Hangover, and two state-line trees are identified and established as state-line trees on that ridge.

"5. The commissioners also ran and marked a line along Slick Rock creek, which connects ultimately with the Hangover line at the junction of the Fodderstack with Hangover.

"6. Between 1821 and 1836 the disputed strip between these lines was a part of the land occupied by the Cherokee Indians, who in that year ceded their land to the United States; the Cherokee lands on the North Carolina side being subsequently ceded to North Carolina and those within Tennessee to the latter state.

"7. Between 1836 and 1853 the disputed region was an uninhabited wilderness, and neither state actively asserted any jurisdiction.

"8. In 1836, Tennessee caused the Cherokee lands ceded to her to be laid off into a land district called the 'Ocoee District.' The surveyor general omitted to plat or survey the lands between the marked line on Slick Rock creek and Hangover, and bounded his survey by Slick Rock creek.

"9. Between 1853 and 1882 grantees under Tennessee in conveying fractional sections within the Ocoee district, described Slick Rock creek as the state line.

"10. After the Ocoee survey, in 1836, and down to 1882, the marked line on Slick Rock creek was reputed to be the state line.

"11. Between 1853 and 1860 North Carolina entries and grants were made between the two lines.

"12. In 1854, Tennessee by law provided for the entering and granting of lands in the Ocoee district, whether platted and surveyed or not, though the act did not assert that there were such unsurveyed lands.

"13. In 1882 the entries under which the complainants claim, or a part of them, were made within the disputed lines, and in 1892 the complainants' grantors obtained a grant.

"14. After 1882 there was a divided opinion and reputation as to the location of the state line, and since that time the few inhabitants have voted and paid taxes in Tennessee, though the appellants have paid taxes on their grant in North Carolina.

"15. The region remains almost uninhabited and inaccessible. Neither state is shown to have exercised jurisdiction over it save by issuing entries and grants as stated.

"16. The true line, as actually located in 1821, was the Hangover line.

"17. There has been, on the evidence in this record, no such long and continued recognition or acquiescence in the tentative line on Slick Rock creek as to justify this court in saying that it has been adopted as the actual line so long as to stand for a definition of the true and ancient boundary. The conclusions and findings of the Master upon the principal points in the case are not shown to have been so plainly erroneous as to justify us in overturning his conclusions as to the existence of the marked state-line trees on the Hangover, nor as to the fact that the Hangover was palpably the 'main ridge' called for in the commissioners' report and survey.

"The case on the whole is not one free from doubts engendered by the existence of the marked line on Slick Rock and its apparent recognition by the Ten-

nessee surveyor general as the state line. The result reached by the Special Master, and confirmed by a most careful and conscientious trial judge, is a result which on the whole is most consonant with the calls in the Cession Act and the subsequent confirmatory boundary acts. The evidence relied upon to deflect the boundary line from the line so plainly described by both acts settling the boundary is not so conclusive as to require us to reverse the action of the Circuit Court. The decree will therefore be affirmed."

In the course of the decision, the court says on page 537, with reference to the Hangover peak:

"The Master reports it was the main or highest ridge, having an average height of 800 feet greater than Fodderstack."

The court goes on to say, in part, as follows:

Page 539:

"These words of description do not appear in the Tennessee act of 1821, and neither the original report of the commissioners nor the surveyors field notes are in existence."

"The line thus marked is not upon the course called for by the survey as reported and adopted."

Page 541:

"We have then two lines run and marked."

"The other line, though scantily marked, is found just where the course and natural monuments called for in the report of the survey would locate the line if neither had been marked."

Page 542:

"The description of the boundary as run and marked by the commissioners calls for a course from one natural object the Tennessee river, to another, the Unaka mountain. In the absence of any further description the line would be run straight from one

monument to the other. The probabilities are that the surveyors tentatively or experimentally marked the line up Slick Rock creek. Discovering that they thereby made a radical departure from the extreme height of the mountain chain called for by the Cession Act of 1789, they abandoned the creek, and ran, adopted and reported the line as running along the extreme height of the main ridge, now known as the Hangover ridge."

Page 543:

"The surveyor general accordingly did survey and plat such lands and the plat shows he stopped his survey at Slick Rock creek, and made that the eastern boundary of the Ocoee district."

It will be seen that the three things that seemed to settle the matter in the minds of the court, although both courts were in much doubt, were these:

1. That the Hangover was the continuation of the course, as it was admitted to be north of the river.

2. The fact that the Hangover seemed to be the main ridge.

3. The abnormal fact that, conceding that the commissioners reached the Tennessee river at the point where the marks seem to lead them, a point about half a mile southeast of the mouth of Slick Rock creek, and that to reach the mouth of Slick Rock creek you would have to go with the thread of the stream; and if such were the case, it would seem to have been proper that the commissioners should have mentioned it, if they had to go back on their tracks, the Slick Rock line did not look right on paper.

The court below dismissed the bill of review and affirmed the original decree, and it comes into this court on appeal from Judge McCALL's decision.

TECHNICAL OBJECTIONS.

When the petition to file this bill of review was presented to the Circuit Court of Appeals of this Circuit, sitting in Cincinnati, counsel for the petitioners was quite aware that in this circuit that court had decided that the petitioners might proceed ex parte, or by giving notice to the parties interested.

Jourolmon vs. Ewing et al., 85 Fed. Rep., 103.
Society of Shakers vs. Watson, 77 Fed. Rep., 512.

But it was thought that the fairest way would be to notify somebody who would be interested in upholding the judgment. Having discovered that Mr. Hebard, the original complainant, was dead, and having discovered that he had conveyed his interest, while making his heirs and devisees parties, we notified The Smoky Mountain Land, Lumber and Improvement Company, a party having an interest adverse to us. This notification was simply by letter, but made known to them that we had made the application to the Circuit Court of Appeals.

We are charged with some neglect in not bringing the matter of requesting leave to file Bill of Review on for an earlier hearing in the Circuit Court of Appeals, but I think the court will recognize the fact that we have no control over it, and we got it up to hearing just as soon as we could, in the regular order of proceeding.

Upon the hearing of that case, all of the technical objections that are now presented, were brought to the attention of the court, to wit:

1. That an assignee could not file a bill of review.

2. That the three years' limitation of the state law of Tennessee, cut us off.

3. That The Smoky Mountain Land, Lumber and Improvement Company was an innocent purchaser, and therefore it would be inequitable to allow a bill of review.

The Circuit Court of Appeals allowed the review in the face of all these. To the first proposition, Judge Severens from the bench asked why a party who was aggrieved, could not file a bill in the name of the original party, we having claimed the right to do that. The implication was that this proposition was no more than the proposition that where an assignment was made of a claim, the assignee could not sue without using the name of the original party. No satisfactory answer was given to that, and no satisfactory answer can be given to it.

With reference to the second proposition, the court made no comment at all. It was argued upon our behalf that state statutes of limitations, which give the right to institute suits for the adjustment of general rights, could not control a Federal Court in the method by which, or the time within which it ought to control its own proceedings.

The third proposition was passed over similarly. Judge Lurton, who decided this case in the Circuit Court of Appeals, I mean who delivered the opinion, called for the two maps and inspected them, and seemingly that was all he desired to see. I do not assume in any way or form to bind Judge Lurton, or to know what passed in his mind, but it seemed to me that he saw a radical difference between the map as made by Hale, Hebard's main witness, and this map as made by the commissioners, and while it is true that they remitted it to the court below to pass upon it, yet it being our duty to apply to the Circuit Court of Appeals for leave to apply to the court below, certainly

their finding that there were sufficient reasons, so far as they were concerned, for allowing this bill of review to be filed, meant something. It meant, so far as that court was concerned, that they were satisfied the bill of review ought to be allowed to be filed.

We hardly expected The Smoky Mountain Land, Lumber and Improvement Company to appear in the case, but they have appeared, and they have made this a litigation between them and William R. Hopkins and his associates. We sought to file a bill in the names of the original parties, and against the original parties; it has been turned into something else by the action of the defendants, who now complain of it. The truth is that the owners who were sued, made a contract and conveyance in December of 1899, while this suit was pending, to Robert N. Archer and Thomas F. McGarry—a trust agreement to sell and pay debts. Under that trust agreement, the sale was made to these present complainants. The contract with these present complainants dated back to the early part of 1900—about April. The contract of sale was not formally executed until the twenty-ninth day of October, 1900—some two or three months after this decree was entered.

As far as this question of the right of an assignee is concerned, there is not anything in it except a technical rule of equity precedure. While it is true that it is said that an assignee may not file a bill of review, it is not said that an assignee may not file a bill of review in the names of the original parties, nor is it said that assignees may not file a bill in the nature of a bill of review. In fact, it is said otherwise.

While it is true that the petition in this case is filed by Hopkins and others, the court will notice that the bill

which we seek to file is in the name of the original parties, so that as assignees we are not seeking to file a bill of review in our own name.

In Story's Equity Pleading, Sec. 409, the author says:

> "No persons, except the parties and their privies in representation, such as heirs, executors and administrators can have a bill of review strictly so-called. But other persons in interest and in privity of title or estate, who are aggrieved by the decree, such as devisees and remaindermen, are, as we shall presently see, entitled to maintain an original bill in the nature of a bill of review, so far as their own interests are concerned."

So that leaving out the proposition whether the assignees, and these were practically assignees, *during* the pendency of the suit, may prosecute a bill in the name of the original party, it is only a question as to an original bill of review, or a bill in the nature of a bill of review. There is also in equity a supplemental bill in the nature of a bill of review, so that the only proposition in this case is whether a bill which we tender should be filed in this original suit, or whether it shall be docketed as an original case in the nature of a bill of review.

In Sec. 357 of Foster's Federal Practice, under the head of "Bills in the Nature of Bills of Review," the author says:

> "Only parties to the decree impeached, or their privies by operation of law, as heirs, executors and administrators, are entitled to file a bill of review; but other persons in interest and in privity of estate, who are aggrieved by the decree, are entitled to have the same relief by means of a bill in the nature of a

bill of review; such are assignees, devisees and remaindermen of the original unsuccessful parties."

See also,

Beach on Modern Equity Practice, Sec. 843.

In Pierce vs. Brady, 23 Bevan 64, a decree was made in favor of a cestui que trust upon an original bill, and without a bill of review, upon the discovery of fresh evidence, although a decree had previously been made as to the same matter against their Trustees, but in a suit to which the cestuis que trust were not parties. The statement of facts in this case, was this: A. insured his life and assigned the policy to his father, Christopher Emmett. A. was William Emmett. Christopher Emmett died and bequeathed the policy to a Trustee for the wife of William Emmett, and after her death, for the children of William Emmett. A. became bankrupt, and Patrick Johnson was his assignee in bankruptcy. It a suit between the assignee of A. and the Trustee, and in consequence of the Trustee not having proved that notice of the assignment had been given to the office, the fund was ordered to be paid to A.'s assignee, Patrick Johnson, as being within the order and disposition of the bankrupt. Parties claiming under these children of William Emmett afterwards filed an original bill against the assignee in bankruptcy, and having proved that notice had been given, recovered the fund. It was suggested in this state of the case that the proper proceeding would have been to have allowed or to have applied to Mr. Brady, the legal representative of the assignee, Christopher Emmett, to file a bill of review, and for that purpose, as a necessary preliminary step, to have

applied to this court and obtained leave necessary for filing a bill of review.

"If Mr. Brady had adopted that course, and it had appeared that the evidence which is now before the court was new evidence, which he had not been able to obtain, (and which appears now from his evidence to be the fact), and that it was material to the matter in issue, then, no doubt the court would have given leave to file a bill of review, and the question would have been brought forward in that manner, but I am of the opinion, that Mr. Maund (purchaser of the children's interest) is not precluded by the omission to adopt that course of proceeding, and that it is open to him now to file a bill. And assuming everything done in the case of Brady vs. Morgan to have been correctly done, which seems to have been the case, and not disturbing anything done in that case, I am of the opinion that the present plaintiffs may now, by bringing forward proper evidence, arrest the fund in the hands of Patrick Johnson (the assignee of Mr. Emmett) for persons other than the creditors of William Emmett (the insured), who may be entitled to receive the money, not meaning thereby to express my opinion whose those persons are, but assuming Mr. Maund, or rather the plaintiffs in this case, his representatives, to have made out a title to at least a portion of the fund. It would be a very unfortunate result if this court were compelled to come to an opposite conclusion, because it could scarcely do so without giving Mr. Brady leave now to file a bill of review, which would only be to occasion considerable delay and expense, and the effect would ultimately be to raise upon the same evidence exactly the same point as is now before the court. I am of the opinion in this particular case that the plaintiffs are entitled to get over the point of form, and that the court is bound to say, that if they establish their case upon the merits, they are entitled to arrest the funds in the hands of Mr. Patrick Johnson."

This decision was by Sir John Romilly, Master of the Rolls.

Noble vs. Stowe, 29 Bevan, 415, in a way discusses the same proposition.

In Whiting vs. The Bank of the United States, 13 Pet., 5, at page 13, the court says:

> "Being a bill brought by the original parties and their privies in representation, it is also properly a bill of review, in contradistinction to an original bill, in the nature of a bill of review, which latter bill brings forward the interest affected by the decree, other than those which are found in privity of representation."

Speaking further of the nature of the document filed in that case, the court proceeds:

> "It is therefore a compound bill of review of supplement and of revivor, and it is entirely maintainable as such if it presents facts which go to the merits of the original decree of foreclosure and sale."

In Thompson vs. The Schenectady Railway Co., 119 Fed. Reporter, at page 634, the court says:

> "Where the rights of persons who are not parties to the suit in equity are affected by the decree entered therein, and they seek to obtain a modification of such decree by setting up matters which occurred pending the suit, but which were not presented to the court, the proper practice is by the filing of a supplemental bill in the nature of a bill of review."

A supplemental bill after decree, in the nature of a bill of review, cannot be filed without leave of court, but it is discretionary with the court whether to require notice to the defendants therein, or the parties to the decree, before granting such leave. There is much learned discussion of

this subject on pages 637 and 638. The application was made by persons who were not parties to the original suit.

Under Section 1099 of Rose's Code of Federal Procedure, Note A, he states:

> "Bill of review is maintainable only by parties to the decree or their privies," etc. "Strangers to the decree must proceed by supplemental bill in the nature of bill of review; or by original bill."

Citing,

> Thompson vs. Schenectady R. R. Co., 119 Fed Rep., 634.
> Kingsbury vs. Buckner, 134 U. S., 675.

In truth, these parties are not altogether strangers to the original litigation, for the reason that the trust mortgage already mentioned, was made during the pendency of the case in the Circuit Court of Appeals, and they bought under that.

See also,

> Street's Federal Equity Practice, Sec. 2187.
> Thompson vs. Schenectady R. R. Co., 119 Fed., 634.

This last case was a case where parties outside of the record, but who were aggrieved by the decree, filed a bill in the nature of a bill of review.

The case has taken on the aspect that it now presents, simply from the fact that The Smoky Mountain Land, Lumber and Improvement Company asked to be permitted to come in and defend the decree, which was permitted to it, and treat the petitioners, who petitioned to file a bill in the name of the original parties, as the real parties in interest.

In relation to the second point, it is said in Rose's Code of Federal Procedure, Section 12:

> "The laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules or decisions in trials at common law in courts of the United States, in cases where they apply."
>
> Rev. Statutes, Sec. 721.

In Section 870, the author makes this statement:

> "While Congress might validly have prescribed the time within which all actions or controversies should be cognizable in the Federal Courts, independently of the state laws, it has chosen instead to require the Federal Courts to apply state statutes of limitations in common law causes, unless some federal statutes otherwise requires in a particular case. In equity, the Federal Courts are not strictly bound by any statutory provision, though they will usually follow the analogy of the statute at law."

Section 900:

> "The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts shall conform as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."

In Note "C," on page 835, in commenting upon this section, the author goes on:

> "The distinction between law and equity is fundamental in federal practice and numerous cases have affirmed the inapplicability in Federal Courts, of state laws as to equity procedure. Both in equity and admiralty, the practice and procedure of Federal Courts

are uniform throughout the United States. The fact that a state has adopted the reformed procedure, abolishing the distinction between law and equity, does not permit any such blending of legal and equitable proceedings in the Federal Courts. The distinction persists in the Federal Courts which will conform to the state reform procedure only in actions upon the law side."

And in Note "D," page 386:

"The mode of appealing a case in the Federal Court is not required to conform to the state practice upon that subject. The manner and time of taking the proceedings which constitute the foundation of the right of review are regulated by Congress and not governed by local practice. The state law as to time for filing the bill has no application nor as to the mode of settling it. The bill of exceptions in the Federal Court should conform to the federal and not to the local state practice. Where jury has been waived, the mode of securing review is not governed by the state law. The right of review is not governed by the state law and a rule adopting a state law denying the right in a given case is void," etc.

In Chateaugay Iron Co., Petitioner, 128 U. S., 555, it is held that:

"The manner or time of taking proceedings as foundation for review of judgment of Federal Courts is regulated by Congress, and not to be governed by the local rules of state practice."

In Beers vs. Haughton, 9 Pet., 359, it is said that:

"State laws can only affect the operation of process of procedure in the United States courts when they are adopted by Congress, or by rules of Federal Courts in conformity therewith."

In United States Bank vs. Hapstead, 10 Wheaton, 54, it was decided that:

> "Provisions of the judiciary act, adopting local law as rule of decision, do not apply to the local law of procedure."

And Fitch vs. Creighton, 24 How., 162, decides similarly.

In Boyle vs. Zacharie, 6 Pet., 658, the court rules that:

> "Federal Courts, in exercise of chancery jurisdiction, are not governed by state practice, but that of the English courts of equity as modified by Congress and rules of court."

In Livingston vs. Story, 9 Pet., 656, it was said:

> "Equity jurisdiction and practice of the Federal Courts are not governed by the practice in the State Courts; where the rules prescribed by the Supreme Court do not apply, the practice of the High Court of Chancery, in England, is to be followed."

And Payne vs. Hook, 7 Wall., 430, is a like case.

In Russell vs. Southard, 12 How., 147:

> "Equity practice and jurisdiction of the Federal Courts is uniform throughout the United States, and cannot be varied by state laws."

And in Pennsylvania vs. Wheeling, etc., Bridge Co., 13 How., 563:

> "The rules of the High Court of Chancery of England have been adopted by the courts of the United States and the latter are not limited by the chancery system adopted by any state."

In Bleave vs. Carlington, 92 U. S., 8, the court says:

> "Act of 1872, requiring pleading and procedure in civil causes in Circuit and District Courts to conform, as near as may be, to practice in State Courts, has no application to equity or admiralty causes."

In Bayard vs. Lombard, 9 How., 551, the court says:

> "The Circuit Court by adopting forms of process of the State Courts and state laws and practice for taking lands on execution and disposing of the proceeds, has not adopted the state mode of reviewing decisions. State legislation can not give jurisdiction to Federal Courts."

Indianapolis Railroad vs. Horst, 93 U. S., 301:

> "Motions in new trials in Federal Courts are within their discretion, and cannot be reviewed by the Supreme Court. Their practice is unaffected by state law on the subject."

Henderson vs. Parker, 156 U. S., 281, decides that:

> "The congressional act requiring procedure of Circuit and District Courts to conform as near as may be to that of the state in which they sit, does not include the manner of bringing cases from the lower Federal Courts to the Supreme Courts."

The time within which a Federal Court may exercise authority over its decrees is not a matter subject to state legislation, nor could it be made subject to state legislation even by a rule of the court. In other words, a Federal Court would have no right to abdicate its chancery jurisdiction and split the chancery system up into as many diverse sub-systems as there are Federal Courts in the country. It is not a matter of applying state laws, which are rules of property, or state statutes which inhere in a cause of action when it is first brought into court, nor is it a case of procedure, but it is a case of federal jurisdiction and authority over the records and decrees of its own courts.

There is no authority, so far as I have been able to discover in the books, for the proposition that is made in the

defendant's brief. Under Section 1099 of Rose's Code of Federal Procedure and under Note "D," "Time for Filing," and which was published in 1907, and presumably would state the law correctly, there is no mention whatever of conforming to state statutes of limitations, but the rule there laid down is that: Where the error complained of is law arising upon the record, the bill must be filed within the time for an appeal. Where the proceeding is sought to be reviewed on the ground of newly discovered evidence, it is entirely within the discretion of the court, but in all probability the rule is that it must be filed within time for an appeal, after discovery of the new evidence, provided diligence has been used in making the discovery.

The argument that there was no time for an appeal in the original cause would simply mean that this matter was entirely within the discretion of the court, and the only analogy that could apply, would be the appeal time from the Circuit Court of Appeals to the Supreme Court, if it had been a case that was by right appealable to the Supreme Court, but the intimation from the bench when as it was heard before the Circuit Court of Appeals was that it was not an appealable case, the matter was entirely discretionary.

In the case of Francisco vs. Erie & Chicago R. R. Co., 149 Fed. Reporter, 354, the court says:

> "The act of conformity (Section 914, Rev. St.) has no application to the practice or proceedings of appellate courts, or to matters relating to bills of exceptions, motions for new trials, or any other means adopted to secure a review of the judgments or decrees of the Circuit or District Courts. Its effect is limited to the practice and proceedings in the trial courts to secure their judgments."

Our contention in this matter is also borne out by the fact that in filing bills of review for new matter, it is wholly within the discretion of the court. See:

Street on Federal Eq. Prac., Sec. 2156.
Ricker vs. Powell, 100 U. S., 104-107.
Craig vs. Smith, 100 U. S., 233.
Street on Federal Eq. Prac., Secs. 2195, 2159; Note 34.
Dewey vs. Stratton, 114 Federal Reporter, 179.

By statute in the State of Ohio, motions for a new trial have to be filed within three days after the verdict of a jury, and yet although this is a statute of limitations relating to court procedure, it does not apply to the Federal Court.

INNOCENT PURCHASER.

The question of Innocent Purchaser, we desire to consider more at length.

My investigation of this subject has shown to my satisfaction that there is no question in the case regarding an innocent purchaser. In the first place, if our contention as to the facts is correct, the court had no jurisdiction. I am quite well aware of the proposition of law that where the jurisdiction of the court depends upon a state of facts, a finding of the court upon these facts one way or the other may determine that in a manner that is binding upon the parties to the case. If an innocent man is convicted of a crime, in the eye of the law he is guilty, though in fact he may be perfectly innocent. Here, in fact, the lands in controversy may be in the State of North Carolina, though if this court, as an indirect consequence of the location of the state line, finds them to be in Ten-

nessee and covered by the grants which finally came to Hebard, that finding may bind the parties to this case. We do not dispute that proposition, but we are reviewing that decree. Upon this question of review the *res adjudicata* of that decree does not bind us, because the question is one of original inquiry.

I have said that this is a unique case; it is unique in this respect. The State of North Carolina has filed a bill in the Supreme Court of the United States against the State of Tennessee, to determine the location of this boundary. Of course, the State of North Carolina is not bound by the decree in this case. This result will come about—if the Supreme Court of the United States should decide in favor of the State of North Carolina, the State of North Carolina may go ahead and grant these properties to somebody else. Now, what would be the answer to that? Hebard and his grantees may say; you granted these to Peet and Gilbert, and we recovered them from Peet and Gilbert's grantee. The obvious answer to that is that they were not recovered from Peet and Gilbert's grantees by reason of any contract or obligation on the part of these grantees to convey their title to Hebard, but simply on the ground that Peet and Gilbert got no title, because the lands were not in North Carolina, and therefore the situation is that the decree establishes that the grants of the State of North Carolina to Peet and Gilbert were invalid. If it now turns out that the lands were really in the State of North Carolina, therefore that state has the right to make those grants to anybody, because their former grants, as between the grantees of the State of North Carolina and Hebard, had been declared invalid, and the result is that the title remains in the State of North Carolina.

With reference to the doctrine covering the right of innocent purchasers, Pomeroy in the Third Edition of his Equity Jurisprudence, Sec. 679, says this:

> "Estates and Interests to which the Equitable Doctrine Applies. 1. Not to Legal Estates.
>
> "Among purely legal titles to the same subject-matter successive legal conveyances of and legal estates in the same tract of land, the equitable doctrine of priorities growing out of the presence or absence of notice, or of a valuable consideration, or of any other incident, has absolutely no application nor effect; such legal titles, estates and interests are, in the absence of any statutory modification, completely controlled, with respect to their priority by the order of time. (1) Even the mere want of a valuable consideration in the earlier conveyance would not, at the common law, affect the priority of legal right given by the priority of time."

And in Note 1 states the reasons on which this proposition is grounded, in the following words:

> "Gaines vs. New Orleans, 6 Wall., 642, 716, per DAVIS, J.; Ruckman vs. Decker, 23 N. J. Eq., 283; Van Amringe vs. Morton, 4 Whart., 382; 34 Amer. Dec., 517; Wade vs. Withington, 1 Allen, 561; Waring vs. Smith, 2 Barb. Ch., 119, 133; 47 Amer. Dec., 299; Arrison vs. Harmstead, 2 Pa. St., 191, 197; Jones v. Jones, 8 Sim., 633. The truth of this proposition is clearly seen from a consideration of the legal conception of estates at law and of conveyances and charges operating at law, and it will plainly appear that between two claimants of legal estates in the same land, the second one in order of time cannot, in the absence of the statutes concerning registration, avail himself even of the position of bona fide purchaser for a valuable consideration and without notice. If A, being owner of a piece of land in fee, conveys it in fee to B, and afterwards executes a deed in fee of the same land to C, at law C can acquire nothing. In contemplation of law, the entire estate passed by the deed to B,

and there was no interest left which could be transferred to C, and it could make no possible difference with this result whether C was wholly ignorant of the prior conveyance or was informed of it. Again, if A has no estate at all, or only a defective one, he cannot by a deed convey any more or better estate than he holds himself, to B, and it can make no difference whether the defect is open or hidden, or whether B buys with knowledge or in ignorance of it. Arrison vs. Harmstead, 2 Pa. St., 191; Ruckman vs. Decker, 23 N. J. Eq., 283. These propositions are constantly illustrated in ejectment suits, where the parties are claiming under conflicting legal titles, and both of them are purchasers for value and without notice. In Arrison vs. Harmstead, 2 Pa. St., 191, ROGERS, J., said: 'Where the vendor has nothing to convey, nothing can be acquired by the vendee. One who bought from the grantee in a voidable deed might be in a better position than a vendor. But the principle did not apply to a sale by a vendor who had no title, or, what came to the same thing, who had avoided the title by his own wrong. A deed acquired surreptitiously without delivery, or altered after delivery, was invalid even in the hands of a bona fide purchaser.' Again, in an action of ejectment between one who claims under deed or other paper title, and one who claims under adverse possession, the latter's notice of the outstanding paper title would not affect his right injuriously; the titles being legal, the controversy would be decided upon the completeness of the adverse possession, or the validity of the paper title."

In Section 735, he reiterates the same doctrine in the following words:

"General Meaning, Scope, and Limitations of the Doctrine. This section will deal with the equitable doctrine of bona fide purchase for a valuable consideration and without notice. The doctrine in its original form was exclusively equitable. Questions of priority cannot, as has already been stated, arise between successive adverse estates which are purely

legal, and therefore cannot, independently of statutory permission, come before courts of law for settlement; such estates must stand or fall upon their own intrinsic merits and validity. A contest concerning priority or precedence properly so called can only exist where one of the two claimants holds a legal and the other an equitable title, or where both hold equitable titles, and must therefore belong to the original exclusive jurisdiction of equity. Courts of equity do not have jurisdiction of suits brought merely to establish one purely legal title against another and conflicting legal title. In the United States these elementary notions seem to have been sometimes overlooked, and the courts sometime seem to have extended the doctrine of bona fide purchase farther than the acknowledged principles of equity would warrant. The tendency is marked and strong in the courts of many states, even when acting as tribunals of law, to make the doctrine a legal rule of property, and to apply it alike to persons who have acquired either a legal or an equitable title to chattels and things in action, as well as to those who have acquired any legal or equitable interest in land. A subsequent holder, even for a valuable consideration and without notice, has certainly no higher right than a prior holder equally innocent and with an equally meritorious ownership. American courts seem sometimes to have acted upon exactly the opposite notion, and to have assumed that a subsequent title was necessarily the better one. When the original legal owner has done or omitted something by which it was made possible that his property should come into the hands of a bona fide holder by an apparently valid title, it may be just to regard him as estopped from asserting his ownership, and thus to protect the subsequent purchaser. But when the prior legal owner is wholly innocent, has done and omitted nothing, it certainly transcends, even if it does not violate, the principles of equity to sustain the claims of a subsequent and even bona fide purchaser."

Sec. 737. "First. Rationale of the Doctrine. I purpose to explain, in this division, the essential nature, foundation, and reasons of the doctrine, the gen-

eral extent and limits of its operation, and the kinds of relief which it furnishes. A correct notion concerning this fundamental theory is necessary to any proper understanding of the practical rules which flow from it. It is sometimes said, in the most unlimited terms, that a purchase for a valuable consideration and without notice of any kind of interest is a defense under all circumstances, which constitutes a complete absolute bar to every proceeding in which it is sought to establish any species of adverse claim, legal or equitable, or to obtain any species of relief. There are dicta of the ablest judges, which, taken literally, without limitation, would go far to sustain this view. These citations well show how misleading general statements may be when separated from their context. Such modes of declaring the doctrine plainly need some limitation and restriction. Taken in their literal and unqualified form, they are opposed to conclusions established by an overwhelming weight of judicial authority, and to the settled practice of the courts of equity."

Sec. 738. "Equitable Origin, Nature and Operation of the Doctrine.—The protection given to the bona fide purchaser had its origin exclusively in equity, and is based entirely upon the fact that the jurisdiction of equity is ancillary and supplemental to that of the law, and upon the conception that a Court of Chancery acts solely upon the conscience of litigant parties, by compelling the defendant to do what, and only what, in foro conscientiae he is bound to do. If the relations between the two contestants standing before the Court of Chancery are such that, in equity and good conscience, the plantiff ought to obtain the aid which he asks, and the defendant ought to do or suffer what is demanded of him, then the court will interfere and grant the relief; if the relations are not of this character, then the court will withhold its hand, and will leave the parties to the operation of strict legal rules, and to the remedies conferred by the legal tribunals. All equitable principles and doctrines and their origin in this conception, however much it may sometimes be overlooked by courts at present in the administration of the doctrines which

have been thus established. The protection given to the bona fide purchaser simply means, therefore, that from the relations subsisting between the two parties, especially that which is involved in the innocent position of the purchaser, equity refuses to interfere and to aid the plaintiff in what he is seeking to obtain, because it would be unconscientious and inequitable to do so, and the parties must be left to their pure legal rights, liabilities and remedies; the court will not aid either against the other. That this is the true rationale is shown by an overwhelming weight of authority. In the vast majority of cases the protection is only given to a defendant, and as a consequence the doctrine itself is commonly spoken of, and ordinarily treated, as essentially a matter of defense. The very few instances in which affirmative relief is granted to the bona fide purchaser are exceptional; they rest upon their special facts, and arise from the fraud of the defendant against whom the relief is awarded."

Sec. 739. "The Doctrine is not a Rule of Property or of Title.—In applying the doctrine of bona fide purchase—and this is the very essence of the doctrine—equity does not intend to pass upon and decide the merits of the two litigant parties; it does not decide that the title of the defendant is valid; and therefore intrinsically the better and superior to that of the plaintiff. On the contrary, the protection given by way of defense theoretically assumes that the title of the purchaser is really defective as against that of his opponent; at all events, the court of equity wholly ignores the question of validity, declines to examine into the intrinsic merits of the two claims, and bases its action upon entirely different considerations. If a plaintiff holding some equitable interest of right, sues to enforce it against a defendant who has in good faith obtained the legal estate, the court simply refuses to interfere and do an unconscientious act by depriving him of the advantage accompanying such an innocent acquisition of the legal title. On the other hand, if the plaintiff is the legal owner, and sues to obtain some equitable relief against a defendant who is the innocent holder of some equitable estate or interest, the court in like manner simply refuses to do

an unconscientious act by giving any aid to the plaintiff, but, without at all deciding or even examining the intrinsic merits of their claims, leaves him to whatever rights would be recognized and whatever reliefs granted by a court of law. It is thus seen that the doctrine of bona fide purchaser as administered by equity is not in any sense a rule of property. Whenever the relations between the litigants are of such a nature, and the suit is of such a kind, that a court of equity is called upon to decide, and must decide, the merits of the controversy, and determine the validity and sufficiency of the opposing titles or claims, then it does not admit the defense of bona fide purchase as effectual and conclusive. The foregoing description shows that it is wholly unwarranted by the settled principles of equity for a court to sustain and enforce the subsequent legal estate acquired by A in any kind of property or thing in action, merely because he is a bona fide purchaser for a valuable consideration without notice, against the prior legal and equally innocent owner, B, or even to sustain A's defense as a bona fide purchaser in a suit brought by B."

Section 740 reads, in part, as follows:

"There are numerous cases, early and recent, English and American, in which the defense has been permitted to prevail in favor of one holding a mere equitable interest against a plaintiff suing for some equitable relief upon his legal title, sometimes even when such plaintiff was in possession, and this conclusion must be regarded as settled by the great weight of authority. In some of these cases, the judicial expressions of opinion have been so broad and unlimited, that, taken literally, they would allow the protection of bona fide purchase by way of defense to one having only an equitable interest, in every kind of suit brought to obtain any species of relief, and against any plaintiff, whether holding a legal or an equitable estate. (6) Relying upon these dicta, some writers and judges have announced the doctrine in a form wholly unlimited and universal."

Note 6 to the above section reads in part, as follows:

"In Colyer vs. Finch, 5 H. L. Cas., 905, 921, LORD CHANCELLOR CRANWORTH said: 'The principle on which the court protects a purchaser for valuable consideration without notice is wholly regardless of what estate he has. It may be that he has not the legal estate, but that will be quite unimportant as to a court of equity interfering or refusing to interfere. His equity depends on this, that he stands equitably in at least as favorable a position as his opponent, and therefore the court will not interfere against him.' This language, especially of Lord Cranworth, has been relied upon as sustaining the doctrine in the broadest manner, that bona fide purchasers of mere equities will always be protected. And yet the chancellor and House of Lords decided in that very case that the defendant before them, who held an equitable interest, could not maintain the defense of a bona fide purchase against the plaintiff who had the legal estate."

Sec. 741. "When the Doctrine Does not Apply.—Such a method of statement is clearly inaccurate. Notwithstanding the numerous authorities referred to in the preceding paragraph, and the sweeping expressions of judicial opinion, it is certain that the doctrine is subject to limitation; it is settled that in some classes of suits a defendant having only an equitable interest cannot be protected by his position as a bona fide purchaser. Thus in an action for foreclosure brought by a prior legal mortgagee, holding of course the legal estate, against a subsequent equitable mortgagee, the fact that the latter acquired his equitable interest in good faith for a valuable consideration and without notice is no defense. It is also a well established and even familiar rule that in the numerous cases between the holders of successive and equal equities, where the holder of a prior equitable interest is seeking to establish or enforce his right, the defense of bona fide purchase will not avail for the holder of a subsequent equity against whom the suit is brought."

Sec. 742. "Phillips vs. Phillips.—Formula of Lord Westbury.—Amidst this apparent conflict and real uncertainty, various judges had attempted to find a

mode of reconcilement, and to formulate a rule which should furnish a universal criterion. It remained, however, for Lord Westbury to bring order out of the confusion, and by his remarkable grasp of principles and wonderful power of generalization to reduce the doctrine into a universal formula, so accurate and comprehensive that it has been taken by most subsequent text-writers as the basis of their discussions, and has been accepted by subsequent judges almost without exception. This formula groups the cases in which the protection of a bona fide purchaser is given to defendants into the three following classes: 1. Where an application is made to the *auxiliary jurisdiction of the court* by the possession of a legal title, as against a purchaser for value without notice, a court of equity gives no assistance to the legal title. The term 'auxiliary jurisdiction' is here used in a sense somewhat broader than that commonly given to it by text-writers. To this first rule there are, however, certain most important exceptions. It does not apply in suits in which the court exercises a legal jurisdiction concurrently with courts of law, nor to suits in which the court gives to a holder of the legal title some equitable remedy belonging to its exclusive general jurisdiction. 2. Where the plaintiff, holding an equitable estate or interest, is seeking to enforce it against a purchaser of the legal title, including those cases where there are several successive purchasers or encumbrancers, all equitable, and the defendant who is later in time has obtained an outstanding legal estate, or some other legal advantage, often called the 'tabula in naufragio.' 3. Where the plaintiff is seeking to enforce some 'equity' as distinguished from an equitable estate, as the reformation of a deed on account of mistake, or the setting it aside on the ground of fraud."

Sec. 743. "Summary of Conclusions.—The following conclusions must be drawn from the foregoing discussion: Wherever one or the other of the parties has a legal estate over which a court of law can exercise jurisdiction, then in an equity suit between them, as a general rule, the defense of a bona fide purchase for valuable consideration will avail as against the plain-

tiff, whether he has a legal or an equitable estate, in either case the court of equity simply withholding its hand and remitting the parties to a court of law. If the plaintiff has a legal estate, he is left to the remedies which a court of law can give, without any aid from equity; if the defendant has a legal estate, the court does not deprive him, even as against a plaintiff clothed with an equitable interest, of the advantage which the law confers upon the holder of such estate, and which it secures through the instrumentality of a legal tribunal. If the suit concerns legal interests, and is one of which a court of equity has jurisdiction concurrently with the courts of law, the defense will not avail. For even stronger reasons must this be true where the suit belongs to the exclusive general jurisdiction of equity, and not only is the defendant's interest equitable, but the plaintiff's right or remedy is also equitable, and must be administered, if at all, by a court of equity. Bearing in mind, that independently of statute, the doctrine of protection to a bona fide purchaser is confined to court of equity, and the most important truth that it is in no respect a rule of property, but merely a rule of inaction, these conclusions are seen to be equally plain and just."

These quotations are pertinent to this case, because the contest on this bill of review arises as if it were being originally tried, with the exception that the effect of the newly discovered evidence only is in question, and because in the original case there was no issue except as to legal titles. The original complainant had no title except by grant from the State of Tennessee, and the defendants had no title except by grant from the State of North Carolina, or by adverse possession.

In Louisiana vs. Mississippi, 202 U. S., page 1, the Supreme Court of the United States, commencing at the bottom of page 53, says:

"The question is one of boundary, and this court has many times held that, as between the states of the

Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive, whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both."

Citing,

Virginia vs. Tennessee, 148 U. S., 503.
Indiana vs. Kentucky, 136 U. S., 479.
Missouri vs. Kentucky, 11 Wall., 395.
Rhode Island vs. Massachusetts, 4 How., 591.

In the case of Moore vs. McGuire, 205 U. S., 214, at page 220, where the question was between private parties as to a boundary, the court says:

"In view of these conditions (to wit, the exercise of dominion by one state), there may be a doubt whether courts should go beyond them in a private controversy, rather than leave it to the State of Mississippi, if dissatisfied, to bring a suit in its own name."

Citing,

Jones vs. United States, 137 U. S., 202.
Foster vs. Neilson, 2 Pet., 253.
Filhiol vs. Torney, 194 U. S., 356.
Bedel vs. Loomis, 11 N. H., 9.
State vs. Dunwell, 3 R. I., 127.
State vs. Wagner, 61 Maine, 178, 184.

See also,

Williams, etc., Bridge Co. vs. Hatch, 125 U. S., 1.

In the case of the State (Chaffee, Com'r) vs. Leander W. Dunwell 3 R. I., 127, the court's opinion is as follows:

"This exception assumes to bring in question the eastern boundary line of this state. Where that line is *de jure* is a political question, with which the courts of the state will not intermeddle. Sufficient for them is it that the state has already claimed jurisdiction

up to and 'along the easterly side or bank' of the Sekonk river, and exercised it in fact. The courts are bound to take cognizance of the boundaries in fact claimed by the state."

The syllabus of this case reads:

"What is the boundary line of the state is a political question, with which the courts will not intermeddle.

"The courts are bound to take cognizance of the boundaries in fact claimed by the state."

In the case of the State of Maine vs. Louis H. F. Wagner, 61 Me., 178, at page 184, the court says:

"Under this condition of things, the presiding judge assumed to decide the question as one of law for the court; and therein we think he did right. Neither the construction of charters or grants, nor the effect of previous acts or jurisdiction as shown by records can be a matter for the jury to determine. The force and effect of charters, grants and records are for the court. Wherever the question of jurisdiction depends upon their construction and effect, it is purely a question of law for the court. And in cases where the political authorities of a state have actually claimed and exercised jurisdiction over particular localities, the doctrine of the law seems to be that the courts are thereby concluded, and have only to declare the fact and conform themselves accordingly without undertaking to pass upon the validity of such claim."

Foster vs. Elam & Neilson, 2 Pet., 254.
State vs. Dunnell, 3 R. I., 127.

The first paragraph of the syllabus in the case of Bedel vs. Loomis, etc., 11 N. H., 9, is as follows:

"Where the Legislature of the state has asserted a right of jurisdiction within certain limits, it is not competent for this court to examine into the matter and circumscribe the jurisdiction by a decision that the boundaries of the state do not extend so far."

In its opinion in this case, the court says:

> "One question which has been made in this case is whether the land described in the deed from the plaintiff was at the time within the limits of this state. Perhaps the limits of the earlier grants might not embrace the territory in question, and the provincial authorities could not have exercised any jurisdiction over it; but upon the revolution and the treaty which followed it, defining the boundary line between the Canadas and the States, this territory was supposed and must be deemed by us to have fallen within the limits of the State of New Hampshire, as the United States have never claimed title to any tract of land lying between this state and Canada; and the state itself, after much investigation upon the subject, asserted a title and jurisdiction in 1820 by a resolution directing the attorney general to proceed against intruders; and again in 1824 by an express declaratory act.
>
> "There has been no pretense of any grant by which the state acquired a title subsequent to the separation from Great Britain, and these acts must be taken and deemed to be an assertion of title and a right of jurisdiction from that period, and the question therefore whether the land is within the limits of the state is here no longer open.
>
> "We can not undertake to limit the jurisdiction which the government has thus asserted, by a decision that the boundaries of the state do not extend so far."

The fourth paragraph of the syllabus of the case of James Foster and Pleasants Elam vs. David Neilson, 2 Pet., 253, reads:

> "In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights; and if they can not adjust their differences peaceably, the right remains with the strongest. The judiciary is not that

> department of the government to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous."

The court must be mindful of the fact that its decree is liable to vest in an alleged innocent purchaser, lands in the State of North Carolina, which are now in controversy, so far as the location of the boundary line is concerned, in the Supreme Court of the United States, as between two states.

When we talk about innocent purchaser, we must not forget the doctrine of equity that where both parties are equally innocent, one can not get any rights by reason of merely being an innocent purchaser. The true principle is this (Pomeroy on Equity Juris., last edition, Section 735):

> "When the original legal owner has done, or omitted something by which it was made possible that his property should come into the hands of a bona fide holder, by an apparently valid title, it may be just to regard him as estopped from asserting his ownership, and thus to protect the subsequent purchaser. But when the prior legal owner is wholly innocent, has done and omitted nothing, it certainly transcends, even if it does not violate the principles of equity to sustain the claims of a subsequent and even a bona fide purchaser."

In other words, an innocent purchaser takes nothing as against a man who is equally innocent, and who neither by act or representation, nor by neglect, has rendered it possible for the subsequent purchaser, who obtains a title and expends his money for it, without notice, to be de-

ceived. Of course, we will go further and say that if the original owner has put it in the power of anybody else to convey an apparently good title, he is cut off as against an innocent purchaser, but as between equally innocent people, there is no exception to the proposition that a person may not convey any more title than he has. The proposition as laid down in the books, for instance in Daniell's Chancery Practice, star page 1577, and the cases cited in note, is not so much one of innocent purchase as it is that a bill of review for newly discovered evidence is within the discretion of the court, and the court will not exercise that discretion if it be unconscionable or inequitable, but it does not become unconscionable or inequitable unless the party complaining has done something, or said something, or been guilty of some neglect or laches. These propositions are evident from an examination of the cases.

In Rector vs. Fitzgerald, 59 Fed. Rep., 808, it is said on page 811 that there is a conflict in the authorities as to whether a voluntary purchaser from a party to a suit, during the period allowed after final judgment or decree to take an appeal or to sue out a writ of error, would be regarded as a purchaser *pendente lite*, and would hold the property subject to the outcome of the litigation. It is also said that there is a conflict of opinion as to whether a person who purchases property from a party to a suit after final decree therein, and within the time limited by law for filing a bill of review is a purchaser *pendente lite*, and is bound by a decree of reversal on a bill of review subsequently filed. It was decided in the affirmative in Earle vs. Couch, 3 Metc. (Ky.), 450, and in Clarey vs. Marshall's Heirs, 4 Dana, 95, 96; but the contrary is held in Ludlow vs. Kidd, 3 Ohio, 541. It is also stated that the decision

in Lee Co. vs. Rogers, 7 Wall., 181, is in harmony with the case last cited, but the case in the 7th Wallace was a case of negotiable bonds and in the case of Presidio County vs. The Noel-Young Company, 212 United States, 58, and many prior cases, it is held that the doctrine of *lis pendens* has no reference whatever to negotiable securities prior to maturity. The distinction is made between the date of maturity and before and after that date, because after maturity a purchaser can not be an innocent purchaser, because he takes it by a rule of law subject to all equities. In the case in the 59th Fed. Reporter, the ground of the decision that an innocent purchaser should be protected, is that the losing party can always guard against risks by sale to an intermediate purchaser, and by proper diligence, so that the question, even in that case, depends upon the losing party exercising diligence to protect himself by the means within his power. In this case, however, the court goes off and decides the case on the ground that there was no reason to change the original decree, even if the question of innocent purchase was out of the case. It will be seen in this case that the real ground of the decision is that an appeal was taken to the Supreme Court and then abandoned, and that the claim to review the case arose from something upon record; that the complainant in the bill of review could not say it was not within his knowledge all along.

Eight suits had been brought by Rector in all of which answers had been filed. Subsequently by stipulation which was made a part of the record in each case, these answers were withdrawn and demurrers filed. These stipulations provided that the result of one case should determine all of them. In one case the demurrer was sustained and

judgment entered, but on appeal, in this case, to the Supreme Court of the U. S. that judgment was reversed. In one of the other cases the demurrer was also sustained in the lower court and judgment entered. In this second case an appeal was taken to the Supreme Court, but abandoned. Thereupon, sometime afterward, the defendant in this second case conveyed the property involved in it and his grantee mortgaged that property and obtained a loan of $5000 on it, from a man by the name of Fitzgerald. Some three years after the judgment and after all of these transactions, Rector filed a bill of review but did not make Fitzgerald a party to it until some four years after he filed it. In this case the reason for the denial of the right to file the bill of review, which was grounded upon the failure of the lower court on motion to set aside the judgment in the second after the reversal of the judgment in the first case by the Supreme Court, was that the stipulation having been made a part of the record and the only error complained of in the bill of review being, that the lower court had misconstrued that stipulation and Rector having abandoned his appeal to the Supreme Court, had so neglected his remedies as to give him no standing as against Fitzgerald.

In Ohio Company vs. Fisher, 115 Fed. Rep., 529, where a son contested a will, and it was set aside and certain trustees were directed to convey the property to the son as heir at law, which they did, and thereafter the son sold all the property, his wife joining in a deed for the purpose of relinquishing her right of dower; it was held that she could not afterwards bring a bill of review because she was estopped.

In the case in the 59th Federal Reporter, *supra*, it is noticed that twice the Court of Appeals of Kentucky have decided against the proposition, but on the other hand it is stated that the Supreme Court of Ohio, in the case of Ludlow vs. Kidd, 3 Ohio Reports, 541, has decided otherwise. We have looked for the grounds upon which the application of the heirs of Ludlow was made but failed to find them; it is back of any report of court proceedings in the State of Ohio, but we may make this comment, that the sole ground for the application seemed to be that there was a statutory allowance made of five years after certain minors became of age, to make application to set aside the decree, without regard to the merits of it.

It is laid down in the books, as heretofore cited, that if it be unconscionable to allow a bill, it will not be done. Our claim is that it can't be unconscionable, unless the applicant is guilty of some neglect, or has said something or done something that has estopped him.

We have examined all the cases that are cited under 2 Daniell's Chancery Practice, 1577, and the first case is Dexter vs. Arnold, 55 Mason, 315; in this case the grounds presented by the petition for review were the discovery of new facts showing that several sums of money had come into the hands of the defendant, belonging to Jonathan Arnold, which were not entered in Thomas Arnold's accounts, nor allowed by the Master, and that several claims made by Thomas Arnold and allowed by the Master, were without foundation and erroneous. The court found in this case (page 319) that the petition for review was utterly defective in the essential ingredients of such a petition, in not stating with exactness the nature of the new evidence, and when it was first discovered, and the court

was of the opinion that the effort made by the bill of review was simply to rehear the case upon the original testimony.

In Thomas vs. Brockenbrough, 10 Wheaton, 146, the court below decided in the original cause that the title to the land in controversy was vested in the heirs of John Harvey, and decreed the appellant to convey the same to them. The court says in the last few lines of its opinion:

> "If Thomas, then, had no title to the land, of what consequence was it to him that the conveyance was decreed to be made to all the complainants in that cause, as being the heirs of Harvey, rather than to two of them, who he alleged were entitled to the land as devisees. If they did not complain of the decree (and that they did not is proved by their plea and demurrer to the bill of review) and if the plaintiff in this bill was not injured by it, the court is at a loss to conceive upon what legal or equitable ground that decree could have been reversed for error growing out of the after discovered evidence. These observations apply equally to the second and third errors assigned."

Wood vs. Mann, 2 Sumner, 316. In this case they held that the court would not open the decree to admit merely cumulative testimony, but that the rule ought to be confined to the discovery of new evidence of a documentary nature.

Hollingsworth vs. McDonald, 2 Har. & J., 230. In this case they held that a bill of review can not be supported for matter existing at the time of the decree and discovered since, without affidavit of such matter and the existence of it at the time of the decree, to lay a foundation for applying to the chancellor for his leave to file a bill of review and obtaining such leave.

In Jenkins vs. Eldredge, 3 Story, 323, the court said:

> "There is no new evidence now offered which in truth, if of any value, ought not to have been originally produced in the cause, and there is none which with ordinary diligence might not in due season have been produced."

In Massey vs. Grant, 3 Md., 41, it is said to authorize a review the evidence must not only be newly discovered, but it must appear that by the use of reasonable diligence, it could not have been discovered. A miscalculation in the amount of the decree by which the defendant is charged with a larger sum than he should be, may be corrected, and the ground of review obviated, by entering a credit for the amount of the unsatisfied decree. Application for leave must present a prima facie case for review.

In Bank vs. Dundas, 10 Ala., 661, there was no ground alleged except error in the finding of the court on the evidence that was before it.

Hughes vs. Jones, 2 Md. Ch. Dec., 289. In this case the court held that any laches or negligence by the party making the application would destroy his title to relief by bill of review.

The syllabus in the case of Harris, Anx., vs. Edmondson et al., 3 Tenn. Ch., 211, reads as follows:

> "The granting of leave to file a bill of review for new matter rests in discretion, and ought not to be granted to the injury of innocent parties; and therefore, where a wife had joined her husband in mortgaging her separate property for his debts, in which mortgage was included certain choses in action of the husband, and in a suit to adjust the equities between the wife and the mortgagee, the latter had been charged with these notes shown to have been collected by her, the court refused to grant leave to the mortgagee to file a bill of review upon subsequently filed

receipts of the husband, showing that the proceeds of these notes had been paid by the mortgagee to him.

"To sustain an application for leave to file a bill of review for new matter, it must appear that it could not have been produced on the former hearing by the exercise of reasonable diligence; but it seems that this rule would be complied with by showing that a personal representative, having no knowledge of the facts, had twice examined the books and papers of the deceased without success, to find evidence on the subject, and afterwards, and after the rendition of the decree, had accidentally fallen upon the evidence in searching among the same papers for another purpose."

In Winchester vs. Winchester, 1st Head (Tenn.), at page 485, the court says:

"It is said in regard to the new matter and new proof, by the complainants, that two of them are married women, that they were so at the time of the decree and have since so remained; that the other is an idiot, and has been such since her birth, and that no laches can be imputed to them. Certainly it is always a consideration, where a demand is made after a great lapse of time, that the party making it has been, during the whole time, laboring under a legal disability. Parties in such situations, however, do not in many instances wholly escape the consequences of neglect or inattention on the part of those whose duty it was to protect their interests. We feel fully the difficulty of attempting to eliminate any general principle from the multitude of cases to be found in the books on the subject of laches," etc.

But the case was a case of laches.

In the case of the United States vs. Samperyac et al., 27 Fed. Cases, page 932 (Hempstead, 118), No. 16216a, the syllabus reads:

"1. It rests in the sound discretion of the chancellor to award a feigned issue, or not; and it is done

to enable him to obtain additional facts and to arrive at a satisfactory conclusion on the facts of the case.

"2. The verdict of the jury on a feigned issue is not conclusive, for the chancellor may have tried again and again, and may even decree against a verdict.

"3. Where there is sufficient proof to enable the chancellor to decide, the parties should not be subjected to the delay and expense of a trial at law.

"4. The act of May 26, 1824 (4 Stat., 52), confers on this court the powers of a court of chancery, for the purpose of trying the validity of claims mentioned in that act, and a bill of review may be maintained therein.

"5. A bill of review lies either for error in law, appearing on the face of the decree, or for new material matter that has come to light afterwards, and which could not have been used at the time the decree was made.

"6. The bill must be founded on new matter to prove what was before in issue, for a party cannot be entitled to a bill of review on new matter, to prove a title which was not in issue.

"7. Where a fraudulent claim was set up, and sustained by false testimony, the decree may be reversed and annulled, on a bill of review, and no rights can be acquired under such former decree.

"8. When the allegations of a bill are distinct and positive, they are taken as true, without proof, after a decree *pro confesso;* which, in its effect, is like a judgment by *nil dicit* at law.

"9. But where the allegations are so defective or vague, that a precise decree cannot be rendered upon them, proof must necessarily be adduced before a decree can be made.

"10. A refusal to deny, where a party is legally bound to speak, is equivalent to an admission of the charges against him. What is admitted need not be proved.

"11. The general denial of allegations, by one uninformed as to their truth, will not be sufficient to dissolve an injunction.

"12. A bill of review will be barred by the lapse of a reasonable time, after discovery of the new matter; but what shall be considered reasonable time depends upon the sound discretion of the chancellor, under all the circumstances of the case.

"13. Fraud deduced from circumstances, may be sufficient to outweigh positive proof to the contrary.

"14. Startling frauds and forgeries proved and commented on.

"15. Judgments and decrees are not assignable at law, so as to vest the legal title in the assignee, and the latter takes only an equitable interest, which is subject to every equity and charge which attached to them in the hands of the assignor.

"16. A purchaser for a valuable consideration, without notice, must be clothed with the legal title and not a mere equity, in order to protect himself.

"17. No one can occupy the attitude of an innocent purchaser, under a forged claim and conveyance.

"18. Construction of the act of Congress of the 8th of May, 1830 (4 Stat., 399), and held not to require the observance of all the technical rules in the ordinary rules of chancery practice on a bill of review under that act.

"19. Almost every law providing a new remedy, affects causes of action existing at the time the law is passed; but such a law is not for that reason invalid. (Cited in brief, Rich vs. Flanders, 39 N. H., 365.)

"20. It is incontestable, that a grantee can convey no better title than he possesses, and hence those who come in under a void grant acquire nothing."

The court, in its opinion in this case, says in part, as follows:

Page 938:

"In the case of a bill of review for new matter recently discovered, no laches or neglect can, we think, be properly imputed to the party filing the bill. It is allowed only on the ground of his ignorance of the existence of the new matter before the former decree; and it is incumbent upon him to file his bill in a reasonable time after the discovery is made; all this is alleged in the present bill. The bill could not be filed within one year after the decree, because the new matter had not then come to light, but was subsequently discovered. If then, laches or neglect are not imputable, has so great a time intervened that it may justly be denominated a stale demand? Two years and four months can scarcely be considered in that light. It would not bar an action of assumpsit upon a parol contract, and cannot be considered an unreasonable delay in bringing a bill of review. In England, twenty years is allowed; and in the case decided in 10 Wheat. (23 U. S.), 146, before cited, five years was allowed.

"We do not think that, to a bill of review for new matter, no lapse of time ought to bar the remedy Upon the principle of repose, we think the lapse of a reasonable time ought to present a bar; what that reasonable time should be considered, and it is well settled to be in the sound discretion of the chancellor, it is unnecessary for us to decide, since we are clearly of opinion that two years and four months is not an unreasonable time for filing a bill of review. Whether the principle settled by the Supreme Court of the United States, in several cases, that laches are not imputable to the government, ought to apply in this case, we need not decide. The second inquiry which arises in this case, and which has been ably argued at the bar, is whether a case is made out for a bill of review according to the established principles of equity."

Page 942:

> "The question arises (of innocent purchase) what effect is this answer entitled to have in the decision of this cause? The defendant, Stewart, in our judgment, does not occupy the attitude of an innocent purchaser without notice, so as to stand on any higher ground than the defendant, Samperyac, himself. The interest which he has purchased in the land decreed by this court, is an equitable and not a legal right.
>
> "It is well settled that a judgment or decree is not assignable at law, so as to vest a legal title in the assignee. The act of Congress of 1824 does not authorize the assignment or transfer of the decree of this court; and, under that act, the land decreed to the claimant could be entered or located only in his name, or in the name of his legal representatives, in case of his death, and the patent could issue only to the claimant or his legal representatives, not to his assignees. Stewart, then, can only be considered as the purchaser of an equity; and it is an established principle, that a purchaser for a valuable consideration without notice, in order to protect himself, must be clothed with the legal title and not a mere equity 2 Brown Ch., 66; 2 Madd., 258; 1 Atk., 571; 3 Atk., 377. The defendant, Stewart, having only an equitable title under the former decree of this court takes it subject to all equities which attached to it in the hands of his assignor. It cannot be asserted that Stewart is a purchaser under the former decree of this court. This can be true only when there has been a judicial sale, in which case the purchaser is protected, though the judgment or decree is erroneous. Upon this ground alone, we think it is obvious that the defendant, Stewart, stands on no other or different ground than the original petitioner, in whose favor the former decree was made."

This case went to the Supreme Court, and is reported in 7 Pet., 241. While it is true that in this case it was found that the conveyance upon which the innocent purchase argument was predicated was forged, yet the court

said, under the fourth proposition considered, commencing at the foot of page 240:

> "The next inquiry is whether the appellant, Stewart, has acquired a right to the land by reason of his standing in the character of a bona fide purchaser. The record contains an admission on the part of the United States that he purchased the grants from John G. Bowie, by deed, for a valuable consideration, in good faith, sometime in November or December of 1828, and the interest of Stewart, whatever it might be, was acquired long after the original decree was entered. He was therefore a stranger to that decree. But Stewart acquired no right whatever under the deed from Bowie, the latter having no interest that he could convey."

> "In the case of Holt's Lessees vs. Wendell, 5 Wheaton, 308, it is said by this court, that on general principles it is incontestible that the grantor can convey no more right than he possesses."

In concluding this branch of the subject and alluding again just for a moment to Ludlow's Heirs vs. Kidd, 3 Ohio, *supra*, it is proper to say that the original of that case seems not to have been reported. The grounds of the original decree are unknown. We know it first as a bill of review, grounded upon a statute allowing minors five years after coming of age to file a bill of review grounded upon the same or any other evidence discoverable—an absolute right to have a re-examination of the original case, but a mere act of grace, which has since been abolished. It may be that such mere act of grace allowed by the law should be so moulded as to suit the chancellor's ideas of the mere abstract of each case. But if we are right upon the facts of this case, it would be a misapplication of the doctrine, assuming that the property was ours, no laches, no act or word on our part, and no neglect of any means

by appeal or otherwise, have contributed to the making of Hebard or his grantees, innocent purchasers.

It will be observed that in each of the cases discussed the unconscionable or inequitable feature was some act of negligence or estoppel or some technical neglect in the allegations of the review papers, or it was some effort to review a case simply on the original evidence or records where the party, with full knowledge, had unduly waited. Whereas, in our case, the property was only wrested from the defendants after every available effort had been made in the fight to keep it, and there was no estoppel or neglect or informality. In allowing the filing of the bill of review in this case, the preliminary questions and particularly the question of diligence in discovering the new testimony are thereby determined.

Kelley Bros. vs. Diamond Drill Co., 142 F., 868.
Dumont vs. Railroad Co., 131 U. S. clx.
Streets Fed. Eq. Prac., Sec. 2866.

so that it can readily be seen that there is nothing that militates against these applicants or that would create any right in an innocent purchaser.

Again, if this decree is upheld, assuming that we are right on the facts, a very curious and anomalous result may be produced. It may turn out that lands situated in North Carolina and belonging to its grantees, have been decreed against their protest and utmost resistance, to grantees of the State of Tennessee, and if the State of North Carolina is successful in its suit, that this has been done by a court utterly devoid of jurisdiction. Until the decree is finally affirmed, it has no binding force as an adjudication of jurisdiction even as to the parties in the case.

We call the attention of the court to the opinions of the Circuit Court of Appeals in passing upon the bill of review in this case. These opinions are found in the record commencing at page 840. The majority of the court affirmed the opinion of the court below in denying the prayer of the bill of review, putting it solely on the ground that the parties having bought the lands in reliance upon the original decree of the court below, it would be inequitable to permit an opening of that decree. On page 844 of the record, the court says: "We rest our decision solely upon this proposition." They therefore do not discuss the pertinency of the newly discovered evidence in locating the boundary line.

On page 846 of the record, there is a very strong dissenting opinion of Severens, Circuit Judge, who discusses every legal proposition that was made, and cites abundant authorities, and among other things, in speaking of the effect of the newly discovered evidence, says this on page 849:

> "The appellees contend vigorously that these documents are not conclusive and still insist that the true line runs over by Hangover Rock. But it is, as I think, a hopeless contest, and my conviction that the map shows the true line is in no wise shaken. What is the result of this conclusion if it is correct? It must be that these lands lie in North Carolina, that the appellees had no title, and that the appellants are the lawful owners of them."

FACTS.

The original case occupies in the record the space up to page 420. Thereafter the case on the bill of review extends to page 760. The remainder of the record consists of proceedings seeking to have the case opened for the purpose of introducing the field notes of William Davenport, one of the original surveyors on the survey of 1821. The maps introduced in the case consist of Hale's map, facing page 754 of the record, labelled "386-A," and following right on is "386-B," a very diminutive copy of the commissioner's map of 1821; "386-C" is another one of Hale's maps; "386-E" is another copy of the map of 1821, and "386-G" and "386-H" are copies of Burns' maps.

We find that the Cession Act, Record, 339, describes the property ceded as being west of a line beginning on the extreme height of the Stone Mountain, at the place where the Virginia line intersects it. Running thence along the extreme height of the said mountain to the place where Wautauga river breaks through it; thence a direct course to the top of the Yellow mountain, where Brights road crosses the same. Thence along the ridge of said mountain between the waters of Doe river and the waters of Rock creek to the place where the road crosses the Iron mountain. From thence along the extreme height of said mountain to where Nolichucky river runs through the same; thence to the top of the Bald mountain. Thence along the extreme height of the said mountain to the painted rock on French Broad river. Thence along the highest ridge of the said mountain to the place where it is

called the Great Iron or Smoky mountain. Thence along the extreme height of the said mountain to the place where it is called Unicoy or Unaka mountain, between the Indian towns of Cowee and Old Chota. Thence along the main ridge of the said mountain to the southern boundary of this state, to wit, the State of North Carolina.

On page 108 of the record is a stipulation as to the use of the act of North Carolina passed in the year 1819, providing for the appointment of the joint commission, and defining the duties of the commission to "settle, run and mark" the boundary line between this state and the State of Tennessee, agreeably to the true intent and meaning of the act of the General Assembly of this state, entitled "An Act for the purpose of ceding to the United States of America certain western lands therein described."

In the second section of that act, it is provided that the state will at all times hereafter ratify and confirm all and whatsoever the said commissioners, or a majority of those of each state, shall do in and touching the premises, and the same shall be binding on this state. And further in Section 3, providing as follows: "And the commissioners on the part of this state shall cause an accurate plan of said boundary line to be made, specifying the course and distances, natural and artificial marks thereof and return the same to the General Assembly of this state."

The third section of the act of Tennessee is in these words: "Be it enacted, that whatsoever the said commissioners or a majority of those of each state, shall do in and touching the premises, shall be binding on this state."

On the 31st day of August, A. D. 1821, the commissioners under their individual names made their report and filed their map, making a report to each state. This re-

port of the State of Tennessee commences on page 466 of the record. The report and map and all other papers connected with this survey that were filed at Raleigh, presumably have been destroyed by a fire which consumed the Capitol there in about 1832 or 1833, and so far as we have been able to find, those particular papers are not in existence.

In making this report on page 466, the Commissioners say that, "We proceeded to ascertain, run and mark the said dividing line, as designated in the 11th Article, called the Declaration of Rights of the Constitution of the State of Tennessee, and in the act of the General Assembly of the State of North Carolina, entitled 'An Act for the purpose of ceding to the United States of America certain western lands therein described,' passed in 1789; which said dividing line as run by us, begins at a stone set up on the north side of the Cataloochee Turnpike Road, marked on the west side Ten. 1821, and on the east side N. C. 1821, running thence a southwestwardly course to the Bald Rock on the summit of the Great Iron or Smoky mountain and continuing southwestwardly on the extreme height thereof to where it strikes the Tennessee river, about 7 miles above the old Indian town of Tallassee, crossing Porters Gap at the distance of twenty-two miles from the beginning; passing Meig's boundary line at thirty-one and a half miles; the Equonettly path at fifty-three miles, and crossing Tennessee river at sixty-five miles from the beginning. From the Tennessee river to the main ridge and along the extreme height of the same to the place where it is called the Unicoy or Unaka mountain, striking the old trading path leading from the valley towns to the Overhill towns, near the head of the west fork

of Tellico river, and at the distance of ninety-three miles from the beginning. Thence along the extreme height of the Unicoy or Unaka mountain to the southwest thereof at the Unicoy or Unaka turnpike road, where a cornerstone is set up marked Ten. on the west side and N. C. on the east side, and where a hickory tree is also marked on the south side Ten. 101 M., and on the north side N. C. 101 M., being 101 miles from our beginning."

This seems to be the only part of the report that it is essential to quote with reference to the line itself, but the report adds: "The said dividing line run by us in its whole length is distinctly marked with two chops and a blaze on each fore and aft tree, and three chops on each side line tree, and mile marked at the end of each mile; agreeably to the plats which accompany this report, and which said plats and reports are certified by us in duplicate, one for each of said states, in the same words, marks and figures."

The act of the General Assembly of North Carolina, passed in the year 1821, confirming the boundary line as run by these commissioners, describes it exactly as it is described in the report, and adding: "The whole distinctly marked with two chops and a blaze on each fore and aft tree, and three chops on each side line tree, and mile marked at the end of each mile."

In considering these acts, under the authority of which the commissioners acted in locating this line, the first thing that strikes one is that at the time the line was so undefined, it was impossible to locate it by the legislative act. If it had not been, there would have hardly been any necessity of a joint commission. There must have been more or less of uncertainty as to where in fact that line

was located. The very fact that a commission was appointed and that both acts provided for the case of a difference of opinion, among the commissioners, shows pretty conclusively that there was, or might arise, a ground for such difference, and secondly, that in cases of such differences, the commissioners were to choose within the general directions and limits and fix where the true line was, and that that difference of opinion might be serious; whereupon it was provided that the majority of the commissioners of both states should settle it, and when it was settled in that way, by both acts, the states had agreed to be bound by it.

It is entirely illogical therefore to argue that these Commissioners had no discretion whatever in the matter; that they were bound to settle the line along the top of some ridge. That they could not leave the ridge even for a temporary purpose in getting to some other point; and that if there was no ridge that was appropriate directly in the line (that Southwestward Line) that then they must hunt one. The rigidity of such an authority would remove all idea of any discretion whatever, even though it might have been an exercise of discretion unanimously, and even something that was necessary, yet they were bound to follow the extreme top of some ridge. That such is the effect of the Acts is manifestly wrong, and much more it is manifestly wrong to claim, not only that the Commissioners were rigidly confined to the extreme height of a ridge, but that it must be such ridge as in the opinion of the surveyors living in the State of Tennessee and employed by the State of Tennessee, was the ridge that they ought to have chosen. We say this last because we think it will appear that the surveyors on the part of the State

of Tennessee followed the original surveyors, the chief of whom was W. D. Hale, who commenced his survey in 1896 for use in the original case, and has been with every subsequent surveyor who has undertaken to run that line on behalf of the State of Tennessee since then and has evidently dominated each surveying party that he was with, and it will be found that he openly avowed that the topography of the country determines the locality of the line in his mind, and that it was so because in his opinion certain ridges were main ridges and the ridge that the Cession Act intended the Commissioners to follow, and which therefore they ought to have followed.

If the legislatures of the respective States had any doubt about the true location of the line and of the ability of the Commissioners to locate it by the mere inspection of the topography of the locality, and if by the law authorizing the joint commission, it is sought to obviate that by empowering a majority of the Commissioners to locate, settle and mark the line, those doubts and that authorization would seem to have been justified by what has been developed by the evidence in this case.

Assuming that all of the expert witnesses are equally honest and equally capable, the difference of opinion that has arisen would indicate that there is ample ground for an honest difference as to which is the main ridge southwest of the Tennessee River and where the Commissioners ought to have located the line, and where the most natural locality of the line would be in the judgment of the Commissioners, reasonably following the requirements of the acts of the assembly. The agreement to ratify and confirm whatever the Commissioners might do in the premises, emphasizes the fact that there was an essential discretion

to a certain extent left to them and their unanimity in adopting the wording "locating, settling and marking the line" shows that there must have been some consideration in the fitness of things, which induced them to locate it where they did, and if we can only locate that line that they did in fact run, then we have the thing that the legislatures ratified and confirmed.

This view of the situation, as foreshadowed in the laws, and the evident purpose of the appointment of the Commissioners, becomes important, because as we proceed it will be found that W. D. Hale, an expert witness for the defendant, who dominated all of the surveys that were made in its behalf, undertook to put his own interpretation upon the Cession Act and Acts providing for the appointment of the Commissioners, and located the line almost entirely from the topography of the country and his own opinion as to which was the main ridge south of the river, and not so much where the Commissioners in fact did locate the line, but where in his opinion they ought to have located the line and endeavored to make everything else conform and be subservient to that opinion of his, formed at the start.

COMMISSIONERS' REPORT.

Looking to the report of the Commissioners of 1821, (Record, 166) and without the aid of any plat or field notes filed with it, we learn in the first place that they assembled at the town of Newport, in the State of Tennessee, on the 16th day of July, A. D. 1821, "to settle, run and mark" the dividing line between the two states from the termination of the line run by McDowell, Vance & Mat-

thews, in the year 1799, to the southern boundary of the said states.

They made their report at Knoxville, on the 31st day of August, 1821, so that a period of about six weeks was occupied by them in getting to and from the localities, making surveys and making the map. This survey is shown further to have commenced about sixty-five miles northeast of the Tennessee river and continued to the southern boundary line of the States of Tennessee and North Carolina, a distance of over one hundred and sixteen miles.

The evidence in the case on both sides shows that that was too short a time to make a strictly accurate survey. The time consumed in getting to the extreme northeast point of the lines and back to Knoxville from the southwest part of the line must have been a week or more.

It would take a week to prepare the map, and making some allowances for Sundays and days when the weather would not permit work to be done, they must have spent on the actual survey considerably less than thirty days. If the time was scant to make one surey, it must have been more inadequate to make two surveys.

The pertinency of this observation will be apparent when we come to discuss the evidence of W. D. Hale. This witness, who is defendant's principal witness, and who dominated apparently all of the surveys made on behalf of the defendant, because he was present with the surveyors and apparently in charge of them at every survey that was made for the defendant. His first survey was made with Muller and Wilson in 1896 or 1897. As we will discover, commencing on the northeast side of the river, when he arrived in proximity to the river, he cast his eye over the territory across the Tennessee river from where he stood

and made up his mind that the Hangover Ridge was the main ridge to the southwest of the river, and that inasmuch as in his opinion the language of the Cession and other Acts confined the Commissioners to the main ridge and rendered them powerless, even for short distances, to leave the crest of the ridge, no matter what consideration may have moved them, he concluded that the Commissioners had no power to go any place else and that therefore in fact they carried the line over Hangover ridge, because they ought to have done so.

He thinks that the Commissioners cast their eyes over the Hangover ridge, while they actually surveyed and marked both the Slick Rock creek part of the line and the Hangover ridge part of the line, nevertheless, they mentally adopted the Hangover ridge as the true state line.

The same claim practically is made with reference to the fixing of the eastern boundary line of the Ocoee land district, which is fixed according to the map of that district at the Slick Rock creek. The excuse made for not going further was that the country was rough, wild and uninhabited and they were also too tired to measure around and survey the Hangover ridge, but that, they just made up their minds it was the dividing line. In other words, in each case the Commissioners in the one case and the Ocoee land district commissioners in the other case, instead of marking the line as it was intended to be located, fixed it in their minds, but made reports and plats diametrically opposed to these secret meetings of their minds.

Referring to the written report, the Commissioners say that they proceeded to ascertain, run and mark the said

dividing line, which they said begins at a stone set up on the north side of the Catalouchee turnpike road and runs thence a southwestwardly course and continues southwestwardly to where it strikes the Tennessee river, crossing Porters gap at the distance of twenty-two miles from the beginning; Meig's boundary line at thirty-one and a half miles; the Equonettly path at fifty-three miles, and crossing Tennessee river at sixty-five miles from the beginning. From the Tennessee river to the main ridge and along the extreme height of the same to the place where it is called Unicoy or Unaka mountain, striking the old trading path leading from the valley towns to the overhill towns, near the head of the west fork of the Tellico river and at the distance of ninety-three miles from the beginning. Thence along the extreme height of the Unicoy or Unaka mountain to the southwest end thereof at the Unicoy or Unaka Turnpike road where a corner stone is set up, being 101 miles from the beginning; thence south two miles and a fraction to a spruce pine on the north bank of the Hiawassee river below the mouth of Cane creek, etc.

Further along, they say, "the said dividing line run by us in its whole length is distinctly marked with two chops and a blaze on each fore and aft tree and three chops on each side line tree, and mile marked at the end of each mile, agreeably to the plats which accompany this report, and which plats and reports are certified by us in duplicate, etc."

We learn further from this report that the Commissioners were apparently in the habit of noticing the gaps and paths and the more prominent streams that had any names. In this connection, we may remark that according to the testimony, on the northeast side of the river

there are streams in close proximity to the undisputed state line which are not mentioned, and, if the line as is claimed goes over the Hangover ridge, there are three deep gaps, to wit, Big Fat gap, Sourwood gap and the Slick Rock gap, which are not mentioned, and two peaks, the Hangover peak and the Hayo peak on the line as claimed by the State of Tennessee, between the Tennessee river and the junction of Hangover ridge and Big Fodderstack, which peaks are, with the exception of the Huckleberry knob, which is not on the state line as claimed by either party, the very highest peaks in that section of the country which are not mentioned. So then it is quite impossible to surmise what rule the Commissioners adopted in mentioning natural objects, and it is wrong to argue that if the Commissioners located the line at a certain place, they would have mentioned this, that or the other natural object which we know to exist, for we are utterly ignorant as to what considerations moved them in determining the importance or non-importance, of mentioning a land mark or monument; and it would be quite consistent to find, especially where some stream had no name, that they had simply called it a creek, or omitted entirely to mention it. For instance, the two peaks mentioned, Hangover and Hayo, were peaks that would stand prominent for all time, and yet, according to the claim of the defendant, the line went right over these two peaks and past the three very deep gaps and not a word is said about any one of them.

There are two portions of this report that we should like to have the court bear in mind. One is with reference to crossing the Tennessee river and from thence to the main ridge. These words would indicate that immediately after

crossing the Tennessee river, they were not on the main ridge, but that they had to go to the main ridge and that that main ridge was a more or less distance (of course we know not exactly how much) from the river, and the pertinency of this will be apparent when we come to show that in the opinion of many competent expert witnesses, not only as to the meaning of that language in surveying parlance, but that on the ground itself, the main ridge commences where the spurs, which are many in number, leading off to the river, going northeast, meet, to-wit, at the point called the Junction; and it will be quite apparent that the ridges which lead from that point toward the Tennessee river, are as numerous almost as the fingers on a hand, and may be likened to such fingers, and that if it is assumed to designate anything from that point to the river as a main ridge, or the main ridge, there would be a very great difference of opinion.

Some very competent witnesses claim that the Big and Little Fodderstack form the main ridge, because they have a greater average bulk and altitude. Others claim that the ridge going northeast leading off toward the right towards the Chcoah river and striking that river, is the main ridge, and it seems to be admitted that it does have greater bulk and average altitude than that ridge which is called the Hangover ridge.

Some witnesses say, with reference to the Hangover ridge itself, that for two or three or four miles southwest of the river it is not capable of being called a main ridge, because from a short distance northeast of the Hangover peak it begins to drop pretty rapidly and drops gradually until it gets to the river, and for the first few miles it is very much broken by gaps.

The next language that we want to call to the particular attention of the court is that part of the Commissioners' report which speaks of their proceeding to ascertain, run and mark the said dividing line, and in the latter part of the report where they say "the said dividing line run by us in its whole length is distinctly marked." So that what we have to hunt for is a marked line, and if we can find that marked line, we have to a very large extent solved the difficulty.

It is not saying too much in this case to say that we are hunting for the line that the Commissioners actually ran and which they set out in their report and the map, and which is the line which was confirmed by the legislatures of the respective states, and it does not answer to look over the country at this day and to pick out where the Commissioners ought to have run the line, and assume that they had no authority to do otherwise and that they actually did run that line so picked out, in the face of abundant and convincing proof to the contrary. If it were otherwise, then this court would be called upon, not to find and re-locate what was actually once located, but at this late date, to make a new location where Mr. Hale and his assistants are of opinion that the line ought to be. With due respect, there is no such question before the court in this case. We are trying to find a line that has already been located, settled and marked, and with that object in view, we will examine the evidence and see whether there is sufficient to enable the court to decide that issue.

On the facts, I call the attention of the court to the fact that at the original hearing of this case, the complainant's expert witnesses were Hale, Muller and Wilson, found in

the record of the original case, commencing at page 57, and running to page 92. Hale was examined again (see page 141), and again Hale and Wilson and Muller were re-examined (pages 181 to 226).

Hale commenced about four miles northeast of the river, and after he had located the line, as he thought, and trying to locate it on the south side of the river, he says:

> "I first examined the spurs of the Hangover ridge where they bluff off to the river, because the butt of that ridge is directly opposite the butt of the ridge on which I found the state line marks north of the river."

He says he was governed to a great extent by the topography of the country south of the river, and located it over the Hangover, because it was the highest and most prominent ridge, and by taking the other line you would have to go northwest down the river about a half mile, and from there nearly due west more than three miles, which means to the Little Fodderstack. The first tree that he found marked at all like the state line on the Hangover was one mile from the river, and there were only two on that line that were discovered with anything like state line marks from the river down to the junction with the Fodderstack, a distance of eight miles.

The other testimony agrees substantially with this; and on page 72, he says that in locating the Hangover lead, the running of his lines did not affect his location at all, but that he relied on the commissioners' report and the topography.

On page 78, he says that all of the marks that he observed on the Hangover lead might have been made to indicate North Carolina corners or mere trails.

Muller, on page 81, corresponds with this, and on page 97 he says, the topography of the country determined his selection of that lead. On page 84, he says the Hangover ridge or lead is undoubtedly the main ridge in that section of the country. Going north, he says, in the direction we were going, the Stratton Bald, the Hao or Christies peak and the Hangover are all connected by narrow leading ridges. He says: "From the Hangover, tending a little more west, this ridge gradually descends to the river, having but few gaps, mostly high until it bluffs at the river gorge."

Wilson, on page 87, testifies about in the same manner He says:

> "The first ridge that we ran after crossing to the south side of the river was the ridge dividing the waters of Slick Rock creek—leading directly up to the Hangover mountain. This ridge butts off at the river immediately opposite where the state line strikes the river on the north side—and the natural supposition would be that the state line would go straight across the river."
>
> "From the Tennessee river this ridge rises sharply for some forty to sixty chains; then comes small knobs, small gaps and level places, until we reach the gap called Slick Rock gap. Then the ridge rises fast with only a small gap or two, until we come to Big Fat gap, the only really deep depression in said ridge. From Big Fat gap it rises sharply again without hardly an intermission until it tops the Big Hangover, one of the highest points in this section. The course of this ridge is southwestern, and agrees well with the course of the state line on the north side of the river."
>
> "The highest and most prominent ridge or mountain in this section is the ridge or mountain from the Hangover to the Stratton Bald—and no other surrounding ridge corresponds as well in course with the Hangover, as the one we first run up from the river."

On pages 90 and 91, he says:

> "Starting at the point they diverge, the Hangover lead runs north of east to the Hangover peak, say three to three and one-half miles; there it turns nearly north, and for a mile curves a little west of north and then more eastwardly until it strikes the river, directly opposite where the state line comes to the said river."

The witnesses for the defendants were Hayes (page 109) and Bogle (page 128). It is needless to say that these two testified that the Slick Rock line is the true one, and on that line testified of finding forty-one state line trees, and three on the other, and Hayes, on page 120, states that the Fodderstack ridge is a higher average until you get on to the Hangover, and on page 125, he describes the different divisions of the Hangover, and describes one of these between the Little Santeetla creek and Deep creek, which runs to the Cheoah, as the main ridge.

Bogle says, on page 134, that the east line of the Ocoee district in Monroe county, corresponds with the line as run by him. And on page 136, that the sixty-five miles called for by the survey of 1821, require you to go to the mouth of Slick Rock and on page 140, he gives us his opinion that the main ridge spoken of in the report and statutes begins at the junction of Hangover and Big Fodderstack, and adds, "If the Hangover lead was the main ridge, you would be at it when you crossed the river."

On page 160, Hyde says: "In running the Hangover lead from river to junction with Fodderstack lead, we went through some very rich gaps and found many very large trees, poplar, chestnut, oak, mountain oak and chestnut and various other kinds—some of them were very large;

some three or four feet in diameter. Some of them at the top of the ridge; many of them from two to ten feet from the top, but many of them were marked."

Carver, a surveyor, agrees with Hyde, Hayes and Bogle.

Testimony of W. D. Hale on bill of review. This gentleman was one of the surveyors who testified in the original

Record 549 case. This question was asked:

"Crossing the river and taking this newly discovered map as your guide, is it possible to locate the line up Slick Rock creek? A. No.

"Please explain why. A. Why, crossing the river at right angles, as indicated by the map, you would be half a mile east of Slick Rock creek, and taking the bearings as near as can be ascertained from this map, and following them, and you will be crossing back and forth across the ridges and foothills and not be on Slick Rock creek and except in one or two places you won't approach Slick Rock creek any less than a quarter of a mile.

"Q. This map shows that the commissioners crossed the river at or near the mouth of some stream. Please state whether it is possible from your previous experience in surveying, for that to be Slick Rock creek? A. No. Following the track of the commissioners to the river, and then following the course of the map, as indicated, you would be entirely east of Slick Rock creek and half a mile east, while the creek on that is shown on the east side of the line instead of the line on the east side of the creek. In my opinion that is only a sketch map and have sketched Cheoah river on that Slick Rock creek.

Record 550 "Q. Now, you give it as your opinion that the commissioners indicated that stream as Cheoah river. please explain your reasons for thinking so. A. The track of the commissioners of the marked trees show that they struck the river fully one-half mile east of Slick Rock creek. Cheoah river is the first stream of any size east of the line—it is about one mile east of the line—and is the stream that would naturally show on the east side of that line. And the description in

the Cession Act of the state line from the Tennessee river to the main ridge would naturally take the commissioners from the river direct from the point at which they struck it and crossed it, up the ridge, that is east of Slick Rock creek and west of the Cheoah river."

He then goes on to say that there is a spur from what he calls the main ridge that terminates at the mouth of the Cheoah river, a very prominent spur. But he says that from the point at which the state line leaves this ridge that leads off towards the Cheoah river, the one leading towards the mouth of the Cheoah river is the main ridge for a considerable distance, the marked state line dropping down off of the main ridge on a minor ridge. Record 550

It must be borne in mind on what he calls in this the "marked state line," and in his testimony previously given, the first mark that he meets on the south of the river, the sourwood tree, is at or before this ridge that reaches the mouth of the Cheoah river, leaves Hangover coming north, and the next question indicates that this ridge leading towards the mouth of the Cheoah river is the main ridge, and that it leaves the Hangover ridge at or near Sourwood gap, about a mile from the river. On the north side of the river, he then explains, there is a spur leading to the Tennessee river from the Smoky mountain, reaching the river at a point about opposite the mouth of the Cheoah river, and then he is asked this question:

"State whether or not these two spurs, the one on the north side and the one on the south side would be as convenient or more convenient than any other spurs, if parties were strangers to the country and were trying to cross the river and reach the ridge on the opposite side; to follow, I mean." Record 551

He answers:

Record 551

"In some respects it would be more convenient, because the parties can cross the Tennessee river at the mouth of the Cheoah, and they could not farther down."

He is then asked this question:

Record 551

"The state line both on the north and south side of the river on this newly discovered map, shows a shading on the left-hand side as they are going southwest. Please state what that shading indicates to you as a surveyor. A. It would indicate that the slope of the ridge was on the side where the shading is.

"Q. State whether or not it indicates that they were on a ridge? A. They were on the ridge, or the slope would not be on that side."

And states his understanding is that they were on top of the ridge.

Record 552

"Q. Examine the map carefully near the mouth of the stream or the creek marked 'Creek' on the map, and state whether it shows that it flows directly up the stream or whether it angles off from it, giving your answer from your knowledge and experience as a surveyor."

He answers:

Record 552

"It appears for little more than half a mile the line follows close to the stream. It then turns at an angle of about sixty degrees to the right or westward and runs something like one-eighth of a mile; then turns at an angle of about somewhere from seventy-five to ninety degrees to the left or eastward and runs about one-eighth of a mile, possibly a little more. It then turns at an angle to the right of about sixty degrees and runs about one-eighth of a mile, leaving the creek. It then turns at a very slight angle, possibly ten degrees more to the right or westward, and runs another one-eighth of a mile, getting still farther from the

creek; it then turns at an angle of about sixty degrees to the left or eastward and runs something like one-eighth of a mile—

"Q. That is as far as my question would carry you — A. About parallel to the creek. This brings it to what appears to be the crest of the ridge, there being etching on both sides and sloping both ways."

He then goes on to state that there is no ridge in the neighborhood of Slick Rock creek that would answer the bearings of this map. He then describes the Little Fodderstack and the Big Fodderstack. This question is then put: Record 552

"State whether or not that ridge extending from near the mouth of Slick Rock creek westwardly to Stiff Knee can possibly conform to the line as indicated on the newly discovered map. A. No.

"Q. Why? A. Because the angles and distances of that newly-discovered map won't follow the ridge or anywhere near the crest of the ridge."

He then goes on to show that it is not possible for the newly-discovered map to conform to certain spurs that he mentions, and as his reason, says the line on that map does not run in the right direction, either for the general course or for any of the angles that would extend the distance shown by that ridge. He then claims that Burns' map shows that the state line strikes the river about half a mile above Slick Rock creek. This question, in part, was then put to him: Record 553

"Is there anything on the newly-discovered map to show that by any possible means the line as projected upon said newly-discovered map followed Slick Rock creek as indicated upon that map?" Record 553

His answer is:

> "I don't see anything on it that would show that that is called Slick Rock creek, or any other creek.
>
> "This map very clearly shows to me that within a mile and a half from the river they were on the crest of a ridge and followed the crest of the ridge somewhere, I don't know where."

He then says:

Record 563

> "The map is so inaccurate, the scale so small, no names given to the mountains or streams, that I wouldn't know how to follow the line by that map. And beyond what I know of the line the map is confusing even where the line is undisputed and misleading."

Record 554

> "Q. State whether or not the general course of the contour of the map showing the southwesterly course is approximately correct. A. Approximately it is. As a sketch map to show that they followed the crest of a ridge and across streams, it would be a correct map for that purpose. But as for showing what ridge they followed or where they crossed streams, the map is not worth the paper it is on."

Testimony of O. W. Muller, who was also a witness on the original hearing. He says the map (speaking of the map of 1821) indicates that the state line runs on top of the ridge from the shading and indicates that it crosses the river at right angles, and he could not locate that line on top of a ridge in that country the way it is sketched here on that map. He then gives some of the distances as shown on the map of 1821, and says:

Record 558

> "We tried to fit the courses and the map on the ridges there, but could not succeed. We could not find anything to fit it."

He says it is not possible to lay the bearings and distances shown on the map of 1821 down on any of those

ridges, and it is not possible to locate the line as shown by the map with reference to any particular ridge in that locality. And furthermore, it is not possible to fit the streams and the ridges in the locality of Slick Rock creek from that map, and he thinks also that the stream laid down there is the Cheoah river a mile and a quarter or a mile and a half above where the line strikes the river at the spruce pine, according to his statement; and he speaks also of the ridge on the north side of the river leading down towards the Cheoah river and a ridge starting at or near the mouth of the Cheoah river on the south side, and joining with the Hangover, and that persons coming through the country who were not familiar with it would be apt to follow the spur leading down to the mouth of the Cheoah river, and that he first thought that was what was done, that he took the left-hand spur running down to the river as the most prominent spur running down to the river, about 1900 feet north of the Tennessee, and showing why persons naturally follow that course. He says: Record 559 Record 560 Record 560

> "They are equally accessible. Those spurs are all tolerably rough, but they are about equally accessible and what determines one that is unacquainted and is hunting the line would be the height of the ridges as showing the main ridge." Record 560

Then this question was put to him:

> "Are those ridges in that particular locality the highest? A. Well, the most prominent ridge you see from the north side of the river is the Hangover lead. Record 560
>
> "Q. I am speaking of the spur that leads down to the mouth of the Cheoah river. A. Certainly.
>
> "Q. The question I want you to answer, Mr. Muller is: Taking strangers who are in that neighborhood and desiring to cross the river, where would be the most convenient, accessible place following the

ridges and taking the river itself, the topography of the country, to get from one side of the river to the other and then reach the main ridge? A. You would have to cross the river just below the mouth of the Cheoah.

"Q. Is there a ridge running down to that point from the north side? A. Yes, sir.

"Q. State whether there is a ridge running from near that point on the south to the Hangover head. A. Yes, sir."

Then this question was put:

Record 561

"Is it possible to take the newly discovered map and locate the line up Slick Rock creek, as they have it on that map, and if not, please state why? A. It is not possible, because it makes a gap here of half a mile that is not accounted for."

And further says that the indications on that map are that they had taken the crest of the mountain just as quick as it could leave the river.

It is shown on cross-examination that the Cheoah river was not visible from a point on the north side and a half

Record 580

or three-quarters of a mile back from the Tennessee river, where the undisputed state line came; and Muiler, on cross-examination, says the highest range there is the Uni-

Record 581

coy, which is what remains of the range after the Big Fodderstack and Hangover unite.

Record 582

"A good many spurs hang down over the river on each side, and the Big Fodderstack is one of the main spurs that runs over the river,"

and that it strikes the river near the Big Slick Rock, just a little below Slick Rock.

Record 583

"The Hangover is a pretty rough peak, and what gives it the name of Hangover there is a place on top that gives it the name,"

and between that and the river there are quite a number

Record 583

of very bad gaps; a continuous ridge, but has gaps in it,

and the Hangover can be reached by a good many spurs starting at the river, and between the Slick Rock and the so-called state line there is a pretty high ridge that strikes the Fodderstack, none of which were shown on the map prepared by him and Hale, because they were not surveyed. It is not customary to survey and plat every spur. Also, that whatever the map of 1821 shows, it does show that it crosses the Tennessee river at some stream, and it does not show that it crosses at any bluff one-half mile above Slick Rock, as testified to in the former hearing. And the whole bank of the river he says is steep and bluffy, although at the previous hearing it was spoken of as it seemed that the river had just cut through the mountain where they said the state line crossed, and their original map contained no survey or plat whatever of the Cheoah river or the spurs in that neighborhood, and that they made their original survey solely on the ground that they picked out the Hangover ridge as the main ridge and he thinks the map of 1821 very inconsistent, because the commissioners reached the river half a mile above Slick Rock, and they would have to go backwards to get to the mouth. He then attempts to show that the map could not even be tested as to the course and distances much less as to the angles. He also says if the map is correct, it shows that the line crossed at the Cheoah river, but he does not so regard the map, but by taking pains, he could ascertain the bearings on the map.

Record 584

Record 585-7

Record 586

Record 586-8

Record 589

W. D. Hale, on further cross-examination, testified and said they took the bearings and distances from the map about twelve miles south of the river, but he did not take the general bearings, but took each particular course as shown on the map separate and by itself; that for the first

Record 597

seven miles as shown by the map, south of the river, the bearing is 44¼ west, and the next three miles south 20 degrees east, and from his own map from the river to Hangover is south 8 west, to the junction south 60 west, and these lines are put on to the map of 1821. That the map indicates that the commissioners went directly across the river at the point where they reached it. He also says that the whole river front is bluffs. This question was put to him:

Record 602

> "Taking the calls, as reported by the commissioners and this map and speaking from your knowledge and experience as a surveyor, where did those commissioners locate that state line? A. On Slick Rock lead; no, on Hangover lead."

On recross examination, he was asked this:

Record 603

> "You say there is no stream, where the line crosses the Tennessee, corresponding to the stream marked 'Creek' on the map of 1821. When you say where the line crosses the river, do you mean where it crosses it on that map, or where you testified it crossed just opposite the bluff of Hangover ridge? A. I mean at the point on the south side of the river opposite the marks of the state line on the north bank of the river.
>
> "Q. As shown on the map of 1821? A. As shown on the ground."

The creek there and the Cheoah river are about a mile and a half to a mile and three-quarters apart.

Record 4.8

Testimony of D. B. Burns. This witness, after stating his qualifications as an engineer and employments in which he has been engaged, says that he has been located as a practicing engineer in Knoxville since February 1, 1908, and that he surveyed the state line between North Carolina and Tennessee for the purpose of testifying in

this case, spending about three weeks on the ground and two weeks in making up the maps; that he commenced about three and one-half miles north of the Little Tennessee river and ended at the junction of the Hangover and Fodderstack leads; that he had the map of 1821 with him, and he was governed by this map in the general courses and directions, and then in detail governed by the marks. He made his survey with a transit, which he says is much more accurate than a compass, and described generally how he proceeded at some length, over the whole course of his survey. He says:

Record 479-80 Exhibit A

> "That red line on Exhibit 'B' indicates the transit line which I ran. You see going up Slick Rock creek here I deviate just slightly from the creek, cutting off some of the sharp bends, but in every instance locating the creek by measuring an offset line. It is clear to my mind that the creek is meant for the state line; where I deviated from the creek the state line should follow around the creek. The red line just indicates where I ran while the creek indicates the state line where I believe it to be."

Record 484

and that the map of 1821 indicates that. He says that on B No. 2 the points A, B, C and D and on B No. 1 the same points are designated by the same letters. The general bearing on B No. 2 is south 70 degrees and 30 minutes west, which was determined from their north point, that is from A to B. That the bearings from A to B on "Exhibit B" is south 74 degrees and 25 minutes west; the bearing from B to C on "Exhibit B No. 2" is south 43 degrees and 25 minutes west; on "Exhibit B" from B to C is south 44 degrees and 28 minutes west, which he states is very close together. From C to D on "Exhibit B No. 2" is south 19 degrees and 15 minutes east, whereas on B it is south 18 degrees and 12 minutes east. These varia-

Record 484

tions are so slight, he does not think there could be any question about the line as being the course in which they ran the line in 1821. The point B is the mouth of Slick Rock creek, right on the Little Tennessee river, right at the mouth of the creek, that is where the state line inter-

Record 484 sects with the river; C is the top of the Big Fodderstack and D is the junction; A is the point 3½ miles north of the river. The only thing in his mind is where the general

Record 485 break in the bearing between A, B and B, C is, and in the map made by him over the same country and that point where that general break commences, takes him on the Big Fodderstack. Coming down north and approaching the Tennessee, river, and following with your eye the general

Record 485 course, you are looking right at the Big Fodderstack southwest, which he says is the main ridge, because it is a greater average height; that in running the map of 1821, it indicates practically a straight line, but on the small

Record 486 scale every little nook and crook could not be indicated. The best way to test it was to take the general course, which is practically a straight line, making right for the Big Fodderstack, and to get there, going up Slick Rock creek; north, the main lead of the Smoky mountain goes

Record 486 right down towards the mouth of Slick Rock creek, but going in a straight line, as indicated by the map, you strike a country which it is impossible to go over, to get a line over it, where the map indicates that it should go;

Record 486 this distance is about a mile, and the only possible way for the commissioners to get there was to go down straight to the river, and down the river, but they were undoubtedly making for the mouth of Slick Rock, which is visible all around the ridge. You can see the mouth of the creek from a point south a mile from the river. They were

forced to go down to the river that way; they were making for the mouth of the creek all the time, but in making their drafting they evidently wanted to go on a straight line from a point about a mile up there on the north side, right to the mouth of Slick Rock creek, over this topography, which they could not do. Then this question, "In other words, you could make a line on paper, but you can't follow it out on the ground?" Answer, "Yes, sir; I think that was their intention." To get over the Hangover, you would have to go to the right from Hangover to the Ball. From the mouth of Slick Rock creek to Hangover is a very decided angle to the left, about 45 degrees. The mileage, according to the mileage circles on the map of 1821 from the Tennessee river to the Big Stack is 6 to 6.6; the distance that we actually got in our survey is 6.6, and the distance from the mouth of Slick Rock to the Ball, as shown by their mileage circles, is 10; we get 9.97. The distance over the Hangover from the river to the Ball is 8.51, and the distance from the Little Stack 11.99, taking the river as a basis. The only one that corresponds to the map of 1821 is the line up Slick Rock to the Big Fodderstack, and thence to the Ball, with a difference of only 3-100 of a mile in 10 miles. It is absolutely impossible that the line could have been run over the Hangover, and altogether inconsistent with the map of 1821, and my red line south of the river corresponds, with scarcely any variation, to that. The distance from Big Fodderstack to the summit of Hangover is 3½ miles. There is no doubt that the creek marked on the map of 1821 is Slick Rock; everybody in the country recognizes that; there is no other creek near there; the government map corresponds with this.

Record 487

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Record 488

Record 488

and the meridians of my map B, and the government sheet correspond. "Exhibit B," prepared by this witness, is four times the scale of the government map; he is acquainted with the government map, has used it and finds that the high peaks are accurate, and the government sheet marks this creek as Slick Rock creek. The map of 1821 and witness' map show the came creek, and there is no doubt that the creek on that map of 1821 is Slick Rock, and taking witness' survey line and placing it on "Exhibit C," government map, it is not possible that the state line could have run either over the Hangover or the Little Fodderstack. The lines indicated by A, B, C and D, are
Record 491 merely test lines. "Exhibit B" and "B No. 2" were merely to test the work after it was completed, in comparison with the map of 1821. They are easily to be picked out from the map of 1821, and the yellow lines on "Exhibit B" are there to compare the map of 1821 with "Exhibit B," and has nothing to do with the red lines. The number of trees on "Exhibit B"—state line trees—are 48; he describes the care with which he located these and blocked them. The general bearings taken off the map of 1821 have nothing whatever to do with the red lines located and shown on "Exhibit B," but the breaks on "Exhibit B No. 2" and on "Exhibit B," correspond at almost exactly the same distances, and give almost the same bearings and the same angles. If point C had been intended to represent Hangover summit, the bearing of the line from B to
Record 493 C would be south 10 degrees and some minutes west. The southwest line north of the river, along the black line, down to the north of the creek, is over country which is
Record 494 so steep and rough, and cliffs in there, that it would be impossible to go over it, unless you had ropes; that the

only way to go down was to go straight to the river and then to the creek; but on paper of course, the line could be made straight, as their map indicates, and there is no doubt in my mind that their intent was to go straight to the mouth of Slick Rock creek. He next describes each tree than he found of the 48, and the marks, and their age, and that he found no marks on the Hangover older than 38 years, and that he examined them carefully. The general bearing from the river to Hangover is 10 degrees and some minutes west of south, whereas the bearing up Slick Rock is 44.28 west and five miles north of the river the bearing is south 74.25 west. When coming down that way, with that bearing, you have the whole Slick Rock basin and the Big Fodderstack standing up right in front of you, and you are going right for the Big Fodderstack and going down the Smoky mountain; the Hangover is way off to the left; standing at the junction of the Fodderstack and Hangover, and going in the direction of the Tennessee river, the Fodderstack range is the main ridge. There are higher points on the Hangover, but the other keeps up its elevation on the average more, and the Hangover ridge, from the Hangover rock to the river is considerably lower down. The line I surveyed is the same southwest course as shown by the map of 1821, and in coming down, in the direction of the survey of 1821, north of the river the Big Fodderstack is the most prominent. The line could not go on the Little Fodderstack and conform to the line of 1821. I ascertained that fact on the first day I was there from a point right opposite the mouth of Slick Rock. In speaking as a civil engineer, so far as the state line was located by the commissioners of 1821, between the Tennessee river and the junction of the Big Fodder-

Record 494

Record 494-8

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Record 501

Record 502-3

Record 504

stack and the Hangover, he has no doubt whatever it was one of the plainest cases he had ever seen, which is clearly proven and shown from "Exhibits B" and "B No. 2." On
Record 505 cross-examination, he says the red lines indicate the meanderings of the river, and the location of the trees down the river. And his red lines indicate the line as shown
Record 505 by the marked trees, but the black line was a straight line, and ends on the south side of the Little Tennessee river, having the same bearing as indicated on the map of 1821, and is produced back until it intersects the ridge indi-
Record 506 cated by the red line, to scale 5800 feet. This straight mile does not correspond with marks which led down to the Tennessee river, but the black line shows the line as indicated on the map of 1821, and the red line indicates
Record 508 where the marks were found. The bearings on the map of 1821 conform almost exactly to the survey indicated by my red line, and the general course of the ridges in my map correspond exactly with every nook and crook and
Record 508 turn in the map of 1821. Just opposite the point on the river where the trees take you is just simply a steep bluff; there are no ridges that lead up to that point on the Hangover. There are often lines run to determine lines at different places where you don't run. For instance, when
Record 510 I got to the Tennessee river I could not take my chain and measure across the river, but I had to take angles and calculate the distance. Very often where people want a line, where they have not access to it on account of bluff topography, it is necessary to run what we call base lines, or triangulation lines. The map of 1821 shows where the
Record 510 state line touches the Tennessee river. Often tentative lines are surveyed and marked and then abandoned. He
Record 511 thinks the river and creek were sketched in. The river is

shown to be one-half mile wide in the map of 1821, where as it is only 300 feet wide. I followed the creek five Record 511
miles to the Big Fodderstack, and then chose the calls
of the Cession Act; that he would mean by the leading Record 512
ridge the one that averaged highest. The Hangover ridge Record 513
is the nearest ridge on the opposite side of the river, but Record 513-14
not the most prominent. There is a bluff there, but he Record 514
would not undertake to climb it. To trace the map of
1821 he would undoubtedly follow Slick Rock creek.
Fodderstack ridges are the most prominent ridges al-
though the Hangover and Hao are 500 feet higher than
the Big Fodderstack. The work, as actually surveyed and Record 516
measured, corresponds surprisingly close to the prominent
points on the map of 1821, but that map is so small that Record 516
each little angle may not be strictly accurate; on the ridge
north looking across, the surveyor would determine his
course before he crossed. Error in regard to the creek Record 517
is that the creek is sketched wrongly.

Libby says it is impossible to go over the Hangover lead Record 520
and fit the map of 1821. He says the creeks and rivers
were probably sketched in, but the results of the compari- Record 522
son between "Exhibit B" and the map of 1821 are remark-
ably accurate. Within 24 hours after we got there we
established in our minds, without a doubt, the line went
up the Big Fodderstack; by laying off the lines A, B, C
and D on the map of 1821, "Exhibit B No. 2," they were Record 522
found to correspond with the same points on "Exhibit B."

Denton made an independent survey, although he was Record 524
out at the same time, and compared results, and his work
conformed practically to theirs, when he got through.
He finds north of the river, marked trees down to a point Record 525
near the bank of the river, at point marked tree 19 on

Record 528

"Exhibit B," which corroborates what was said by the previous witness with regard to state line trees south of the river. North of the river, for the first mile from the river, there were discrepancies between the lines as shown on the map and as marked by the trees; that distance straight to the mouth of Slick Rock was so precipitous that we could not penetrate it by running through on a direct line, and between the marked line on the map of 1821 and the red line on "Exhibit B" coming down north of the river, within a mile of the mouth of Slick Rock creek, they could see the mouth of the creek; and taking the bearing of that point we started towards it, but running against cliffs and gorges they have got there, in the easiest way, marking it as they went; after taking the bearing to the mouth of Slick Rock creek, they drew a straight line on their map from that point to the creek, and apparently abandoned the marked line. He also corroborates what is said about the Fodderstack being the main ridge on the south; taking the bearing, the big Fodderstack stands right up before you. The Hangover mountain is not in the same general course, but is off to the left about 3½ miles; leading to the Hangover mountain, the ridge is very much broken. The Big Fodderstack is the most prominent ridge, having the greater average height. The red line on "B" corresponds with the map of 1821 down to a point about a mile north of the river, and then from the mouth of Slick Rock down, but it substantially agrees with the location of the commissioners so far as courses and distances are concerned, except at the one point, but it does not coincide exactly with the way they sketched in the topography. The line as run by the commissioner and shown by "Exhibit B," with the exception

Record 528

Record 528

Record 529

Record 529

Record 530-1

Record 531

of that one mile north of the river, are the same. It could not have possibly been run over the Hangover. Record 532

Denton said the last mark we found down there near the bank of the river on the north side, was on a large spruce pine, marked fore and aft, and in fact, we found marks on one side of it; I believe that was kind of on the east side, and that was near the bank of the Little Tennessee river, and the west side had been blocked. That line did not follow the top of a ridge all the way down the river at all as we traced it by the marks. Record 604

On page 214 of the Record, W. P. Chambers, a witness for the appellants, corroborated Mayfield, and on page 219 says that the Fodderstack lead averages the highest, and Record 608 in looking at the river from the north, Slick Rock creek would be on the right and the Cheoah river on the left; the Cheoah river is a mile and three-quarters or two miles from the point of observation, and the river itself is not visible. On pages 222, 223, 224, 225 and 226 he states generally that he had always, prior to 1882, known the dividing line as on the Slick Rock creek, and never heard anything else; and that it was quite possible to take the map of 1821 and go upon the ground and locate the line. Record 611-615 On pages 226 and 227 he gives some history of the inception of the idea that the Hangover was the line, and that when an attempt was made to get out grants from the State of Tennessee for the ground known as the Slick Rock Basin as unoccupied land, the then Governor of Tennessee refused to sign them, claiming there was no unoccupied land there. (Record, 237.) Record 614-616

Coming to the facts as they now appear: First, the opinion of Clark, judge on the Circuit, and of Lurton,

judge, on appeal, show that the case was one of much doubt, and the force and effect given to the Master's findings, apparently turned the scale. There were two marked lines, Judge Lurton says: The better marked line was the Slick Rock creek line—there were found forty-one state line trees on that between the river and the junction of Hangover and the Fodderstack ridges, and only two, or at most three, on the Hangover line. Our original testimony, and addititional testimony taken on this review, of surveyors, reveals that a careful scrutiny discloses no state line trees at all on the Hangover ridge; that the oldest mark is only thirty-eight years old.

The three points mentioned on page 17 of this brief, coupled with the assumed fact that the commissioners were following the main ridge, perhaps, will be found to be the determining factors in all the findings, and judgments. The factors necessitated the Hangover line as claimed by Hebard to the east of the Slick Rock creek line as claimed by us. The real locus of the contention is stated near the top of page 6.

The state line, down to a point on the Smoky mountain ridge, about a mile northeast of the Tennessee river, seems to be undisputed. From there, owing to the loss of the commissioners' map of 1821, it was claimed, following certain marked trees, that they reached the river at a point opposite a bluff, which, with alternate bluffs and gaps, reaches the Hangover ridge at the Hangover peak, about a mile and a half from the river. The real Hangover ridge, at Hangover peak coming from the south, circles off to the right, and reaches the Tennessee river at the mouth of the Cheoah river a mile and a half to the southeast of where the above mentioned bluff is. Standing north of

the river and looking south, the real main ridge does not commence until you get to the junction of the Hangover and Fodderstack. From that point going north, the Tennessee is approached by numerous spurs or ridges. All the surveyors speak of these ridges and Mayfield, one of our witnesses on the review, speaks of these as like fingers of a hand, bearing the same relation to the main ridge as branches do to the trunk of a tree. (Hale, Record, pages 208 and 209.) Judge Lurton said: "The description of the boundary as run and marked by the commissioners calls for a course from one natural object, the Tennessee river, to another, the Unaka mountain. In the absence of any further description, the line should be run straight from one monument to the other. The first call in the boundary act of both states is 'from the Tennessee river to the main ridge.' There are no words of intermediate description." Now, if we only know where the commissioners struck the Tennessee with their line, the whole thing becomes plain. The Unaka mountain commences at the junction of Hangover and Fodderstack. "From the Tennessee river *to* the main ridge" indicates two separate points, and does not indicate from the Tennessee river *along* the main ridge, showing conclusively that the main ridge and the Unicoy range are identical, just as our new witnesses, and particularly Mayfield say it is, and that the Hangover is only a "finger" and not a main ridge at all. Record 599, 600

The newly discovered map of the commissioners of 1821 shows conclusively how they reached the Tennessee river. It shows conclusively that the line apparently marked by trees to the river, and which strikes the river at a point opposite the bluff, is not the line they mapped and adopted. Ex. 386b & d

Whatever that map may show or not show, one thing is conclusively established by it, and that is that the commissoners did not cross the river with their line at the so-called bluff or series of bluffs leading to the Hangover. This both Hale and Muller, Hebard's old witnesses now reluctantly admit. (See Muller's testimony. Record, pages 190, 191, 192 and 193; Hale, page 213.)

Record 584-6
Record 603-4

The joint commissioners were delegated to "settle run and mark" the line. They reported that they had done those things. They speak of the line as running in a southwestwardly course. From a point five miles north of the river along the crest of Smoky mountain range, the course is south 70 degrees 30 minutes west. When you get to a point about a mile north of the river, the Slick Rock creek and the Fodderstack are right in front of you; you can not see the Hangover without turning to your left, it is south 10 degrees west. When looking at the Hangover, Slick Rock is to your right; the Cheoah to your left about a mile and a half, and is east of south. The line to the mouth of Slick Rock is right on the line south 74 degrees and 25 minutes west, and therefore Slick Rock and Fodderstack are in the line of the general course, and not Hangover. (Burns' testimony, Record, pages 93 and 94; also 81 and 82.)

Record 501-3
Record 492-3

The measurements of Burns' survey of the Slick Rock line and on the map of 1821, show that that line must be the line run by the commissioners, no other is possible. (Burns' page 76.)

Record 488

At this point the difficulty about reaching the river and going back on your tracks along the thread of the Tennessee is cleared up. The ground straight to Slick Rock was utterly inaccessible. A tentative marking of trees to

the river a half a mile up was run, but on paper and on the map as *the* line adopted, a straight line was run to the mouth of the creek. The abnormal situation vanishes. The efforts of Hale and Muller to uphold their former testimony and to degrade the map of 1821 are comical. Opposing counsel by the form of question admit that the map shows that the commissioners crossed the river at the mouth of a stream; it is now sought to show that the stream is the Cheoah river, in a direction east of south a mile and a half to the left. The way for that is prepared by having Hale and Muller say that a very prominent ridge extends to a point on the Tennessee opposite the mouth of the Cheoah, and on the south side another ridge from the mouth of the Cheoah to the Hangover peak—the latter higher than the so-called Hangover ridge from the peak to the river, and that strangers coming close to the river on the state line and finding the river to the so-called bluff opposite impassable, would more conveniently and naturally follow the last named ridges. Muller, however, imparts the information that after getting to the peak, they could take up and adopt the line as running straight across the Tennessee from the bluff just opposite where the marked trees reached the north side, just as they might, and in fact did, mark a straight line to Slick Rock, for the same reason in each case that surveyed lines mapped are not stopped or deflected by impassable territory. Hale (at page 155 of the Record) Record 554
states that the map of 1821 as to the southwesterly course the general course is correct. At page 148 that the scale is so small that only an approximate course and distance Record 548
can be obtained from it. However, on page 152 while criticising the map, he proceeds to give in detail, until Record 552

stopped by counsel, the angles, courses and distances shown by that map; on pages 205 and 206 he gives quite accurately the mileage, courses and angles south of the river to the Unicoy. It it needless to say that these courses and distances starting over the Hangover would never reach the junction of Fodderstack by way of the Hangover.

Record 597

Now, we come to a very important bit of information, ironically speaking, imparted by Hale and Muller. Assuming the very point in controversy, to wit, that the commissioners reached the Tennessee at a point half a mile east of Slick Rock, instead of just west of the mouth of that creek, as the map of 1821 shows, the map can not be made to fit the country south of the river so as to bring it out at the Unicoy—in other words, the map can not be made to fit something it was never intended to fit. That is exactly our claim that the map of 1821 can not be made to fit the line as run by Hale and Muller. (See Hale, Record, pages 149, 150 and 213; Muller, 163 and 164.) Their efforts to locate the line as shown on the map of 1821, or fit it, as they say, on some ridge, are disturbed by their preconceived notions and assumptions persisted in up to now. It is easy enough to run that line as shown by the map from near the mouth of Slick Rock on the river to that other undisputed point, the Unicoy, the two points fixed by the map, over the course fixed on the way over the Big Fodderstack. It seems impossible for Hale and Muller to comprehend that the commissioners, for a part of its course, sketched the Slick Rock inaccurately—drew it too far away from the line; they do see how they might have sketched the Cheoah a mile and a half further east inaccurately and made it come out west of their line, for

Record 549-50, 603, 560-1

there can be no dispute that where the map shows the mouth of the stream called "creek" is west of where Hale and Muller say the commissioners reached the river. Every one of our witnesses say that it is impossible for that creek to be anything but the Slick Rock and gives his reasons. (Burns, Record, page 77; Chambers, page 224; Mayfield, page 242; Cozad, 283 and 291.) The testimony shows that in surveying lines, the line is attempted to be run accurately, but the topography is sketched off-hand, and very little attention is paid to that. It is not the purpose of such a map as a rule, to show topography. Mayfield, one of our witnesses, is entry-taker in Bradley county, says the maps in his charge are quite universally inaccurate in topography, but accurate in the lines run. (Record, 234 and 235.) Mr. Hale, at page 211, was asked this:

Record 489, 612, 613, 627, 663, 669

Record 631-2

Record 602

> "Taking the calls as reported by the commissioners and this map (1821) and speaking from your knowledge and experience as a surveyor, where did those commissioners locate that state line? A. On Slick Rock lead; no, on the Hangover lead."

This indicates to me a psycological fact, to wit: That the witness' mind was intently concentrated on the Slick Rock line, and when unawares the question was put, the mind free from its previous schooling, spoke out. It is like an ejaculation free from contrivance or control like a *res gesta*.

Recurring to the judicial history of the case, we find that the Master, after discussing the point of contact with the Tennessee river, main ridges and the abnormal turning off to Slick Rock comes to the other side and expresses himself dissatisfied with the reasons given by the Tennes-

see state commissioners, who in 1836 surveyed the Ocoee land district and stopped at the Slick Rock line as the state line. It would not have taken a very great stretch of the imagination to have supposed that in 1836 the papers, including map and field notes, were all accessible. Perhaps people were then living who had personal knowledge of the line. After that, conveyances were usually made on both sides, calling for that line. Tradition fixed it. Chambers, one of our present witnesses, who was county surveyor of Monroe county, Tennessee, from 1879 to 1887, never heard of any other line prior to 1882, and he only heard of the other then because he was a "thirder" with two others to survey and claim the other line, and successive governors of Tennessee refused, on McCroskey's entry, to issue warrants until 1892, on the ground that Tennessee had no vacant lands beyond Slick Rock.

Record 610-613, 614, 615

(Chambers, 221, 222, 223 and 224, and on page 226 where "herders" is printed for "thirders"; page 227.)

Judge Clark said, speaking of the case:

> "It is a very close one on the facts, and the equity of the case is rather with the defendants in view of the fact that they obtained their grants earlier (1860), and have been paying taxes upon the property, while the plaintiffs' grant was only recently obtained. If there was a basis for estoppel, or if the doctrine of estoppel could be applied to the State of Tennessee, a different question might arise, growing out of the fact that the state has, through the Ocoee district commissioners, established its line at Slick Rock creek and has sectionalized all of the territory supposed to belong to the state."

Record 369

With deference, it was not so much a question of estoppel. All of these matters were cogent evidence merely of

the location of the line as a fact, and they were very strong evidence.

In closing this brief—taking it for granted that the court would examine the testimony, especially that taken on this bill of rehearing, we want to recommend to the court to read carefully the testimony of D. B. Burns. He is a man of scientific education, no preconceived ideas, who took the map of 1821 and went upon the ground, made his own survey, and has testified at large about the state line as fixed by that new map. Some effort was made to pervert his testimony to show that his red line, as it was laid down on the survey, showed that the commissioners reached the river at some point that Hale said they reached it, whereas in truth, the red lines were mere test lines, and Burns' statement of his black line, and the features generally of the map of 1821, show that the original finding of the court, has no support whatever from his testimony.

I also ask the court to read attentively the testimony of Mr. M. E. Cozad, Record, 279, who, while not a technical surveyor, has had great experience with surveyors and in examining titles and going upon the ground to determine disputed lines. The testimony of Mr. Cozad was taken at my office in the city of Cincinnati on June 17, 1909. I want to call the attention of the court further, to the testimony of J. Newton Peck, taken at the same time, which shows that the option to purchase the lands claimed by them in this case, was taken in November of 1899, eight months before the original case was decided in the Circuit Court of Appeals, and the lands are described as forty-one thousand acres in Monroe county, Tennessee, and evi-

Record 660

Record 646

dently did not include anything except what Mr. Hebard had previously owned there, and that the deed subsequently made was substantially a quitclaim deed, which does not make the vendee an innocent purchaser.

May vs. LeClaire, 11 Wall., 217.
Dickerson vs. Colgrove, 100 U. S., 578.
Baker vs. Humphrey, 101 U. S., 499.
Wrightman vs. Spofford, 56 Iowa, 145.
Hows vs. Butterworth, 62 S. W., 1114.
2 Pomeroy Eq. Juris., 3d Ed., pages 1337-38.

In the Iowa case it is held that the words "bargain and sell" are not inconsistent with its being a quitclaim deed. The case of Hows vs. Butterworth, above mentioned, is a Tennessee case.

I want to call the attention of the court further to the fact that the witness Ogle, in the original case, said that the sixty-five miles from the commencement of the state line, would not reach the Tennessee river at the point claimed by Hale, but would reach it opposite the mouth of Slick Rock creek.

Complainants have founded their bill of review upon the propositions that an instrument signed by the commissioners and the surveyors of the States of Tennessee and North Carolina in 1821 and by them certified to be "a true and correct plat of the dividing line between the said states as settled, run and marked by us," which plat or map could not have been produced at the original hearing of the case, constitutes new and decisive evidence in support of the contention of the defendants in the original case, and that if it had been before the court it would have been decisive in favor of the defendants and would have resulted in a decree in their favor. And complainants pray for a re-

examination of the evidence that was introduced at the former hearing in connection with this newly discovered map and the evidence corroborating the same, for a finding that they are the owners of the land in dispute and that the boundary line between the State of Tennessee and the State or North Carolina is as was claimed by the defendants in the original suit.

The sole question in the original case was as to the true location of that part of the dividing line between the States of Tennessee and North Carolina from the south bank of Little Tennessee river to the junction of the Fodderstack and Hangover ridges southwesterly thereof. This line was run and marked in 1821 by commissioners acting for both states and "the dividing line run and marked by" them was by each state "ratified, confirmed and established as the true boundary line" between them in terms so positive as to make each confirmatory act a Cession Act in so far as the line run and marked by the commissioners was at variance with the original Cession Act of 1789. For example, the commissioners had quite disregarded the last call of the Cession Act of 1789 and had arbitrarily run the line due south from the end of the 101st mile instead of along the main ridge of the mountain to the southern boundary of the state. The Act of North Carolina which ratified, confirmed and established the line run and marked by the commissioners therefore operated also as a further cession to Tennessee of the land lying between the line so run due south and the line running southwesterly along the main ridge of the mountain to the southern line of the state which was called for by the original Cession Act. By these confirmatory acts of both states, the line run and marked by the commissioners was

ratified, confirmed and established as the state line in language which leaves no room for argument as to where the line should have been run. *Both states established the line where the commissioners ran and marked it.*

The commissioners provided three kinds of evidence of the location of the line which they ran and which the states established. The confirmatory act of North Carolina described the manner in which the line had been marked in its whole length on trees, and the report of the commissioners, which was recently found along with the plat or map generally referred to in the pleadings, testimony and briefs as "the map of 1821," concludes with the statement: "The said dividing line run by us in its whole length is distinctly marked with two chops and a blaze on each fore-and-aft tree, and three chops on each side line tree; and mile marked at the end of each mile; agreeably to the plats which accompany this report, and which said plats and reports are certified by us in duplicate, one for each of the said states, in the same words, marks and figures; which we respectfully submit to the governors of the said States of Tennessee and North Carolina." Thus it appears that the commissioners furnished three kinds of evidence of the location of the line:

1. The evidence of the trees marked by them along the line.

2. The evidence of the plat or map, showing the location, direction and length of the line, which they and the surveyors certified to be "a true and correct plat of the dividing line between the said states, as set, run and marked by us;" and

3. The evidence of the report describing the line in general terms and declaring that "the said dividing line run by us in its whole length is distinctly

marked * * * agreeably to the plats which accompany this report."

The commissioners evidently considered these three kinds of evidence sufficient to enable persons competent to understand all three to locate the line. As to the part of the line involved in this case, complainants are satisfied that the evidence of the marked trees, the plat or map, and the report are consistent with each other, corroborative of each other, conclusive in favor of the line up Slick Rock creek, Fodderstack lead and Fodderstack ridge and against any line over Hangover mountain.

But in the original case the court did not have the aid of the evidence furnished by the commissioners' plat, nor of those parts of their report which were not copied into the confirmatory acts. All of this evidence was beyond the reach of the parties and, lacking its guidance, the court fell into conjecture, confusion and error. The defendant showed that there were forty-one (41) trees bearing state line marks, as described by the commissioners, on the line up Slick Rock creek, Fodderstack lead and Fodderstack ridge, which all of the witnesses for defendants testified to be the state line. Only two trees on the line leading to Hangover mountain were ever claimed to bear such marks, and both of these trees were about a mile from the Tennessee river, and of very doubtful character. The opinions of the Master and Judge Clark and Judge Lurton all show clearly that the weight of the evidence of the marked trees was strongly in favor of the line up Slick Rock creek. Against this evidence, however, three objections were made:

(1) The first objection was that, in order to get from the last state line tree on the north side of the

river to the first state line tree at the mouth of Slick Rock creek, it was necessary that the state line follow the river half a mile instead of crossing it directly, and it was argued that if the commissioners had really done so, their report would have mentioned the fact.

(2) The second objection was that the marked line up Slick Rock followed a creek five or six miles, or seven miles (actually five miles), a fact which they insisted would have been mentioned by any surveyor but which not mentioned in the report of the commissioners.

(3) The third objection was that since the Cession Act called for the location of the line along the extreme height of the mountain, the commissioners should not have located it along any creek and, in the absence of strong proof to the contrary, it should be presumed that they did not do so.

In support of the line over Hangover mountain, it was urged that this line crossed the river directly from the "main ridge" north to the river to the "main ridge" south of the river; that it followed along no stream, and that the report of the commissioners described the line as running "from Tennessee river to the main ridge;" and that the line over Hangover was, therefore, not only where the Cession Act required it to be, but also where the report said the commissioners had actually run and marked it. But after all of these objections had been urged and the argument about "extreme height" and "main ridge" pressed to the limit, the evidence of the marked trees on Slick Rock and Fodderstack was so strong as to cause the Master to suggest that the commissioners may have run that line as a "tentative line" which was not finally adopted in the report by them, and to lead Judge Lurton to say: "As this whole region was the habitat of the

Cherokee Indians at the time of this survey, in 1821, it is altogether possible that all of this marking was done by the Indians as mere trail marks, or in a spirit of limitation, though the *stronger probability is that it was tentatively marked and then abandoned for the Hangover line,* as the one indicated by the Cession Act, and the report made accordingly." And this feeling finds expression in the very last paragraph of the opinion of Judge Lurton (p. 69): "There has been, on the evidence in this record, no such long and continued recognition or acquiescence in the tentative line on Slick Rock creek as to justify this court in saying that it has been adopted as the actual line so long as to stand for a definition of the true and ancient boundary. The conclusions and findings of the master upon the principal points in the case are not shown to have been so plainly erroneous as to justify us in overturning his conclusions as to the existence of the marked state-line trees on the Hangover, nor as to the fact that the Hangover was palpably the "main ridge" called for in the commissioners' report and survey.

The case, on the whole, is one not free from doubts engendered by the existence of the marked line on Slick Rock creek and its apparent recognition by the Tennessee surveyor-general as the state line. The result reached by the special master, and confirmed by amost careful and conscientious trial judge, is a result which, on the whole, is most consonant, with the calls in the Cession Act and the subsequent Confirmatory Boundary Acts. The evidence relied upon to deflect the boundary from the line so plainly described by both acts settling the boundary is not so conclusive as to require us to reverse the action of the Circuit Court.

The decree will therefore be affirmed."

But if, along with the evidence of the marked trees on one side and the Hale map on the other, the court had before it the evidence of the commissioners' plat, how would the case have stood?

A single glance at the plat would have disclosed the error of the argument that the commissioners would not have carried the line down the river and up a creek without mentioning those facts in their report. Their plat shows that they did both, and it flatly contradicts the Hale claim that the line went direct on a course nearly due south, from a ridge north of the river to a ridge south of the river. It shows that the line crossed the river on a southwesterly course in such a way that the point where it touched the south bank was fully half a mile west of the point where it left the north bank; that in crossing the river it passed the mouth of a stream marked "Creek"; that the sixty-fifth mile circle was at the mouth of the sixty-fifth mile circle alongside and at the edge of that creek.

A second glance would have shown that the courses of the line on the plat south of the river flatly contradict the course shown on the Hale map in that the commissioners' line ran first southwest nearly seven miles and then southeast a little more than three miles, while the Hale line ran first almost due south and then southwest.

With the commissioners' plat before it, the court could not have fallen into the erroneous opinion that by taking the line over Hangover the commissioners would be "keeping up the previous course." The southwest point on the star showing the points of the compass on the plat shows instantly that the general bearing of the entire line from

Big Pigeon river to Tennessee river is more than south 45 degrees west. From this general course the Hale line deviates sharply on a course of south 8 degrees west, while the line on the plat clearly approximates a course of south 45 degrees west and so comes near to "keeping up the previous course."

The commissioners' plat clearly contradicts the claims that the commissioners did not go down the river half a mile, did not follow any creek, did cross direct from ridge to ridge and did keep up their previous course by taking a line south of the river to Hangover mountain. But the commissioners' plat was made as part of the affirmative evidence of the location of the line. The commissioners and surveyors all certified that it was "a true and correct plat of the dividing line between the said states as settled, run and marked." How does its evidence tally with the other evidence which they left us?

Fair consideration of this plat as evidence requires that we take note of just what its makers intended to show by it, how far they undertook to make the showing accurate and complete, and under what conditions it was made. First of all, we have on the face of the instrument the explicit declaration of the surveyors and commissioners that it is a *correct plat* of a *dividing line*. They certify the correctness of a line but make no claim as to geography or topography. In the next place, they certify it as showing the line which they had settled, run and marked. And, finally, they state in their report that the line was marked its whole length on trees "agreeably to the plats." From their report we know that the entire work of the commissioners was done between July 16, 1821, when they "met at the town of New Port in the State of Tennessee" and

August 31, 1821, when they signed their report at Knoxville, Tennessee. We know that during this period of forty-seven days, of which at least seven must have been Sundays, they traveled in all not less than 240 miles, ascertained, ran and marked a new state line nearly 117 miles in length along the tops of high mountains, across streams and through virgin forests still inhabited by Indians and infested by wild animals and had awaited the completion by the surveyors of the work of platting on paper the line which they had surveyed and marked. Within such a brief space of time and under such conditions, it seems remarkable that the commissioners were able to locate, run and plat such a line. It would be absurd to assume that they had surveyed the country on either side of the line or that they had secured data as to the exact location of the mountains and streams shown on their plat, or that even with such data in hand, there was time to put it on an accurate map of the entire section shown upon the plat. They did not pretend to have done any of these things, and the plat itself was made on a very small scale of two and a half miles to the inch. But they did declare that their plat correctly showed the dividing line which they had settled, run and marked. Does the evidence of the plat *agree* with the evidence of the marked trees?

We say that the agreement is so complete that any competent surveyor; equipped with proper instruments, and furnished with the plat and the report of the commissioners, can locate the line marked by the commissioners either north or south of Tennessee river and that he cannot, without disregarding the plat, locate the first ten miles of the line south of the river anywhere excepting on the line up

Slick Rock and Fodderstack where all of the witnesses for defendants in the original case testified that the state line was located.

The witness, Burns, whose experience, skill and expert qualifications are all amply attested by his map filed as "Exhibit B", the correctness of which has not been questioned in any way, described the manner in which he located the line with no aid or evidence excepting his instruments and the marks, map and report made by the commissioners in 1821. We call the special attention of the court to this "Exhibit B" and to the evidence which Ex. 386h
it furnishes of the method, skill and precision with which a competent surveyor tested the evidence furnished by the commissioners plat by comparison of it with the evidence which the commissioners left on the marked trees. Taking the map of 1821, and considering the small scale upon which it was made, and the consequent limitations both in platting and subsequently calculating all of the courses and distances of the line run on the ground, he first tested the line for general bearings between well defined points. Taking the points of the compass shown by the star on the plat, he was able to calculate the general bearing of any part of the line and by taking a sufficient length of line was able to reduce to a minimum the errors incident to platting on so small a scale. He then selected four salient points on the plat, the first at a sharp turn in the platted line of 1821 just northeast of the third mile circle northeast of Tennessee river; the second point taken was the mile circle on the south bank of Tennessee river at the point where the plat shows a stream entering the river from the southwest; the third point he chose at an abrupt turn in the platted line about six and two-thirds

miles southwest of the river, and the fourth point he selected at a second abrupt turn about three and one-third miles southeast of the first turn. These points he designated by the letter A at the point north of the river, the letter B at the point on the south bank of the river, the letter C at the first abrupt turn and the letter D at the second abrupt turn. He then drew on the plat of 1821 a line from point A to point B and calculated the bearing of that line to be south 70 degrees 30 minutes west. He drew a line from point B to point C and calculated its bearing to be south 43 degrees 25 minutes west, and he drew a third line from point C to point D and calculated its bearing to be south 19 degrees 15 minutes east; all as shown upon the "tracing of a portion of the map of the state line survey of 1821" shown on "Exhibit B." When these lines were drawn upon the map of 1821, the platted line bore certain definite relations to the straight lines, which Mr. Burns assumed should correspond at least in a general way to the line which the commissioners had marked upon the ground. Thus in going from point A to point B, the platted line turned first to the right and then, a little more midway between A and B, crossed over to the left of the straight line and remained on that side down to point B. Again, the platted line from point B to point C appeared in nearly its entire course to be to the left of the straight line B-C and the platted line from point C to point D ran nearly with or to the left of straight line C-D. Mr. Burns then went upon the ground, located point A in the recognized state line and proceeded southwestward in the general direction (south 70 degrees 30 minutes west) indicated by his test line on the map of 1821, located the marked line along the ridge, found it well

Ex. 386h

marked by trees bearing the commissioners' marks and found it first to the right and then to the left of the straight line as indicated on the commissioners plat. In other words, he assumed that if he would proceed from point A in the general direction of south 70 degrees 30 minutes west, he should find the evidence of the line marked on the trees along the ridges, swinging first to the right of his general course and then to the left of it and returning to it on the south bank of the river on the west bank of the creek, and this he found to be the case. He found marked trees all the way down to the bank of the river, the last being half a mile east of the mouth of Slick Run creek. The sixty-fifth mile crossing Tennessee river is shown upon the plat as a straight mile having a bearing which Mr. Burns has indicated by a black line on "Exhibit B." By calculation the mile represented by the black line was found to be 5800 feet long. Whether this course and distance were arbitrarily adopted by the commissioners in view of the fact that they could not themselves cross the river at that point, can only be conjectured. The fact determined by Mr. Burns by actual survey and mathematical calculation is that a line from point A north of the river to B at the mouth of Slick Rock has an actual bearing of south 74 degrees 25 feet west, which is so close to the scaled bearing of south 70 degrees 30 minutes west from A to B on the commissioners plat as to prove conclusively that the creek on the plat was in fact Slick Rock creek. *The detour which all the testimony both at the original hearing and at the hearing upon this bill showed that the commissioners must have made to get across the river would necessarily involve difficulty if not error.*

Witnesses Hale and Muller both testified (Record 151 and 163) that it was not possible to cross the river at the point where the state line strikes it on the north; that it would be necessary to go up the river to an eddy just below the mouth of Cheoah river in order to cross with safety; and that it could be crossed there on a raft. In the original hearing witnesses, Steven Whitaker (page 360), John Dockery (page 363) and C. C. Jones (page 375) testified that they had been told by men who had been with and served the original surveying party in 1821, that the commissioners had gone down the Tallahassee trail to Tallahassee ford, crossed at the ford and came back up the river to Slick Rock creek. The commissioners' plat seems to confirm this by the fact that it shows both the "Path to Tallahassee," and a point on the river marked "Tallahassee." Their report further confirms it by the statement that their line "strikes Tennessee river about seven miles above the old Indian town of Tallahassee." It is therefore beyond dispute that the work of the commissioners was cut in two by Tennessee river; that they themselves never crossed the river anywhere near where their line was made to cross; that they were compelled to turn back from the north bank, make a long detour and return to the point on the south bank where they began again to mark the line. The only evidence we have to show how they determined to locate the line is found in the plat which shows that they drew a straight line from the sixty-fourth mile circle north of the river to the sixty-fifth mile circle on the south bank of the river on the west bank of a creek, on a course closely approximating the general bearing of the line for three miles north of the river, and that such a line on the ground would be only slightly more

than a mile long (5800 feet). *The general course of the line north of the river was found by Mr. Burns to carry him to Slick Rock creek and permitted him to go nowhere else.*

From point B, on the sixty-fifth mile circle of the plat and on the west bank of Slick Rock creek where it enters Tennessee river, Mr. Burns again proceeded to test the evidence of the plat by the evidence on the marked trees. The plat indicated a general course of south 43 degrees 25 minutes west, for a distance of six and two-thirds miles, with the marked line on the left nearly all the way. "Exhibit B" best shows how remarkably the line marked on trees, as claimed by every witness who testified for the defendants in the original case, conformed to the platted line of the commissioners. *The course carried him up Slick Rock creek five miles, then up Fodderstack lead a mile and two-thirds to the top of Big Fodderstack mountain.* Upon exact calculation of the general bearing of the marked line on the ground it was found to be south 44 degrees 28 minutes west; the general bearing of the same line on the plat had scaled south 43 degrees 25 minutes west. The evidence of the plat had completely confirmed the evidence of the marked trees, the evidence of all the witnesses for defendants in the original case, the traditions of the country and the acts of both states prior to 1892 when Tennessee issued her first grant of lands which described the state line as running along Hangover.

Beginning again at point C, on the top of Big Fodderstack mountain, Mr. Burns again proceeded in the general course of the line C-D on the plat (south 19 degrees 15 minutes east) found the line marked by trees bearing the commissioners' marks, almost wholly to the left as indica-

ted on the plat and running three and one-third miles, as indicated by the plat, to the second sharp turn, *which proved to be the junction of the Fodderstack and Hangover ridges.* Upon exact calculation, he found the general bearing the marked line to be south 18 degrees 12 minutes east, as compared with the scaled bearing of 19 degrees 15 minutes east for the line C-D on the plat. Again the evidence of the plat had confirmed the evidence of the marked trees.

Thus the evidence of the map and the evidence of the marked trees unite to furnish conclusive proof that the line settled, run and marked by the commissioners and ratified, confirmed and established by both states as the boundary line between them, did run up Slick Rock creek to Fodderstack ridge to Big Fodderstack mountain and along Fodderstack ridge to its junction with Hangover ridge. Do the plat and the marked line contradict the report of the commissioners? The language of the report is "from Tennessee river to the main ridge." It cannot be denied that the line B-C-D reaches the main ridge at the junction, if not at Big Fodderstack. Had the commissioners' plat been before the court, it would have been clear that the commissioners considered Fodderstack to be the main ridge, as many good surveyors since then have considered, and even now consider it to be. With the plat before it, the court would doubtless have laid more stress upon the adjective "main" and refused to apply it to a ridge a few hundred feet high in the immediate vicinity of ridges two or three thousand feet high. *In any event, the court would have found no contradiction between the three forms of evidence left by the commissioners on the ground, on their plat and in their report. Neither would*

it have been possible for the court to infer that the marked line had been abandoned in favor of the Hangover line. Upon this last point, the attention of the court is especially called to the red lines placed upon "Exhibit A" by Mr. Hale, at the request of complainants. One of these red lines he drew from the point where the platted line leaves the river to the first sharp turn nearly seven miles southwest; the course of this he noted on the plat as being south 44¼ degrees west. The second line he drew from the first turn in the platted line above mentioned to the second turn a little more than three miles away; the bearing of this he estimated as south 20 degrees east. The third line he drew from the platted line at the south bank of the river to show the length and general bearing of the Hale line from the river to Hangover; the bearing of this he marked as being south 8 degrees west. And the last red line he drew was put on to show the length and bearing of the Hale line from Hangover to the junction, with an indicated bearing of south 60 degrees west. *These lines drawn by Mr. Hale show clearly how impossible it would be to reconcile his line up Hangover with the line platted by the commissioners on their map. Both the evidence of the marked trees and the evidence of the platted line are against his line. These lines also show how radically the Hale line deviates from the entire course of the state line north of the river.* The bearing of the line for three miles north of the river was more than south 70 degrees west. From Big Pigeon to the Tennessee the general bearing was more than south 60 degrees west. By his own figures, Mr. Hale's line has a bearing of south 8 degrees west.

But the evidence of the plat is not limited to the course of the line in dispute. It purports to speak positively in

the matter of distance by miles, which are marked by circles on the platted line. It shows that from the point where the line leaves the river to the first sharp turn, at point C, the distance is a litle less than seven miles; the marked line up Slick Rock and Fodderstack ridge to Big Fodderstack ridge is actually six and two-thirds miles long. It shows that, from this first turn to the second sharp turn, at point D, the distance is a little more than three miles; the marked line along Fodderstack ridge is actually three and one-third miles long. *It shows that the total distance from the south bank of the Tennessee river to the second turn, point D, is ten miles; the actual length of the marked line from the mouth of Slick Rock to the junction of Fodderstack and Hangover ridges, is actually nine and ninety-seven one-hundredths miles.* How does the Hale line meet this test? From the south bank of the river to Hangover, on the general course marked by Mr. Hale, south 8 degrees west, it is six miles and, from Hangover to the junction, on the course marked by Mr. Hale, south 60 degrees west, it is two and one-half miles, making a total distance of eight and one-half miles from the river to the junction, where the line as platted by the commissioners requires a distance of ten miles. *If the measurements were taken from the north side of the river, the Hale line would be two miles shorter than the platted line on the map of 1821.*

The testimony adduced in support of the bill of review seems to us to show conclusively that the evidence of the newly discovered map on which the commissioners and surveyors platted the dividing line which was settled, run and marked by them is decisive in favor of the line as claimed by the defendants in the original case; that had

this map been before the court at the hearing of that case, the line would have been found to be as defendants claimed it to be; that the court would not have been misled by the argument that the failure of the report of the commissioners to mention the fact that their line followed the Tennessee river a short distance and Slick Rock creek a longer distance proved conclusively that they had done neither; that the court would not have fallen into the error that the statement in the report that the line ran from Tennessee river to the main ridge mean that it struck the ridge on the south bank of the river; that the court would not have been persuaded to conjecture that the line evidently marked up Slick Rock and Fodderstack had been abandoned after it had been marked; that the court could not have been persuaded that a line running nearly due south from the river would be "keeping up the course" of a line which had a general and positive southwesterly course north of the river; that the court could not have been led to adopt a line which ran, first, almost due south and, thence, southwest to the junction, when the commissioners showed a line running, first, southwest, and thence southeast to the junction; that the court would not have failed to note that the line over Hangover lacked two miles of the length required for the state line as platted and described by the commissioners; that the court would have found that the evidence left by the commissioners on the marked trees from the river to the junction and the evidence furnished by the commissioners on their plat of the line they had marked confirmed and corroborated each other, and that both were consistent with their report.

We submit that under all the circumstances of the case, this bill of rehearing ought to have been differently decided, and not result in a decree like the original decree and this court should so declare.

Respectfully submitted,

C. B. MATTHEWS,
Solicitor and Attorney.

No. 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

DAVID W. BELDING AND OTHERS,
PLAINTIFFS,

vs.

CHARLES HEBARD,
DEFENDANT.

WILLIAM R. HOPKINS AND OTHERS,
APPELLANTS.

vs.

THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY,
APPELLEE.

SUPPLEMENTARY BRIEF OF WILLIAM R. HOPKINS AND OTHERS, PETITIONERS AND APPELLANTS.

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Attorney for W. R. Hopkins and Others.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 232.

DAVID W. BELDING AND OTHERS,

PLAINTIFFS,

vs.

CHARLES HEBARD,

DEFENDANT.

WILLIAM R. HOPKINS AND OTHERS,

APPELLANTS.

vs.

THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY,

APPELLEES.

SUPPLEMENTARY BRIEF OF WILLIAM R. HOPKINS AND OTHERS, PETITIONERS AND APPELLANTS.

The Court of Appeals in deciding this case below against the bill of review, passed upon only one question, finding that sufficient for its judgment. The case is reported in 194 Fed. Rep., page 301.

On page 310, the majority of the court says (after discussing at some length the question of purchase in good faith by the Smoky Mountain Company):

> "What we do mean to decide is that in our opinion, taking into account not only the speculative purchase by appellants, but the good faith purchase by the Smoky Mountain Company, a case is not presented which appeals to the equitable discretion of the court to allow the review of the decree upon the ground alone of newly discovered evidence. We rest our decision solely upon this proposition."

There is one rather astonishing statement in this. There is not one item of testimony showing, or tending to show, that the appellants made a speculative purchase, or that the purchase by the Smoky Mountain Company was any more in good faith than the other. We could have had available plenty of testimony to contradict the speculative nature of the title by the appellants, but if we had offered it, upon the rules of evidence, it would not have been admissible, because the purpose for which the appellants purchased the property is of no moment whatever. Usually people buy property to make money out of it, and what the court below means by the word "speculative," judging from the evidence in this case, nobody can fathom.

It is true the court discusses the subject of an assignee filing a bill of review, but only academically. That question has been argued fully in the original brief filed in this case, but we desire to call the attention of the court to the fact that seems to have been ignored by the majority of the court in deciding the case, to wit, that the original application was to file a bill in the names of the original parties and that kind of a bill was in fact filed.

After the decision on this bill of review by McCALL, J., in the United States Circuit Court at Knoxville, a petition for an appeal and assignment of errors were filed, and in both of these, by the express wording of them, the appeal was taken in the names of the original parties. The title of William R. Hopkins and his associates was derived from a deed made prior to the final decree in the original case. The deed of the Lumber Company was merely a quitclaim deed, and while the court remarks that a quitclaim deed may make a man an innocent purchaser, yet this deed did not have that effect, unless you judge merely from the deed itself. The court seems to have determined that because a quitclaim deed may have such an effect, as a matter of law this deed did have that effect; not as a question of fact, because there was no evidence other than the deed itself.

With regard to this matter of an assignee intervening, the Lumber Company itself is an intruder, but its intrusion was applied for by it and granted by the court, and these appellants made no objection and it went along thereafter as if it were a contest between the real parties in interest at the time.

In,

Leggett v. City of Detroit, 137 Mich., page 247,

it is said:

> "Answering to an original bill in the nature of a bill of review filed by a person not a party to the suit waives the right to appeal from the order allowing such bill to be filed. It seems quite evident that the appellee cannot complain of a state of affairs that it had brought about by its own action in the case."

In relation to the only point decided by the Court of Appeals, we have to say that we have examined the authorities upon which the court based its right to use its discretion against the appellants, not only all of the cases that are cited by the court in support of that proposition, including Section 417 of Story's Equity Pleadings, but also all of the authorities cited under that section, and have included herein a short statement with reference to each case. If there is any one thing that is noticeable by its absence from those authorities, it is that a subsequent private sale by a successful party in a litigation is any element in determining whether a bill of review should be allowed to be filed, or in determining its effect after it is filed. The only possible exception is where the very object of the suit was to dispose of the property; in other words, where the suit was in rem and the sale has been a judicial sale. Even in that case, the fact of the sale is only regarded as one element in passing upon the application, and has, as far as my knowledge extends, never been used as an isolated fact and alone, separated from informality in the papers or laches, or immateriality of the matter, to rule the question.

The sanctity of judicial sales and the great protection extended to them, are shown in the case of

Grignon v. Astor, 2 Howard, 319,

and in the subsequent cases of

Florentine v. Barton, 2 Wallace, 216,
Comstock v. Crawford, 3 Wallace, 396.

Of the authorities cited in

2 Daniels' Chancery Practice, 1577,

which text book is in turn cited in Story's Equity Pleadings, Section 417, we will say nothing further, because we

examined those in the original brief and commented upon them.

The case of,

Dunfee v. Childs, 59 W. Va., 239,

heretofore apparently much relied upon by the counsel for the Smoky Mountain Company, is a case where an application to file a bill of review was based upon two grounds. First, an error of law in not granting the applicant's motion to stay the proceedings in the original case pending an appeal, which appeal covered the very same errors, and when another application for a bill of review covering the same matters was pending and undisposed of. (page 234). Second, upon alleged newly discovered evidence, where it turned out that the newly discovered evidence was the fact that the Supreme Court of Appeals on the appeal mentioned reversed the original decree. Of course this application was denied. It was a case of judicial sale.

Rickey v. Powell, 100 U. S., 104.

Upon a bill of foreclosure against A. and the parties to whom, after mortgaging the land, he respectfully conveyed separate parcels thereof at different times, the only question raised was as to the order in which the court should direct the parcels to be sold to satisfy the debt. From the decree rendered June 5, 1875, finding the sum due and prescribing such order B, one of the defendants, appealed. The decree was affirmed. Thereupon C, another defendant, filed a petition below, May 21, 1879, for leave to file a bill of review for alleged errors of law, being the same as those passed upon by this court on the appeal and for newly discovered evidence; but although the decree was in full force, he neither offered to pay the same, nor any part thereof, nor alleged any reason for not doing so. Held, that leave to file the bill

rested in the discretion of the court below, and was properly refused.

In the opinion, page 109, it was held that as to the errors of law the application was too late. As to the newly discovered evidence, the court held that the refusal of the court below to permit it to be filed should be affirmed solely on the ground that is mentioned in the syllabus. This was a case of judicial sale.

Virginia Iron Co. v. Roberts, 103 Va., 661.

This is a case cited by the Lumber Company in this case and relied upon on the subject of filing a bill of review. The court on page 674, says:

> On September 15, 1903, complainants filed what they called a bill of review to the foregoing decree of April 11, 1903. In this bill of review they set forth at great length all the previous proceedings but alleged no new matter whatever except that they had discovered that the case of Hunsucker v. Spear had in 1898 been removed to Russell county and had never been transferred back to Wise county, and that therefore the orders entered by Irvin, special judge, in 1899 and 1902, were void for want of jurisdiction. This application was demurred to and also a plea was filed in which it was alleged that all of the parties had agreed to the entry of said order of transference and supposed such decree had been entered. This plea was held upon the evidence to be true, and the court found that there was no ground on the merits for a bill of review. Thereupon the complainants dismissed their bill of review and took an appeal from the order of the court.

Wilson v. Webb, 2 Cor. 3.

In this case the syllabus of the court reads:

> "It is in the discretion of the court to give leave to file a bill of review on the discovery of new evidence,

It was refused in this case as it tended to deprive creditors of payment of their just debts."

The opinion of the court on page 4, reads:

"I confess the circumstance which strikes me as the strongest to prevent the court listening to this application is the character and situation in which these parties stand. Here has been a decree for sale of an estate to satisfy fair creditors whom it was the clear intention of the father to satisfy when he subjected his real estate to their claims, and if he had known that any part of that estate had been entailed, he had it in his power to have made himself tenant in fee by suffering a recovery, which he probably would have done if he had forseen the necessity of it. It is admitted that it is in the discretion of the court whether or not to admit such an application as this. Now, if this is such a case as calls for our particular favor, fair creditors may be defeated by it, and therefore without depriving a party of any legal advantage, surely the court will not be anxious to give him any assistance in bringing about such an end."

In this case it appears that prior to the subjection of the property to the payment of debts, the property had been entailed, but the deed of entail was not discovered for some time after the decree of the court, but all the time it was in the possession of the attorney of the party making the application, but apparently without his knowledge of its contents. This case was also one of a judicial sale to pay debts.

Bennett v. Lee, 2 *Atkins*, 528.

This is a case also where the parties after a decree discovered a deed of entail. On page 530, the chancellor says:

"Now it appears to me plainly that he was acquainted with this (the will) antecedent to the pub-

lication of the case, but that the will was known to him was admitted by himself in his answer and taken notice of in the bill itself, but it was claimed that he had no notice of the right under the will; but it was held by the court that he should have known."

The court in its opinion on page 534, says:

"The third ground is that the matter came to his knowledge subsequent to the master's making his report."

The court says:

"And this is a proper ground for a bill of review, supposing the evidence came up to it, but it turns out quite otherwise. This being so, the petition must be dismissed."

Young v. Keighley, 16 Vesey, 348.

On page 354, the court says:

"(Lord Eldon) As far as I can ascertain what the court permits with regard to bills of review upon facts newly discovered, the decisions appear to have been upon new evidence, which if produced in time would have supported the original case, and are not applicable where the original cause does not admit the introduction of the evidence as not being put in issue originally, especially where enough appeared upon the original and supplementary bills to call upon the plaintiff using reasonable diligence to bring forward the whole case; but this application proposes new evidence in support of a case not upon the record which might have been put upon the record."

Perry v. Phelips, 17 Vesey, 173.

On page 178, the court will observe that the discretion on this latter page relates to the form in which the remedy was sought to be invoked, but that was passed over by the

Lord Chancellor and he considered the case upon the merits.

In this case, the court's opinion practically discusses only a question of law as to the effect of a will which was in issue originally, and remarks upon the whole "the clear conclusion is that I could not vary this decree dismissing the bill if it was before me upon a proper bill of review."

Ord v. Noel, 6 Maddocks, 127.

The syllabus in this case reads as follows:

> "To entitle a party to file a supplementary bill in the nature of a bill of review, it is necessary that the new matter should be discovered after the decree, or at least after the time when it could have been introduced into the cause, and the matter should not only be new but material, and such as if unanswered in point of fact would clearly entitle the plaintiff to a decree, or would raise a question of so much nicety and difficulty as to be a fit subject of judgment in a cause."

This was a case where it was alleged that the existence of certain deeds had been discovered. The court in winding up its opinion, says:

> "The more it is examined, the more it will be found that these newly discovered deeds and dealings with third persons, in which the plaintiff was neither party nor privy, cannot be material to the plaintiff's case and cannot affect the decree."

On page 130, it would appear that the plaintiff had discovered the contents of the deed before the cause was finally heard, but it seemed that neither he nor his advisors appreciated their importance.

Partridge v. Usborn, 5 Russell, 245.

In this case the court refused to dispense with the rule that the applicant must perform the decree sought to be opened, before his application, and hence the application was denied.

Taylor v. Taylor, 1 McN. & G., 405.

In this case there was a motion to strike a certain paper from the files, assuming that it was intended to be a bill in the nature of a bill of review. The court held that it was not such a document and denied the motion.

Hodson v. Ball, 11 Simon, 456.

In this case a bill in the nature of a bill of review was stricken from the files because no leave had been obtained to file it.

Bank v Dundas, 11 Ala., 661.

In this case there had been a bill filed to foreclose a mortgage, wherein one of the questions involved was the order in which certain parcels of property should be sold. It was held that as the testimony established that the land had been constantly depreciating in price if not in value, since the sale; it being a judicial sale, it was not just or equitable again to direct a sale conceding the report to be erroneous, as this would be to expose the bank to probable, if not certain loss, when it has been guilty of no fault and the necessity had been caused by the gross neglect of the party asking a re-sale. That in such a case, the Chancellor in the exercise of a sound discretion should refuse to permit the bill to be filed.

Massie v. Graham, 3 McLean, 41.

This application was not made until twenty years after the decree. The court, on page 52, says:

> "The grounds on which this application rests have been examined with some minuteness, and with the exception of the first one which is obviated by a remittur, there is no clear and satisfactory evidence of payment to any amount having been made on the mortgage. Indeed, in every instance the presumption is rather against such payment. If on such evidence, after the lapse of more than thirty years, the parties all being dead, a decree should be reviewed, great mischief would result. The application for leave to file the bill is overruled."

It would appear from the opinion of the court that the action was one to foreclose a mortgage to sell the property to pay a debt, and therefore it is a case of a judicial sale, and an examination of the merits found that the evidence alleged to have been discovered did not support the contention.

Wood v. Mann, 2 Summer, 316.

In this case Judge STORY held as stated in the syllabus, as follows:

> "The court may in the exercise of a sound discretion allow the introduction of newly discovered evidence of witnesses to facts in issue in the cause after publication and knowledge of the former testimony, and even after the hearing. But it will not exercise this discretion to let in merely cumulative testimony. The same rule holds in cases of bills of review and supplementary bills in the nature of bills of review, semble that the rule ought to be confined to cases of the discovery of new evidence of a documentary nature and the testimony of witnesses necessary to substantiate this."

On page 335, alluding to the claim that the evidence was merely cumulative, STORY, J., says:

> "I am not able to satisfy myself that this objection to the evidence is not well founded; on the contrary, the more I reflect, the more I feel the difficulty of the admissibility of merely cumulative and corroborative testimony, though newly discovered, to the facts in issue. If I were to decide in favor of its admissibility, I should as far as I know, be the first judge who ever acted upon so broad a doctrine. I am not bold enough to venture upon such a course. On the contrary, if I were called upon to frame a rule, it would be to exclude all testimony of newly discovered witnesses to any facts in issue unless connected with some newly discovered document. There is no authority in favor of the petition. There is authority against it."

It seems to have been admitted that the testimony was cumulative but that it was newly discovered but not of a strong nature.

Thomas v. Brockenbrough, 10, Wheat., 146.

In the last paragraph of the opinion in this case, the court says:

> "In this case the court below decided in the original cause that the title to the land in controversy was vested in the heirs of John Harvey and decreed the appellant to convey the same to them. If Thomas then had no title to the land, of what consequence was it to him that the conveyance was decreed to be made to all the complainants in that cause as being the heirs of Harvey rather than to two of them, who he alleged were entitled to the land as devisees? If they did not complain of the decree (and that they did not is proved by their plea and demurrer to the bill of review) and if the plaintiff in this appeal was not injured by it, the court is at a loss to conceive upon what legal or equitable ground that decree could have been reversed for the heirs growing out of the after discovered evidence. These observations

apply equally to the second and third errors assigned. All of these grounds related to the same matter."

The case of Dexter vs. Arnold, 5 Mason, at page 315, speaks of the fact that leave to file a bill of review is discretionary with the court, but at pages 317-319, the reasons for denying leave in that case are explained.

The petition in the case for leave did not state the nature of the evidence newly discovered, by whom it was expected to be proven, or when the new facts were discovered.

The court in the examination of each ground, holds that they were not germane to the original case or else that the evidence was originally accessible.

On page 309 of that same report:

"To support that proposition the following authorities are relied upon:

2 Daniels' Chancery Practice, 1577;
Story's Equity Pleadings, Sec. 417;
Hughes v. Jones, 2 Md. Ch., 289-296;
Harris v. Edmondson, 3 Tenn. Ch., 211;
Bank v. Dundas, 10 Ala., 661-669;
Massie's Heirs v. Graham's Admr., 3 McLean, 41;
Craig v. Smith, 100 U. S., 226-233;
Ricker v. Powell, 100 U. S., 104-107;
Thomas v. Harvie's Heirs, 10 Wheat., 146-150;
Stockley v. Stockley, 93 Mich., 307-313."

In Story's Equity Pleadings, Sec. 417, this is said:

"In the next place, there is another important qualification, which is indeed deducible from the very language of Lord Bacon's ordinance; and that is, that the granting of such a bill of review for a new-discovered evidence, is not a matter of right, but it rests in the sound discretion of the court. It may, therefore, be refused, although the facts, if admitted, would change the decree, where the court, looking to

all the circumstances, shall deem it productive of mischief to innocent parties, or for any other cause unadvisable."

The cases in,

10 Ala.;
3 McLean;
100 U. S., 94;
10 Wheaton, 146,

have already been commented on above. The remaining cases are

Hughes v. Jones, supra.

In this case the court held that the matter on which a bill of review is grounded must be new and due diligence must be used to discover it, and that laches or negligence will destroy the right to relief. This case had been pending for eleven years. A great amount of testimony had been taken and by consent the case was submitted to the court and fully argued. The witness whose newly discovered testimony was sought to be introduced, lived in the family of an uncle of the party making the application for more than six years and did not remove from the county where the cause originated until long after the pendency of the suit, and since that time had resided in Baltimore. Furthermore, the petition did not state that by the use of reasonable diligence the knowledge of the new matter might not have been acquired in time to be used when the decree passed and upon this last ground the application was denied.

In *Harris v. Edmondson*, 3 *Tenn. Ch.*, 211, the application was grounded upon the discovery of certain receipts for payments. This application was denied because, the

court says, (page 215) "if these receipts had been in the original case, they would not have changed the general result."

In *Craig v. Smith, Supra*, it appeared that the suit was brought for infringement of a patent. In the original case, the defense was grounded upon public use for more than two years and anticipation, and evidence was introduced upon both of these points. Afterwards the defendant discovered additional public uses and additional anticipations and made some effort to show due diligence in hunting for these without success prior to the entry of the decree. The court which had entered the judgment allowed the bill of review to be filed, heard the case on its merits with the new evidence and set aside the decree and dismissed the bill. The remarks of this court were admonitory, simply stating the general ground that care should be used in allowing them, but affirmed the judgment dismissing the bill, although it seemed that the evidence was merely cumulative, and it is difficult to say why the defendant might not have discovered additional anticipations as they were matters of record at the seat of government.

In *Stockley v. Stockley, Supra*, a bill had been filed to foreclose a mortgage. The defendant employed counsel and an order was made in the case to close the proofs in sixty days. The defendant paid no attention to this order and a decree was taken. Upon application of the defendant, that decree was set aside and defendant was allowed a certain further time to close the proofs, but he paid no attention to this order, and a new decree was entered. After the second decree was entered, a petition for a rehearing was filed, overruled, and then the defendant de-

sired to file a second petition for a re-hearing. This was denied, the judge remarking that the state of affairs was brought about by the defendant's own negligence. The defendant blamed his attorney but failed to prove any fault on the attorney's part.

In Putnam v. Clark, 36 N. J. Equity, 33-36, the application for a bill of review was grounded on the testimony of an alleged newly discovered witness, but the court found that the existence of the witness and the materiality of her testimony was known when the suit was commenced, and the application was denied on account of laches.

Lindblom v. Rocks, 146 Fed., 663.

"In order to obtain protection on the ground that he is an innocent purchaser for value and without notice, a purchaser must have acquired title to the subject matter of his purchase."

Young v. Scofield, 132 Mo., 660;
Wells v. Walker, 29 Ga., 450;

In Vattier v. Hinde, 7 Pet. (U. S.) 270, 8 L. Ed., 675, Chief Justice MARSHALL said that the rules respecting a purchaser without notice are framed for the protection of him who purchases a legal estate and pays the purchase money without knowledge of an outstanding equity. They do not protect a person who acquires no semblence of title. In Sampeyreac v. United States, 7 Pet. (U. S.) 222-241, 8 L. Ed., 665, it was said that a grantor can convey no more than he possesses. Lampe, from whom the plaintiff in error purchased, was in no better position to convey the right of possession than if he had held under a forged deed. The doctrine of bona fide purchaser without notice does not apply where the purchaser

buys no title at all. His good faith cannot create title.

Dodge v. Briggs, (C. C.) 27 Fed., 160, 166;
Texas Lumber Co. v. Branch, 60 Fed., 201, 8 C. C. A., 562.

"In addition to this both Lampe and the plaintiff in error held under quitclaim deeds. It is the general rule, that the grantee in a quitclaim deed is a purchaser with notice, and that he takes only the interest of his grantor in the premises.

May v. LeClaire, 11 Wall. (U. S.) 217, 20 L. Ed., 50;
Villa v. Rodriguez, 12 Wall. (U. S. 323, 20 L. Ed., 406;
Baker v. Humphrey, 101 U. S., 494, 25 L. Ed., 1065;
Runyon v. Smith, (C. C.) 18 Fed., 579;
Dodge v. Briggs, (C. C.) 27 Fed., 167;
Gest v. Packwood, (C. C.) 34 Fed., 368;
Baker v. Woodward, 12 Or. 3, 16 Pac., 173;
American Mortgage Co. v. Hutchinson, 19 Or. 334, 24 Pac. 515; Low v. Schaffer, 24 Or. 239, 33 Pac., 678."

In reference to the above cases, the language of Chief Justice MARSHALL in Cohens v. Virginia, 6 Wheat., 264-293, is extremely pertinent:

"General expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but not control the judgment in a subsequent suit when the very point is presented for decision."

See also, Wells Fargo v. Johnson, 214 Fed., 180-184.

Lord COKE has said that judicial discretion means "discernere per legem." In other words, judicial discretion is not arbitrary. It must be a discretion bred from a knowl-

edge of the law. It is a little remarkable that in all of the decisions on the question of the bearing of an alleged innocent purchaser upon the question of allowing the bill of review to be filed, or on deciding it if filed, upon the merits, there is no suggestion in any case that a private sale between parties subsequent to a decree has anything whatever to do with the allowance of the filing of the bill, or in the disposal thereof on the merits. Perhaps for the reason that if the purchaser has any rights depending upon an alleged purchase without notice, but not being a party to the suit, he would have to set these up in some separate proceeding. Possibly, if called upon to surrender possession by a delivery order in the original case, he might then seek to uphold his title, but that any innocent purchase by an outsider has nothing to do with the allowance or the decision on the bill of review is quite plain. A person who is entirely innocent himself, who has fought the effort to deprive him and his predecessors of his property by every means in his power, including appeals, and who has by neither word or act estopped himself in any way, certainly stands in as good a position as the purchaser. It is no more inequitable to deprive the purchaser of the price that he put into the property than it is to deprive the real owners of the price that they put into it, and when you add that the original owners were *in fact* the owners, as it now appears, there can hardly be any question about where even the equities reside. Can it be that within the limits of the law a party who has been inadvertently, but nevertheless wrongfully, deprived of his acknowledged property, has no means of righting that wrong because forsooth somebody else may be hurt? This is about as clear a case of putting the apparent mis-

fortune of the purchase of the property entirely above the rights of the owner of the property, who has lost it through no fault of his own, that could be imagined. Protection in equity is supposed to go in accordance with merit, but wherein lies the superior merit of an innocent purchaser over an innocent owner of property who has been deprived of that property by the strong arm of the law against his protest and active defense carried to the utmost limits? Such an outcome ignores all merit and all law.

When such a person seeks to file a bill of review upon the ground of newly discovered evidence, of course it is grounded upon the fact that he had previously known nothing of it and could not by diligence discover it, and therefore he could take no steps to protect the public from purchasing it, and it will be noticed that the majority opinion steers entirely clear of the question of fact involved as to where the state line was located. But Judge SEVERENS, who delivered a dissenting opinion, states that after thorough examination of the new evidence and the old record, the contention that the line went over Hangover Ridge was a hopeless contest. In fact his whole opinion is so able a presentation of what we have contended for in the case, that we append it in full.

It would seem to be conclusively established by the authorities that the discretion of the court spoken of in the general phrases used means upon the merit or demerit of the application for leave to file a bill of review alone, and that relative hardships are not germane to the case.

Respectfully submitted,

C. B. MATTHEWS,

Attorney for W. R. Hopkins and Others.

APPENDIX.

SEVERENS, Circuit Judge (dissenting). For the reasons stated in the following opinion, I am unable to agree with the majority of the court or with the reasoning on which their conclusion is based. Inasmuch as the statement of facts contained in the opinion of the other judges is not, as I think, sufficiently full to disclose the whole case and omits to mention several important facts material to the proper disposition of it, I am constrained to state the case in my own way.

This is an appeal from a decree of the Circuit Court dismissing a bill of review which was allowed to be filed there by the consent of this court given upon a petition filed here August 6, 1907. The decree which was complained of was made by this court on an appeal, July 13, 1900, affirming the decree of the Circuit Court. The reasons which induced this court to affirm the decree of the court below are stated in the opinion by Judge LURTON reported in 103 Fed., 532, 43 C. C. A., 296. The object of the original bill was to obtain an injunction to restrain trespassers on certain described lands alleged by the complainant to be in Tennessee and to belong to him, and to obtain a decree quieting the complainant's title to said lands. The complainant claimed title under a grant from the state of Tennessee. The answer of the defendants averred that the lands were not in Tennessee, but were in North Carolina, and claimed title in themselves under grants from the latter state. The lands lie along the boundary line between the two states, and the question

was which of the two lines claimed by the respective parties to be the boundary was the true boundary line, for the lands in controversy lie between those lines. This was the sole question in controversy. The regularity of the derivation of the titles was not disputed on either side. The following excerpt from the statement of facts prefacing the opinion of the court will explain the history of the respective grants, the steps which had been taken by the public authorities of the two states to ascertain and settle the boundary line and the character of the lands in controversy:

> "The territory now comprising the state of Tennessee, was ceded by the state of North Carolina in 1789 [2 Ired. & B. Rev. St. p. 171] to the United States. The Session Act describes the eastern boundary line as follows: 'Beginning on the extreme height of the Stone Mountain, at the place where the Virginia line intersects it, running thence along the extreme height of the said mountain to the place where the Wautauga river breaks through it; thence a direct course to the top of the Yellow Mountain, where Bright's road crosses the same; thence along the ridge of said mountain, between the waters of Doe river and the waters of Rock creek, to the place where the road crosses the Iron Mountain; from thence along the extreme height of said mountain to where Nolichucky river runs through the same; thence to the top of the Bald Mountain; thence along the extreme height of the said mountain to the Painted Rock, on French Broad river; thence along the highest ridge of the said mountain to the place where it is called the 'Great Iron' or 'Smoky' Mountain; thence along the extreme height of the said mountain to the place where it is called 'Unicoy' or 'Unaka' Mountain, between the Indian towns Cowee and Old Chota; thence along the main ridge of the said mountain to the southern boundary of this state.' The line here to be ascertained is included within the call beginning 'thence along the extreme height of the said

mountain to the place where it is called Unicoy or Unaka Mountain.' The mountain whose extreme height is to be followed until Unaka Mountain is reached is the 'Great Iron or Smoky Mountain.' The necessity for a definite location and marking of the line became evident to both states, and in 1821, under acts passed by each state, a joint commission was appointed for the purpose of settling, running, and remarking the boundary line. The Tennessee commissioners were appointed under an act which provided that the commissioners should 'settle, run and remark the boundary line between this state and the state of North Carolina, agreeably to the true intent and meaning of the said act of the General Assembly of the State of North Carolina, entitled: "An act for the purpose of ceding to the United States of America certain western lands therein described."' Acts Tenn. 1820, c 22 [2 Scott's Laws, p. 635]. The North Carolina act, providing for the running of the line, was substantially identical with the Tennessee statute above set out. 2 Ired. & B. Rev. St. N. C., p. 94. The joint commissioners did run and re-mark the line, and each state passed an act ratifying, confirming, and adopting the line as run and reported by the commissioners. Acts Tenn. 1821, p. 45, c. 35; 2 Ired. & B. Rev. St. N. C., p. 96."

It will be sufficient for the present purpose to state that the line run by the commissioners as claimed by the plaintiff in the original suit would be a line starting from a known point where the disputed lines separate northeast of the land in controversy and extending southwardly and somewhat westwardly over what is known as Hangover Rock to another known point where the disputed lines converge. If this were the true line, these lands lie in Tennessee. The line which the defendants in the original suit claimed was the one run by the commissioners starts from or near the same point as the other, but diverging therefrom extends more to the right, as one looks to the south-

west, and passes over the Fodder Stack range of heights to the converging point. This line lies west of these lands and would locate them in North Carolina. The evidence in the original case showed that there were signs and marks along each line, the character of which is stated in Judge LURTON's opinion on the original case. On the Fodder Stack ridge line there were 11 trees marked like those on the general and undisputed line established by the commissioners. This court thought the probability was that these trees were thus marked by the commissioners, but concluded that this line was only temporarily run, and was afterwards abandoned, and the Hangover Rock line substituted. We need not go into the various reasons which led the court to conclude that the Hangover Rock line was the true boundary line. The necessary result was that the land in question passed by the Tennessee grant, and that, therefore, the complainant was the true owner; and the court decreed accordingly. Counsel for the defendant remind the court with great earnestness of the importance to the public of the stability of judgments. But it is of even higher interest to the public that the citizen shall not be despoiled by a wrong judgment. It is for the prevention of such unjust consequences that the law gives to the courts the power of correction by a bill of review. It is an ancient principle of equity that, if a man shall lose his property to his adversary by the decree of the court, he still retains the right to regain it, if, by subsequent discovery of hitherto unknown proof bearing directly on the issue, he is able to convince the court that its decree was clearly wrong. This right is one to which the right acquired by the decree is subordinate, and neither the opposite party nor any one claiming under him

can successfully deny that right, so long as the true owner has done no act either of commission or ommission, whereby he should be estopped from claiming it.

When the former suit was pending nothing of the work of the commissioners was to be found in the archives of either state, although diligent search was made. The state house of North Carolina at Raleigh was burned in 1831, and its archives nearly all destroyed. But what had become of the report of the commissioners which came to the state of Tennessee no one could explain. The court had only scant means for locating the line, and was in doubt about the conclusion to be drawn from what it had, but based its judgment upon the probabilities as they seemed to be. But about the beginning of the year 1904 and after the three years which a statute of Tennessee prescribes as a limitation for bills of review had elapsed, the report of the commissioners and the map which accompanied it belonging to the state of Tennessee were discovered in a barrel of rubbish in the basement of the capitol of the state at Nashville, which the state authorities had ordered to be cleaned out. The rumor of this discovery spread abroad and came to an agent of the defendants residing in North Carolina. The grants of these lands by the state of North Carolina were made upon sales made during the years 1853, '54, '55, and '56. That by the state of Tennessee was made in 1892, and probably was at a time subsequent to the time of the disappearance of the commissioners' report and map. I say "probably," because it is hardly to be credited that the official who had charge of the making of the grant would have allowed it if he had knowledge of the action of the commissioners. But it is possible that the making of this grant was the result of

the seemingly loose practice of the land department of that state which is stated thus by Judge CARUTHERS in State v. Crutchfield, 3 Head (Tenn.) 113, at page 115:

> "The state does not warrant the title to the land which she grants. She opens her offices, and permits individuals to enter, at their own risk, any lands they choose, and she issues her grants. They must beware of the titles they get."

The lands were wild, rough, and uncultivated, and almost unsettled, and were valuable mainly for their ore mines and timber.

The state of Tennessee at one time caused a survey and sectionizing to be made of lands in this locality. Of this survey Judge CLARK in his opinion in the original case said:

> "That the state has through the Ocoee District commissioners established its line on Slick Rock creek, and has sectionized all the territory supposed to belong to the state."

This survey and sectionizing took place in 1836, and Slick Rock creek is on the line running over the Fodder Stack range. Aside from the making of the grants, neither state had made any distinct claim of territorial dominion. Taxes have been assessed upon them by the state of North Carolina, and they have been paid by the appellants or their predecessors in title. And recently the appellees have paid taxes to the state of Tennessee. The complainant in the original suit alleged that he was in possession, but this statement was not supported by the evidence. Judge CLARK, in the opinion on which he based his decree, said:

> "After careful consideration of this case, I reach the conclusion that I am not warranted upon the facts

> in differing from the commissioner in the view which he takes of the case. It is a very close one on the facts, and the equity of the case is rather with the defendants in view of the fact that they obtained their grants earlier, and have been paying taxes upon the property while the plaintiff's grant was only recently obtained."

The report and map of the commissioners above mentioned were put in evidence in the court below in this proceeding, and are now before us. The authenticity of them is not disputed. The map shows the line run by the commissioners in distinct color, and it shows the line as it was contended to be by the defendants in the original case, and is the line running over the Fodder Stack ridge, and is on the line of the 41 marked trees above mentioned. The inevitable conclusion is that the original decree was erroneous. The appellees contend vigorously that these documents are not conclusive, and still insist that the true line runs over by Hangover Rock. But it is, as I think, a hopeless contest, and my conviction that the map shows the true line is in no wise shaken. What is the result of this conclusion if it is correct? It must be that these lands lie in North Carolina, that the appellees had no title, and that the appellants are the lawful owners of them.

Counsel for appellants urge that, where it is found that the lands are not within the territorial limits of Tennessee, the jurisdiction of the Circuit Court fails, and that the order should be that the bill be dismissed on that ground. This objection was presented to the Supreme Court in boundary cases at an early day, and was overruled, the court being of opinion that, if upon the allegations of the bill the land is within the territorial jurisdiction of the court, that is enough, and that its authority

will not be divested by its final conclusion that the land is located in an adjoining state. Fowler v. Miller, 3 Dall., 411, 1 L. Ed., 658; New York v. Connecticut, 4 Dall. 1, 1 L. Ed., 715; Handly v. Anthony, 5 Wheat. 374, 5 L. Ed., 113; Rhode Island v. Massachusetts, 12 Pet., 657, 726, 727, 9 L. Ed., 1233; Howard v. Ingersoll, 13 How., 381, 14 L. Ed., 189.

On the merits the conclusion above stated is fatal to the claim of the appellees. The bald, but perfectly true, state of the case is this: The real owners of the property have defended it against a claimant having in truth no interest in it by all the lawful means available to them, but by the adverse decision of the court the owners have lost it. The court has been the instrumentality by which this grievous miscarriage had been accomplished. It does, indeed, sometimes happen that by error or accident such injustices is done and is irremediable; but it certainly ought not to happen by the conscious act or omission of the court while it yet has the power and opportunity to prevent the mischief.

The only question in the case at the original hearing was that of the location of the boundary line between the states. The new evidence seems to be conclusive of that question. It is difficult to conceive of a case more suitable for the remedy now invoked.

But the appellees, apprehending that perhaps the court would come to the foregoing conclusion in respect to the boundary line upon the new facts, interpose a great variety of objections to the relief prayed, among them these: First, it is urged that these complainants are not persons aggrieved by the original decree; and, further, as they contend, the parties in whose behalf the bill of review is

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filed are assignees, in whose favor the court will not review the decree. These contentions are directed to the ultimate question, namely, whether they have any interest affected by the decree which entitles them to the relief which they seek. The first of these, that these complainants were not aggrieved, does not merit prolonged discussion, certainly not, if this bill is to be treated as a bill by the original defendants as I think it should. The second, concerning the rights on such a bill, is more serious, and is the principal ground as I understand on which the court is to affirm the decision of the court below. The general rule is stated by the Lord Chief Baron Gilbert in his book on the Chancery Practice entitled Forum Romanum at page 186, which is this:

> "None but parties and privies, such as heirs, executors, or administrators, can have this bill of review, since nobody else can be aggrieved by such decree because it can only be revived upon such privies."

Mr. Justice Story in his work on Equity Pleadings, note to section 409, in quoting this language uses the word "by" instead of "upon" in the last line. But I suppose this is an error, as the original publication has it "upon." This rule has been stated and followed in many judicial opinions, and is no doubt the foundation of the practice of the court. Some qualifications to its generality, however, have been made where the special circumstances require it, which is an incident to all general rules. And Mr. Justice Story in the note above mentioned says: "This language is very broad, and requires qualification." And he proceeds to state several of such.

The majority of the court treat this bill of review as one brought by assignees, and not as one brought by the

parties to the original decree to enforce their own rights. While it is true that the petition filed in this court for permission to make application to the Circuit Court for leave to file it was presented by the "assignees," as we will call them, the bill which was allowed by the Circuit Court to be filed is the bill of the original defendants themselves as complainants, and they pray in their bill that they may be allowed to file it. The case stated is the case of those parties. The relief prayed is in their own behalf, and the bill is signed by their solicitors. No statement of any facts in behalf of any other persons than themselves is made—nor, indeed, is there any reference to the rights or interests of any other person. They thus became parties to the suit, and subject to the jurisdiction of the court, and would be bound by the decree which the court should render. The discretion of the Circuit Court as to whether leave to file should be granted was invoked and exercised and at no time was its permission to file the bill recalled. Nor does the fact that the other parties assisted in the promotion of the suit constitute an objection. They had an interest which they might subserve without censure.

It would seem from the rule approved by the Supreme Court upon the authority of the Lord Chief Baron Gilbert's book that the original parties and their privies by representation who were bound by the decree are the only ones properly joined in the suit. Thompson v. Maxwell, 95 U. S. 397, 24 L. Ed. 481; Gies v. Green, 42 Mich. 107, 3 N. W. 283. Nevertheless, a purchaser subsequent to the decree was allowed to intervene as defendant.

But, passing by this objection for the present, I proceed to inquire whether the parties complainants are so affected by the original decree that they are entitled to

maintain a bill of review. The original defendants are aggrieved because the decree cut them out of the interest they had in the lands subject to the deed in trust to Archer and McGarry, and so affected the value of the title conveyed in trust as to materially depreciate the price that could be obtained for it, and the extent to which their debt would be paid. This deed in trust was made pendente lite. The deed of the trustees was offered in evidence by the defendant, and is therefore evidenced of any disserving statements made in it. 1 Wharton's Evidence, § 619. Turning to the deed itself, it appears to have been given to carry into effect certain trust agreements entered into before the making of the final decree. It was of these and other lands to secure a large indebtedness, a very considerable portion of which was due to Archer, one of the trustees. It contained a power of sale, the power being coupled with an interest, and was irrevocable. The good faith of the transaction is not questioned. It was therefore perfectly valid in law and in equity. Hartley v. Russell, 2 Simons & Stuart, 244; Hartington v. Long, 2 Myl. & K. 590. To be sure, the grantees would be bound by the decree if one should be finally entered against the grantors. This because of the rule which the court applies for the maintenance of existing conditions and consequently of its jurisdiction to make an effective decree. The fact that the grant was made pendente lite has no other consequence. In earlier times the courts looked with disfavor upon a purchase pendente lite, not only because of its disturbance of the status quo, but also because it afforded an opportunity for maintenance and champerty. To avoid the first of these objections, the rule that the purchaser should be bound by the judgment was applied.

With respect to the subject of maintenance and champerty, the objection has lost much of its force, and is now only sustained upon a plain case. It is not sustained where the purchaser has an interest in the subject of the litigation, but only when he comes in as a volunteer, to assist the party from whom he buys. 6 Cyc. 865, where the subject is fullly treated and numerous authorities are cited in support of the rule just stated. After the transfer by the defendants, they, to the extent of the interest transferred, continued as representatives of the transferee as was said by Chief Justice Waite in Stout v. Lye, 103 U. S. 66, 26 L. Ed. 428, and repeated by Mr. Justice Brewer in Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 386, 14 Sup. Ct. 122, 37 L. Ed. 1113. Archer and the other creditors sought to obtain this security for their debt, and, if we look to ultimate justice, it would be more just that the debt of the real owner should be paid to his creditors, rather than that the fund should go to a stranger to that ownership. If the purchasers from the trustees would have no other means of protection, it would seem that they should have such a right as the trustees had. It was necessary that there should be purchasers, else the power of the trustees could not be executed. The title would not be marketable, and would remain stagnant in their hands. But we need not pursue this subject. It is enough that the original defendants are in due form before the court, and were injured by the decree. And it is of no concern whatever to the defendant in this bill what use the complainants make of the fruits of the decree, as, for instance, whether they shall thereby make good their own conveyance to their grantee. Counsel for defendants maintain in effect that, notwithstanding the original decree had the

effect to pass the title from the defendants to the complainant, no one was aggrieved thereby.

I have been induced to discuss these questions touching the interests of parties deriving such interests from one of the parties to the original suit, but who were not themselves parties because the case has been presented and argued as if such questions were open on a bill of review. It is only by such an assumption that the presence of the Smoky Mountain, etc., Company can be recognized; for its rights are only such as it has derived since the decree sought to be revived. Thus on both sides proofs have been introduced as if new issues could be raised and decided in this proceeding, a proposition which I doubt. There are some precedents cited by counsel wherein, as is claimed, such a broad jurisdiction has been exercised on a bill of review. But it seems manifest that this practice destroys the proper limitations of such a proceeding and confounds it with the proceedings of an ordinary suit in equity; and it is inconsistent with the equity practice of the federal courts. It is a singular circumstance that in this case the defense is made by a party who, under the rule referred to, could not properly be made a party to the proceeding at all. But proceeding, further, another objection is that:

> "A bill of review will not affect the title of a bona fide purchaser (of the property in controversy) from the successful party after a final decree and without notice that a bill of review is to be filed."

Now, whatever application such a rule may have to a bill filed to review a decree for error apparent on the face of it, it can have none to a case where the bill is filed on

account of newly discovered evidence of which the plaintiff in most cases would have no knowledge and no definite hope of discovery. Moreover, how is he to give notice of an intention to file such a bill? And to whom must the notice be given? How is he to know who is an intending purchaser? In this connection it may be worth while to remark that the original complainant lost no time in disposing of the lands to another after the decree of this court was entered. Only a few days elapsed after the decree before he had sold it, and it was conveyed before the time had elapsed for moving for a rehearing or applying for a certiorari. If in such circumstances a man may cut off the true owner by forthwith conveying away the property, then, as said by the Court of Appeals of Kentucky, a bill of review is of little value. Clark's Heirs v. Farrow, 10 B. Mon. 146, 151, 52 Am. Dec. 552. This point is made in the interest of the Smoky Mountain, etc., Company, which claims to be a bona fide purchaser. Admitting it to have that character, for the sake of argument, it would not suffice to defeat the claim of the complainants; for it never acquired the title to the property, and it is only in such case that a bona fide purchaser can have protection. 1 Story's Eq. Jur. § 64. The grant of the state of Tennessee conveyed no title, legal or equitable, and the grantor of the Smoky Mountain, etc., Company, had no title to sell and nothing passed by the deed. Non dat qui non habet is a maxim of the law, as well as sound logic. An apparent title is not always enough, as, for instance, when the name of the true owner has been forged, or the grantor was under a disability, or when, for any reason, the deed conveyed no title. The defendants in the former suit, who are complainants here, derived

the true title from the state of North Carolina. It was of a fee simple absolute, the highest and best title known to the law. The owner of property cannot be deprived of it without some fraud or fault on his part by a bona fide purchase of it by another from some other party than the owner. In 2 Pomeroy's Eq. Jur. § 735, the author says:

> "A subsequent holder, even for a valuable consideration and without notice, has certainly no higher right than a prior holder equally innocent and with an equally meritorious ownership. American courts seem sometimes to have acted upon exactly the opposite notion, and to have assumed that a subsequent title was necessarily the better one. When the original legal owner has done or omitted something by which it was made possible that his property should come into the hands of a bona fide holder by an apparently valid title, it may be just to regard him as estopped from asserting his ownership, and thus to protect the subsequent purchaser. But when the prior legal owner is wholly innocent, has done and omitted nothing, it certainly transcends, even if it does not violate, the principles of equity to sustain the claims of a subsequent and even bona fide purchaser."

And again, after an extended discussion of the subject, he says at the close of section 739:

> "The foregoing description shows that it is wholly unwarranted by the settled principles of equity for a court to sustain and enforce the subsequent legal estate acquired by A. in any kind of property or thing in action merely because he is a bona fide purchaser for a valuable consideration without notice against the prior legal and equally innocent owner, B., or even to sustain A.'s defense as a bona fide purchaser in a suit brought by B."

It seems to me that this doctrine rests upon a fundamental principle, and is indisputable. It has been rec-

ognized and enforced by the federal courts in several cases. Vattier v. Hinde, 7 Pet. 252, 8 L. Ed. 675; Boone v. Chiles, 10 Pet. 212, 9 L. Ed. 388; Smith v. Orton, 131 U. S. Appendix lxxviii, 18 L. Ed. 62; Texas Lumber Mfg. Co. v. Branch, 60 Fed. 201, 8 C. C. A. 562. Lindblom v. Rocks, 146 Fed. 660, 77 C. C. A. 86. Judge Gilbert, in this last case, puts the matter in a nutshell when he says:

> "The doctrine of bona fide purchaser without notice does not apply where the purchaser buys no title at all. His good faith cannot create title."

In the case of Texas Lumber Mfg. Co. v. Branch, supra, the deed to the bona fide purchaser for a valuable consideration stated that the grantors where the heirs of the deceased owner, and the purchaser supposed that to be so. But it turned out that another was the lawful heir, and the property was decreed to him. See, also, Latham v Barney (C. C.) 14 Fed. 133, 146. The doctrine concerning bona fide purchaser has been built up and has always rested upon the assumption that the purchaser paying value, has acquired a title, in the enjoyment of which a court of equity will protect him. At one time the court of chancery pressed the rule so far as to permit the purchaser to get hold of the title by seizing the evidence of it by any means in his power, even by trespass if he could. This excess was subsequently disallowed. But the requirement that the purchaser must have a title in order to enable him to call for the protection of the court has always continued to be regarded as an essential condition; and, indeed, upon sound reason, it must be so.

The cases of Rector v. Fitzgerald, 59 Fed. 808, 8 C. C. A. 277, and Ohio R. Co. v. Fisher, 115 Fed. 929, 53 C. C. A. 111, which are relied on by the defendants, decide

nothing opposed to this. In the first of these cases it appears from Judge Thayer's statement that the bona fide purchaser had acquired the legal title. And the references which Judge Thayer makes indicate that Rector had been seeking to defeat the title which defendant who was the grantor of the bona fide purchaser, had acquired, and to obtain a declaration that he was himself entitled to it. The case finally turned on the question of the laches of the plaintiff in filing his bill. The other case, that of Ohio River R. Co. v. Fisher, was not one of a bill of review, but it involved facts and proceedings occurring after an original decree and the filing of a bill of review. The railway company had become a purchaser for value through a sale and conveyance by the trustees under a will. The trustees held the legal title and the railway company had acquired it by their deed. Judge Simonton referred to the case of Bank v. Ritchie, 8 Pet. 146, 8 L. Ed. 890, where Chief Justice Marshall distinguished such a case from one where the title had not been acquired by the purchaser, at least that was the interpretation of it by the learned judge. The same observations apply to the case of Perkins v. Pfalzgraff, reported in 60 W. Va. 121, 53 S. E. 913.

The notion that, because at the time these lands were purchased of the complainant in the original suit he had obtained a judgment in his favor which precluded the defendant from asserting title to the lands, he might ever afterwards rely upon the estoppel by which the defendant was then bound, is unsound. On the contrary, the true rule is that, when the ground on which the estoppel of the judgment rests is removed and the truth is let in, the estoppel collapses and the structure built upon it falls to

the ground; whereupon there must be restitution of that which by the previous error of the court the party has been unjustly deprived of. 2 Foster's Federal Practice (4th Ed.) 1132; Mitford's Ch. Pl. 107, 89. Cases where judicial sales made in pursuance of decrees, and before the reversal of such decrees have been protected in the hands of purchasers at such sales, rest upon the security which must be afforded to the purchaser in relying upon the action of the court. It is necessary that the purchaser should have such confidence or sales could not be made for the proper value. Moreover, the price inures to the benefit of the true owner. What would be thought of such a case, if the court in addition to divesting the owner of his title should also deprive him of the proceeds? The rule itself results from a balance of inconveniences, the one which the owner suffers from a forced sale of his property and the other in depriving the purchaser of the necessary safeguard which the general interest of the public requires. Such cases have no application to an ordinary sale made after the court lets go its hold, and leaves the property to the ordinary incidents of business transactions. The distinction is stated by Gilfillan, C. J., in Lord v. Hawkins, 39 Minn., 73, 38 N. W., 689, as follows:

> "The second question in this case is, Does a purchaser in good faith from a successful party in a judgment determining the title to real estate come within the rule which protects a bona fide purchaser under a judicial sale; that is, a sale made pursuant to a judgment or to enforce a judgment, from the effect of a subsequent reversal or vacation of the judgment? The reason for the rule is obvious, and suggests the answer to the question. It is founded upon considerations of public policy, which require

that property shall not be sacrificed at sales that the law makes, that at such sales purchasers shall be encouraged to bid a fair price. And this cannot be effected if the title they acquire is subject to be defeated in consequence of errors or irregularities in the judgment under or pursuant to which the sale is made. This is no such case. Here was no sale nor anything equivalent to a sale. The judgment did not assume to pass any title. It passed on only the previously existing title like an action in trespass or ejectment. The appellant purchased from the party and took only the title that he had."

In 24 Cyc. 6, it is said:

"A sale is not a judicial sale, properly speaking, unless it is made under an order of the court, and subject to confirmation of the court [citing a number of cases]."

This distinction is highly important in the present case.

Another ground taken in defense, but not alluded to by the other judges, is that the bill of review is barred by a statute of limitations of the state of Tennessee which is as follows:

"No bill of review shall be brought, or a motion made therefor, except within three years from the time of pronouncing the decree; saving to infants, married women, persons of unsound mind, imprisoned or beyond the limits of the United States, a right to a bill of review within three years after such disability has been removed." Shannon's Code, § 4848.

I should suppose that this statute was intended to apply only to bills of review for errors appearing of record; for, if it be applicable to bills filed because of newly discovered evidence, the result would be that parties who have no knowledge of such evidence would be cut off at the end of three years, and many cases might arise where

the new evidence might not have been discovered before the period of this limitation should elapse, and yet be of such a character as to show that great injustice had been done. It has always been a favorite doctrine in courts of equity that the time for limiting recourse to those courts should begin when the cause of action is discovered, and some of the states have enacted statutes extending this rule to all cases whether at law or equity. But I am of opinion that, if it be conceded that this statute was meant to include all bills of review, it is not a law which binds the courts of the United States. It was enacted for the regulation of the procedure in the courts of the state. The legislature of the state had not the power to regulate the procedure of the courts of equity of the United States. Nor, indeed, has it the power by its own authority to regulate the procedure in any actions in the federal courts. Congress has power to adopt such legislation, and has done so in respect to actions at law. But the act expressly excludes suits in equity and in admiralty from the rules prescribed by state legislation for actions at law. Nor can a state prescribe a law which restricts the equitable jurisdiction of the federal courts. It may indirectly extend the jurisdiction of those courts by supplying new conditions wherein the federal courts, without departing from their own fundamental principles, may exercise equitable jurisdiction. The consequence of applying the statute of Tennessee to cases such as this would defeat the exercise of jurisdiction by the equity court of the United States in all cases of bill of review filed after three years from the original decree, although the courts of equity have hitherto and through a long period of time taken jurisdiction and decreed relief in many cases where

a much longer period had elapsed. And this further result would happen, that the power of the court existing in other states would be restricted in the state of Tennessee to a part only of its familiar jurisdiction. As we said in Kentucky Coal & Timber Co. v. Kentucky Union Co. (C. C. A.) 187 Fed. 948:

> "State statutes of limitation are prescribed for the tribunals of the state. They are not ex proprio vigore of any force in the courts of the United States. They may be, and in many instances have been, adopted by acts of Congress as laws of the United States. There is no general statute of limitations in the laws of the United States relating to suits in equity. But, speaking now of the equity courts of the United States, there has been, for the sake of conformity, a disposition to accept the statutory regulations of the states prescribing the time within which suits may be brought. And this practice has ripened into a rule which will be enforced whenever by observing it the court is not required to abrogate its own principles, in which case it will protect its own jurisdiction. Alsop v. Riker, 155 U. S. 488, 460 [15 Sup. Ct. 162, 39 L. Ed. 218]; Patterson v. Hewitt, 195 U. S. 309 [25 Sup. Ct. 35, 49 L. Ed. 214]. Instances are found where those courts have enforced the doctrine of laches in favor of defendants where the lapse of time has been shorter than that prescribed by state laws, but where the peculiar circumstances gave rise to an equity which the court was bound to protect. By the same token it would allow a longer period for bringing suit than that prescribed, when by fraud or concealment of the cause of action had not been discovered, or would not by reasonable diligence have been discovered."

This brings us to the last defense which the defendants make, which I think it material to notice. This is, that the complainants have been guilty of laches in taking measures to obtain leave to file the bill. There is no stat-

nte of the United States which limits the time for filing a bill of review. The general rule is that the party should move within a reasonable time after discovering the new evidence. It is a question of laches. In many cases it has been tested by the analogy of statutes fixing the time for taking an appeal from the original decree. But this has never been regarded as an absolute rule in applying the doctrine of laches. But, by whatever rule the matter is to be tested, I think there was in this case no such delay as should bar the remedy. The complainants were non-residents. They had an agent in Cherokee county, N. C., who had charge of lands they held in that state, and apparently of those in Tennessee. He testified that he first heard a rumor that the map had been found in February, 1906; that he at once set about verifying it; that in March of that year he obtained a copy of the map; that he tried to find out whether the field notes of the commissioners could be found at Nashville; that he made trips to Raleigh, N. C., and made thorough search of the state archives there, for the map, the report and the field notes of the North Carolina commissioners, which he hoped to find there, but failed to find them; that, when he had secured all that he could find, the matter was placed in the hands of local attorneys. The details of his search are stated more at length in his testimony. It appears that subsequently counsel at Cincinnati was employed to assist. The petition for leave to file the bill of review was filed by the counsel at Cincinnati, August 6, 1907. It does not appear that any change of conditions occurred meantime.

Reference is also made in the opinion of the majority of the court to the character of the appeal, and it is sug-

gested that it is the appeal of the "assignees." But I think, when construed by the whole record, it may properly be regarded as the appeal of the original parties. The privilege of prosecuting the suit in the court below would seem to carry with it the right to appeal if there should be occasion. As elsewhere said, the bill presented only a controversy to which the original defendants were parties plaintiff, and it is plain that that was the controversy intended to be removed to the appellate court. Evidently the parties have so understood it. There has been no motion to discuss the appeal, and it has been argued and submitted without any controversy on that point. This court has, instead of dismissing the appeal as it should have done if it was deemed fatally defective, entertained it, considered the case on its merits and now affirms the decree.

Restoration of the premises is, as I have said, an incident to the remedy. The remedy of the grantee of the baseless title in such a case would seem to be an action against his grantor to recover the consideration paid.

The proper order would be to reverse the decree of the Circuit Court, and to direct that the original decree be reversed, and the original bill dismissed, and for a restoration of the possession of the premises.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1911. No.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, FRED. W. BRUCH, GEORGE REEVES AND JOHN MATTHEWS
Petitioners

VS.

CHARLES HEBARD, AND THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY
Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

BRIEF STATEMENT OF THE ISSUES

The chief difficulty in replying to petitioners' brief (and indeed, also, to their petition) consists in the fact that the whole of the same is an argument on the merits of the case, as petitioners believe them to be, as if the petition for *certiorari* had been granted and the case at issue. In fact, no sufficient reason is cited by petitioners, either in their brief or petition, that would justify this Court to grant a petition for *certiorari* to the Circuit Court of Appeals.

The present suit turned on questions of fact of importance only as between the parties, which questions of fact were found by the Master, the Circuit Court and the

Circuit Court of Appeals. Petitioners, both in their petition and brief, base their reasons, argument and many of their statements upon conclusions of facts contrary to those found by the Court.

In order to appreciate the issues in this case it will be necessary to set forth briefly certain material facts in the history of the case.

When the original case was at issue it was referred to Special Master Wright, whose report was submitted to the Circuit Court at Knoxville, Tenn., July 7, 1898.

On June 10, 1899, the Circuit Court at Knoxville, Tenn., adjudged and decreed that the title, to the lands in dispute, was valid in Charles Hebard, under whom respondent claims title, and that the title claimed by Belding *et al.*, under whom petitioners claim title to the lands in dispute, was void.

Upon appeal and hearing the Circuit Court of Appeals for the Sixth Circuit affirmed this decree, entered July 13, 1900, by said Court.

No motion or petition for writ of *certiorari* was made to this Court at that time as to this case and there was no right of appeal to this Court. The decree of July 13, 1900, above referred to, was a final decree by a proper Court. See U. S. Judicial Act, 1891, and also the case *Hugh Stevenson vs. William Fain et al.*, 195 U. S. 166, which was a suit of exactly like character, involving a part of the same State Line and decided in the United States Circuit Court of Appeals at Cincinnati.

After said final decree of the Circuit Court of Appeals for the Sixth Circuit, July 13, 1900, Charles Hebard conveyed the lands in dispute, together with other lands, to P. C. Blaisdell *et al.*, and said deed was dated July 16, 1900, was placed in *escrow* and was not delivered out of *escrow* until January 9, 1903. Later, P. C. Blaisdell *et al.* executed a deed for the said lands, including those in dispute, to the Smoky Mountain Land, Lumber & Improvement Company, the respondent in this case, which deed was dated

January 28, 1901, and also placed in *escrow* and not delivered to the Smoky Mountain Land, Lumber & Improvement Company until January 9, 1903.

And after said final decree of the Circuit Court of Appeals for the Sixth Circuit, July 13, 1900, petitioners under deed dated March 3, 1903, but executed as the acknowledgment shows, on June 5, 1903, became vested with the "title" of Belding *et al.* to the lands in dispute, as well as other lands, which deed purported to convey 65,000 acres in Graham County, N. C., and contains these significant words:

> "Subject, nevertheless, to all deductions, if any, arising by, through, or under 'State Line' suit hereinafter mentioned, grants No. 8100 for 16,800 acres and No. 2336 for 14,800 acres above mentioned being for the same lands."

And also the following clause:

> "But there is especially excepted from the covenants of this conveyance all those lands situated at or near the State line between the State of North Carolina and Tennessee, which were recovered in a certain action known as the State Line suit, which was pending in the United States Circuit Court for the Eastern District of Tennessee, and was brought by one Hebard against David W. Belding, and others, if future proceedings do not recover the title thereof."

It therefore appears that after the final decree of the Circuit Court of Appeals of July 13, 1900, without notice of bill of review, respondent purchased the lands in dispute from those claiming under Hebard, in whom it was declared by said final decree the title to the said lands was valid, and it further appears that petitioners purchased the claim of title to the lands in dispute, of those claiming under Belding, whose title was declared in said final decree to be void. It has never been asserted by petitioners that they paid any value whatever for the land which was in dispute in this

case, and with their knowledge of the final decree of July 13, 1900, and from the recitals in their deed, even had they done so, it would have been but a speculation and not as innocent purchasers.

On September 25, 1906 (over six years after the final decree of the Circuit Court of Appeals entered in the original case July 13, 1900), application by petition for leave to file bill of review was made by petitioners to the Circuit Court of Appeals for the Sixth Circuit, and leave was granted to file their petition for bill of review with the Circuit Court of Knoxville, Tenn.

On August 6, 1907, petitioners presented their petition for leave to file bill of review to the United States Circuit Court at Knoxville, Tenn., and leave to file bill of review was granted by the said Circuit Court, in an opinion by Judge CLARK, who had heard the original case. The Court in its decision upon petition and answer filed, said:

> "It does seem, upon examination of this case, that there is no ground on which the success of the proposed bill of review might finally be expected. The objections which are made to permitting this bill to be filed go to the very merits of the bill, and can, and, in my opinion, should more properly be taken up by demurrer to the bill if filed. If, in the exercise of discretion I refuse to allow the bill of review to be filed, it is not certain that my refusal to do so would be subject to review. On the contrary, if the bill is filed and a demurrer should be sustained to it on the same grounds that are now urged against its filing, the action of the Court would be subject to easy review, and so the petitioners for review would suffer no error at the hands of this Court that could not be readily corrected.
>
> "In view of these considerations I have determined to allow the bill of review to be filed, subject, of course, to all legal objections, by demurrer, answer, plea, or otherwise, as the defendants may be advised and it is ordered accordingly."

Thereupon the bill of review was filed. On hearing upon bill of review in the said Circuit Court, the prayer of said bill was denied and the bill dismissed September, 1909, by the said Court in an opinion by Judge JOHN E. MCCALL, in the course of which opinion the Court said:

> "As indicated above, there are other grounds upon which the relief sought by the bill of review should be denied, but I prefer to base my action upon the ground that the newly discovered evidence, if it had all been before the Court at the original hearing, would not have led the Court to a different conclusion than the one reached."

From appeal therefrom made to the Circuit Court of Appeals for the Sixth Circuit, the bill of review case came on to be heard in the said Circuit Court of Appeals on the 5th day of October, 1910, and on the 2d day of October, 1911, decree was entered in said case by the said Circuit Court of Appeals, again affirming the decree of the said Circuit Court. The decision in all these hearings turned upon questions of fact, and, as stated before, were important only as between the parties.

It now appears that petitioners seek to have reviewed by this Court a bill of review proceeding, which bill of review has been denied and dismissed by the Circuit Court and the Circuit Court of Appeals, and said Courts thereby refused to disturb their decrees.

We submit that in accordance with the principles laid down by this Court it would involve an entirely new departure by this Court to grant the petition of *certiorari* prayed for by the petitioners in this case.

Petitioners urge that this is a curious and anomalous case by reason of the fact that there is pending for hearing at the present time in this Court a case of original jurisdiction, brought by the State of North Carolina against the State of Tennessee, to decide the boundary line between the two States and involving the location of that portion of the said State Line which was originally in dispute in this case.

The decree of the United States Circuit Court of Appeals in this case is that the title to the lands in dispute is valid in Hebard, the party under whom respondent claims, and void as to Belding *et al.*, those under whom petitioners claim. Said decree cannot in any manner affect the decision or decree in the case of North Carolina vs. Tennessee, which issue is as to the jurisdiction and sovereignty of the States, nor can the decision as to the jurisdiction and sovereignty of the States, whatever it may be, ever affect the decree as to the parties in this suit.

The issue in this case is now *res adjudicata*, as to the parties, determining the title to the lands and not the jurisdiction and sovereignty of the States.

The United States Judiciary Act of 1891 enacts, *inter alia*, that the United States Circuit Court of Appeals shall be the final Court of Appeals, for all suits between parties claiming under grants of different States, and as it necessarily follows in a suit arising between parties, claiming under grants of different States, that the State boundary would be involved, there can be no question that a case such as this was in the mind of Congress when it passed the Act referred to, and it does not appear that anyone except petitioners have ever regarded this as anomalous. The deductions suggested by petitioners that the fact of the decision by the United States Supreme Court in the case pending in this Court referred to, to wit: North Carolina vs. Tennessee, if said Court should decide that the line was located as contended for by petitioners, would be to reinvest title to the lands in dispute in the State of North Carolina, we submit is not worthy of serious discussion. The State of North Carolina has granted these lands and these grants must always be superior to any junior grants *per se*, and we do not regard that this Court will consider the statement as sound reasoning.

Surely the decree of the Circuit Court of Appeals declaring that the superior title under the laws of North Carolina is void as to the title of respondent, would not enable

an inferior title under the laws of North Carolina to prevail. The State of North Carolina having by solemn grant conveyed the title it claimed to have, would under the laws of North Carolina as well as every other State, have nothing to convey by purported junior grants. In any event, the position of the party claiming under junior grants of the State of North Carolina, or the possibility that such an event might happen, we submit would not be a reason for granting a petition of *certiorari* as prayed for by petitioners.

We submit further that this question has already been decided by this Court in the case referred to between the State of North Carolina and the State of Tennessee in the Supreme Court of the United States, October Term, 1908, numbered 13 originally. In that case the Babcock Lumber & Land Company, claiming to have succeeded to the title of respondent, filed a petition praying for leave to intervene in the case, in May, 1909, on the ground that their title, which had been adjudged to be in Hebard—ancestor in title of respondents—would be affected by an adjudication in the case between North Carolina and Tennessee if it should be found that the lands which it had purchased from the respondent were in the State of North Carolina instead of the State of Tennessee. To this petition the State of North Carolina answered, denying the right of the Babcock Lumber & Land Company to intervene in the case, on the ground that the rights of the Babcock Lumber & Land Company could not be prejudiced by a decree of a boundary line between the States, although that decree might put the land in controversy under the jurisdiction and sovereignty of the State of North Carolina, because the issue in the suit in this Court between North Carolina and Tennessee was for the purpose only of establishing a boundary line, and would affect only the question of jurisdiction and sovereignty of the States, and not affect the private titles of individuals or decrees theretofore made. And the said State of North Carolina did set up in the paper filed in that suit—by its counsel, who are of counsel

in this petition filed for this *certiorari*—called a brief for complainant, meaning the State of North Carolina, in opposition to the motion of the Babcock Lumber & Land Company for leave to file petition to intervene and become a party defendant in this case, that

> "The subject matter of this controversy is a state line. Nobody is interested in that subject matter except the two states. The direct consequences of fixing the line affecting private interests do not concern the states. They are property rights to be settled between private parties in some other manner."
>
> "In *Fowler vs. Lindsey*, 3rd Dallas 411—which was a suit in ejectment arising out of the fact that a state line between Connecticut and New York had never been authoritatively settled—the State of New York tried to intervene and this Court held that a decision as to the right of soil between individual citizens can never affect the right of the State as to the soil or jurisdiction."
>
> "Afterwards, in the case of New York against the State of Connecticut, 4th Dallas 1, the State of New York tried to enjoin the prosecution of suits depending on that state line location and this Court denied the right of the State to interfere in the matter in any way, on the same ground, to wit: that it was not the party in interest, nor affected in any way by any litigation between private parties. The rule certainly works both ways."

The case of Fowler vs. Lindsey even goes further in settling the question raised by the petitioners for this *certiorari*, for, in rendering the opinion of the Supreme Court of the United States, WASHINGTON, Justice, says:

> "It is not sufficient that a state may be consequently affected, for in such case (where the grants of different states are brought into litigation) the Circuit Court has clearly a jurisdiction; and this remark furnishes an answer to the suggestions that have been found on the remote interest of the state in making retribution to her grantees upon the event of an eviction.

> "It is not contended that the states are nominally the parties, nor do I think that they can be regarded as substantially the parties to the suits; nay, it appears to me that they are not even interested or affected. They have a right either to the soil or to the jurisdiction. If they have the right of soil they may contest it at any time in this court, notwithstanding a decision in the present suits and though they may have parted with the right of soil, still the right of jurisdiction is unimpaired. A decision as to the former object between individual citizens can never affect the right of the state as to the latter object; it is *res inter alios acta.*"

Justice CUSHING, filing an opinion in this case of Fowler vs. Lindsey, says:

> "Whether the land lies in New York or Connecticut does not appear to affect the right or title to the land in question. The right of jurisdiction and the right of soil may depend upon different words, charters and foundations. A decision of that issue can only determine the controversy as between the private citizens who are parties to the suit, and the event only give the land to the plaintiff or defendant, but could have no controlling influence over the line of jurisdiction."

The application by the Babcock Lumber & Land Company to intervene, in the suit pending in this Court between North Carolina and Tennessee, dwelt upon in the petition for this *certiorari*, was refused by this Court. While not filing any opinion, it is evident that the refusal by this Court of the petition of the Babcock Lumber & Land Company for intervention was made on the ground that the Babcock Lumber & Land Company would not be affected or interested in the litigation and decree therein between the two States to establish the boundary line.

In other words, the boundary line between two States may be passed upon by a Circuit Court in determining the rights of individuals, but the decision of a Circuit Court in

determining the rights of individuals, by locating a boundary line between States, does not prevent nor affect the right of this Court to relocate or find a boundary line between the two States for jurisdiction purposes. The only effect—which a decree in the case pending in this Court, between North Carolina and Tennessee, finding a different boundary line than the one established in the case in the Circuit Court, for which this petition is filed for a *certiorari*, would be that if the lands adjudged to belong to the respondents were found by a decree in this Court—establishing a different boundary line—to be in North Carolina that they would pay taxes to North Carolina and be subject to the jurisdiction of North Carolina in all police regulations and law; but it would not affect the rights adjudicated in this case by the Circuit Court.

It is true that Charles Hebard claimed under grants from the State of Tennessee, and that Belding *et al.*, defendant in the original suit, claimed under grants from the State of North Carolina, but it is also true that the Smoky Mountain Land, Lumber & Improvement Company, in addition to the title which was vested in Charles Hebard prior to 1898, claims under the decree of the said Circuit Court at Knoxville, Tenn., of June 10, 1899, as affirmed by the Circuit Court of Appeals of July 13, 1900.

If there ever was any virtue in the statement and argument of petitioners as stated in their brief and petition, we submit that when the same should have been urged, if at all, was within one year from July 13, 1900, and not twelve years afterward.

THE LAW AND PRACTICE GOVERNING WRITS OF CERTIORARI

There is not present in this case any question of gravity and no new principle of law of any importance to the public, nor is there any conflict of decisions between Federal

Courts or between Federal Court and a State Court, and there is no question of international law affecting the nation.

It is evident that the petitioners seek to persuade the Court to review the decree upon the correctness of facts found by the inferior Courts, the soundness of which depended upon their judgment. For this Court to grant this petition would involve an entirely new departure from the principles laid down by this Court. The decisions of this Court have been so clear and uniform as to when it will or will not grant petition of *certiorari* that it is probably unnecessary to quote any authorities to the Court. This Court should not issue a writ of *certiorari* for the purpose of reviewing findings of fact.

We submit that this case was decided by the Master and twice by the Circuit Court and twice by the Circuit Court of Appeals under rules of law and equity that have been well settled for many years in the Courts of the United States, and that the mass of evidence taken and the care shown in the various written opinions of the Court, show unusual opportunity to both the Circuit Court and the Circuit Court of Appeals of reaching a just decision.

The principles which govern the exercise of this Court's authority to issue a writ of *certiorari* are very clearly set forth in the case of *Fields vs. United States*, 205 U. S., page 292-296 (1907), from which we quote as follows:

> "In this case there is no sufficient ground for a *certiorari*. The application comes within none of the conditions therefore declared in the decisions of this Court. However important the case may be to the applicant, the question is not one of gravity and general importance. There is no conflict between the decisions of the State and Federal Courts or between those of Federal Courts of different Circuits. There is nothing affecting the relations of this nation to foreign nations, and indeed no matter of general interest to the public."

In *American Construction Co. vs. Jacksonville Railway*, 148 U. S. 372, 382 (1892), the Court states:

> "The act has uniformly been so construed and applied by this Court as to promote its general purpose of lessening the burden of litigation in this Court, transferring the appellate jurisdiction in large classes of cases to the Circuit Court of Appeals, and making the judgments of that Court final, except in extraordinary cases."

The Court also defines the class of cases in which the writ may be allowed, in *Forsyth vs. Hammond*, 166 U. S. 506, 514 (1897), in which the Court declares that the power of the Court in *certiorari*—

> "is a power which will be sparingly exercised, and only when circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the Courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

We consider it unnecessary to impose upon the Court quotations of any further authorities as to when this Court deems it proper to grant a petition for writ of *certiorari*, especially as all the decisions of this Court are in accord with the cases above quoted, and we submit that the principles therein declared will not allow the Court to grant the petitioners' prayer for a writ of *certiorari* to the Circuit Court of Appeals in this case.

Notwithstanding the fact that the Special Master, the Circuit Court and the Circuit Court of Appeals in the original case found in favor of the contentions as to the location of the State Line, of the plaintiff, Charles Hebard, under whom the respondent claims title to the lands in dispute, and notwithstanding the further fact that upon Bill of Review, Judge CLARK, of the Circuit Court, who had

heard the original case, in his opinion allowing the Bill of Review to be filed, stated: "It does seem, upon examination of this case, that there is no ground on which the success of the proposed bill of review might finally be expected;" and in effect saying that he merely allowed the Bill of Review to be filed in order that the petitioners might have opportunity, should they suffer error at his hand, of making an appeal to the Circuit Court of Appeals, which they would not have if he refused to allow the bill to be filed; and notwithstanding further that upon hearing of said bill of review by the Circuit Court, the Court, in an opinion by Judge JOHN E. MCCALL said, *inter alia:*

> "As indicated above, there are other grounds upon which the relief sought by the bill of review should be denied, but I prefer to base my action upon the ground that the newly discovered evidence, if it had all been before the Court at the original hearing would not have led the Court to a different conclusion than the one reached."

And also, notwithstanding that the Circuit Court of Appeals, upon hearing of an appeal from the said decree of the Circuit Court, affirmed the same and dismissed the bill, petitioners lay great stress on the "grave doubts" of the different Courts as to what their decision should be.

We call this Court's attention to Special Master Wright's report, wherein he finds, *inter alia:*

> "After a careful consideration of the whole case, I am of the opinion, and so report that the line between the States of Tennessee and North Carolina from the Little Tennessee River to the Junction of the Hangover and Fodder Stack Ridges, as run and located by the Commissioners of said States, in 1821, and confirmed by the respective legislatures of said States, crosses the Little Tennessee at a point where it reaches the river on the northeast side, and from the river runs up the Hangover lead, as shown on complainant's map, and along the extreme heights of this ridge, passing the black or red oak, Slick Rock Gap, Cold Spring

> Knob, Big Flat Knob, Hangover, Haoe, Grassy Gap, and Stratton Bald to the junction of Hangover with Fodder Stack."

and also the opinion of Judge CLARK of the Circuit Court at Knoxville, in his opinion in the original case June 10, 1899:

> "It must not be forgotten, however, that the Commissioners in surveying and marking the line, followed the mountain range down to the Tennessee River, and that according to the calls actually made, they would cross that river and proceed along the mountain crest where complainants contend the line is. It was the crest of this same mountain range which brought them to the river, and it was the obvious and conspicuous range to have followed by directly crossing the river and keeping up the previous course. It is extremely difficult to believe that the Commissioners at this point would have dropped down the river for half a mile and then followed Slick Rock Creek for a distance of five or six miles without ever making the slightest reference to this water stream. Granting as argued that the creek may, at that time have had no name whatever, nevertheless it would have been so natural and so necessary to avoid misleading, for the Commissioners to have said that they changed their course, and instead of going directly across the river went down and then followed a creek or water stream up the valley and then to the ridge which led out to the junction; that it is next to impossible to think that such a deviation as this would have been made without a word to give any indication of the fact. Following the calls as actually given, it would be impossible to run this line as claimed by the defendants."

And also the decision of the Circuit Court of Appeals, expressed in the opinion of Mr. Justice LURTON, wherein he states *inter alia* as follows:

> "The significance of these trees as marking the State line is also affected by the fact that other trees similarly marked are found on the Fodder Stack ridge,

which, confessedly, are not upon any line now claimed as the actually located State line. The surveyors who testify to such trees express the opinion that they were marked to designate Indian trails. As this whole region was the habitat of the Cherokee Indians at the time of this survey in 1821, it is altogether possible that all of this marking was done by the Indians as mere trail marks, or in a spirit of imitation, though the stronger probability is that it was tentatively marked and then abandoned for the Hangover line, as the one indicated by the Cession Act, and the report made accordingly."

And also:

"The marked trees on this line are shown by blocking to have been probably made in 1821, and correspond in appearance to those existing in the undisputed line. They are strangely scattered along the line claimed. About one-half of the whole number are found within one and one-half miles of the mouth of the creek. Then for a distance of three and one-half miles not a marked tree is shown, though the line is still in the valley, where there was and is a great abundance of timber. Then where the line is claimed to have left the creek, there are found a great number of marked trees within a short distance after staring up a spur leading to the Fodder Stack, but from the junction of this spur with the Fodder Stack to the Hangover, only two or three trees are found. It is most difficult to account for this line of marked trees, irregularly as they are grouped. The probabilities are that they were marked by the Commission."

"For what purpose, is the question. Their evidential value as establishing the actual State line is greatly impaired by the following circumstances:

"1. The line thus marked is not upon the course which is called for by the survey as reported and adopted.

"2. It departs from the line of the 'main ridge' called for in the Commissioners' survey, and a natural

monument of the utmost significance. When a monument natural or artificial is called for, and its identity is doubtful, great importance may be properly attached to an actually marked line upon the ground.

"But in this instance there was no reasonable doubt as to the identity of the 'main ridge' called for in the Commissioners' survey.

"The greater altitude of the Hangover ridge, as well as its general course, makes it most clear that there could have been no difficulty in determining that the Hangover and not the Fodder Stack was the 'main ridge.'

"It is, therefore, not a case of ambiguous calls or doubt as to the identity of a natural monument in the description. The indisputable facts that the Hangover is much the greater in elevation, was in the direct course called for by the Cession Act, and was indicated by the chops on the established monument on the north side of the river, leaves no reason for supposing that the commission mistook the Fodder Stack ridge as the 'main ridge' and undertook to reach it by a line up the creek.

"3. If we adopt the Slick Rock Creek line, we must believe that the Commissioners not only turned down the river at an acute angle from the course they had been following, followed the river for half a mile and yet made no call in their report which would indicate such a departure, or that the river was made the boundary for any part of the line.

"4. We must also believe that instead of following a mountain boundary, which, according to the Cession Act, ran with the summits of the highest mountains, they deliberately abandoned the heights of the mountain ranges and followed a water course from its mouth for seven miles, and yet made no mention of this natural object in their report whatever."

And upon reading these excerpts or the full opinions themselves, we think this Court will have no doubt whatever as to the certainty existing in the mind of the said Courts that their final conclusions and decisions were proper

and just in reaching a full determination of the rights of the parties.

Petitioners in their brief, under the history of the case, "Facts" and "Points of Law," state deductions and make arguments on fact and law as if this case were being heard by this Court upon direct appeal from the Circuit Court of Appeals. The argument by petitioners upon the merits of the case, if it were allowable, would make it possible to bring every case into the Supreme Court of the United States and have the merits reviewed under the disguise of a writ of *certiorari*.

Respondent is advised that the allegations and arguments of petitioners upon the merits of this case has nothing whatever to do with the issue before this Court as to the granting or not granting of a writ of *certiorari*. Petitioners in their brief also profess to set forth the legal defences urged by respondent in the bill of review proceedings, and petitioners proceed in their brief to reply to such defences. The essential facts commented upon in the course of petitioners' brief and petition are contrary to those found by the Circuit Court and the Circuit Court of Appeals. Many of the decisions cited by petitioners in reply to the legal defences of respondent are well construed decisions, sound in principle as applied to the specific case quoted from, but are not applicable to this case. The error of petitioners lies in their failure or unwillingness to see that which is plainly pointed out by the Courts below, to wit: that the essential facts claimed by petitioners are not the facts as shown by the evidence and found by the Courts, and that none of the equitable doctrines cited by petitioners can avail upon the facts as found by the Court.

Respondent does not wish to impose upon the Court a long brief arguing upon the merits, which is not the issue upon petition for *certiorari*, and such reply as is here made to the "Facts" and "Points of Law," by respondent is merely an endeavor to be somewhat responsive to petitioners' brief.

GENERAL REPLY TO PETITIONERS' BRIEF ON FACTS

The brief of petitioners, and also the petition, indicates that portion of the State line in dispute began at the sixty-fourth mile tree, which is not correct. The record and the evidence will show that the State Line in dispute was undisputed down to the very north bank of the Tennessee River, about midway between the sixty-fourth and sixty-fifth mile trees, where stood a fore and aft State Line tree directly opposite the point where respondent, and those under whom they claim, contend that the State Line crossed the Tennessee River to the Hangover Ridge.

Judge LURTON in his opinion in the original case, states that

> "the line to the Tennessee River is undisputed and is not here involved. The point where the Commissioners' line reaches the Tennessee River is one of the fixed and settled questions on this record. The line on the northeast side of the river is well located, and a fore-and-aft state line pine tree is standing very near the bank of the river. * * * He (the Master) also reports that the parties agreed before him that the line was well established to that tree."

As will appear from the evidence on the record it was found by the Master and the Circuit Court and the Circuit Court of Appeals as a fact that the line over Hangover Ridge (the "line" claimed by respondents and those under whom they claim) was the true State line, and that located on said line are State line trees marked as such in 1821. It was also found as a fact, as set forth in all the opinions, that the Hangover Ridge is the "main ridge." That the Cession Act and the confirmatory acts of 1821 enacted by the respective States, according to their language and descriptions, located the State Line between the States at the point in dispute on the Hangover Ridge. That it was recognized by the Master, the Circuit Court and the Circuit

Court of Appeals that the surveyors in marking the State Line in 1821 probably did survey up Slick Rock Creek, but such line under all the evidence was a tentative line and was not adopted by the Commissioners, for the reason that the line up Slick Rock Creek would not conform to the words of the Cession Act of 1789, nor the words of the Confirmatory Acts of 1821, which purported to be a ratification of the Reports of the Commissioners.

Therefore, it appears in the opinions of the Master, the Circuit Court and the Circuit Court of Appeals, that though they admitted that the surveyors of 1821 surveyed and marked a line up Slick Rock Creek, that under the language of the confirmatory acts of the States and the Cession Act, the Commissioners never adopted such line, and that the only line that would conform to the words of said acts was the line over the Hangover contended for by those under whom respondent claims.

Judge LURTON, in his opinion, says:

> "Returning to the line as located by the joint commission, we find the next call, after striking the Tennessee river, is in these words: 'From Tennessee river to the main ridge and along the extreme height of the same to the place where it is called the "Unicoy" or "Unaka" Mountain. Just here it may be observed that the Unicoy or Unaka Mountain is about 15 miles in a southwesterly course from the junction of the two ridges spoken of heretofore. How did the commissioners locate the line between the Tennessee river and the Unaka Mountain? It is to be borne in mind that their authority was to "settle, run, and re-mark" the line "agreeably" to the cession act. The Tennessee river was a water course, which cut a deep gorge through the main mountain range which the line was following between the Smoky and the Unicoy Mountain. The cession act placed the boundary "along the extreme height of said mountain (that is, the Great Smoky) to the place where it is called "Unicoy" or "Unaka" Mountain.' It was the duty of the commissioners to locate the line 'agreeably' to this call. They

had been following the extreme height of the ridge between the Smoky and the Tennessee River. The river cut through the ridge by a deep gorge, the mountain on either side gradually lowering, and terminating at the river in a bluff. The last monument on the northeastern side is a tree marked as a fore and aft tree. A fore and aft tree is a tree in the line, and the chops are on the sides showing the direction of the line. The chops on this tree indicated that the line there crossed the river. The general course of the line, as called for by the call which brought the line to the river, was southwesterly, and this course was to be continued to the Unaka. The course would, therefore, require the line to there cross the river, as also indicated by the chops on the tree. The general direction of the cession act would keep the line on the extreme height of the mountain ridge or range. Immediately across the river, and in the general course of the line, was the Hangover ridge * * * . The Master reports that the Hangover ridge was the main or highest ridge, having an average height of 800 feet greater than the Fodder Stack."

And at the beginning of Judge LURTON's opinion, he says:

"The intention of the North Carolina cession act of 1789 was to make the crest of the great mountain ranges extending across the State of North Carolina in a southwestwardly direction the boundary line of the ceded territory. This is most evident from even a casual reading of the boundary line therein described. The Painted Rock on the French Broad river is a natural monument of great notoriety. From that point the calls in the cession act are, 'Thence along the highest ridge of said mountain to the place where it is called the "Great Iron" or "Smoky" Mountain; thence along the main ridge of said mountain to the place where it is called "Unicoy" or "Unaka" Mountain, between the Indian towns of Cowee and Old Chota.' The part of the great mountain range called 'Smoky Mountain' is well known, as is also that part of the same range southwest of Smoky Mountain called 'Unicoy' or 'Unaka' Mountain. There is

> no trouble about the location of these two great natural monuments in the line. The distance between the two is not less than 50 miles, and the only call which is locative of the line between the two is that the line is to run along 'the extreme height of the said range, theretofore called the "Great Iron" or "Smoky" Mountain, to that part of the range or ridge called the "Unicoy" or "unaka" Mountain.' The commissioners representing the two states were not authorized to agree upon a new boundary, but to 'settle, run and remark the boundary line * * * agreeably to the true intent and meaning' of the said cession act of 1789. It was clearly their duty to run and mark a line between the Great Smoky and Unaka Mountains 'following the extreme height' of the mountain range connecting these two prominent points."

It will be noted that in the original case the only evidence of the report of the Commissioners was the description contained in the "Confirmatory Acts", which purported to quote the words of the report of the Commissioners. The original report of the Commissioners of 1821 had not been found and was not in evidence.

Petitioners based their bill of review proceedings on the purported "newly discovered map of 1821" *and respondent filed the newly discovered report of the Commissioners of* 1821. It will be observed that as to the descriptions of the line in dispute, the original report of the Commissioners thus placed in evidence *is verbatim the same* as the "Confirmatory Acts", which acts were before the Master and the Courts in the original case. Therefore, the conclusion of the Master and the Courts below in the original case, to wit: *that the only line that would conform to the Cession Act and the Confirmatory Acts of the respective States was the line over the Hangover,* is confirmed and not disturbed by the fact that the original report of the Commissioners of 1821 contains *verbatim* the same description as that set forth in the Confirmatory Acts, which they had construed.

The report of the Commissioners, the Confirmatory Acts of the respective States, and the newly discovered map make no reference whatever to any field notes—that is, courses and distances. Further, the newly discovered map *as a picture or sketch map* conforms to the words of the Report of the Commissioners, the Confirmatory Acts and the Cession Act and conforms to the "line" over the Hangover.

Petitioners in the Courts below sought to accept the map as independent of the Cession Act and the Report of the Commissioners and the Confirmatory Acts of the States, and endeavored to point out certain features of the map which they claimed to be in their favor and at the same time, to reject the map as incorrect where plainly it did not conform to their contentions.

Judge McCALL heard the case upon bill of review in the Circuit Court, and in his opinion states as follows:

> "Upon an examination of the newly discovered map, it appears that the State line crosses the Little Tennessee River at right angles, and at the point where the line first reaches the river, and that it proceeds in a southwesterly direction along the ridge, lying adjacent to and immediately south of the river, towards the Unicoy Mountains. There is a black line upon the newly discovered map, marked "creek" which forms a junction with the Tennessee River a short distance above where the line crosses the river, and east of the line. But there is no indication upon the map, nor in the report accompanying it that this line ran up said creek for any distance, or that it touches the creek at any point. Indeed, if the line followed either the river or creek for any distance, that facts is not indicated upon the map, nor is there any reference to such thing in the Commissioner's report.
>
> "In order that the map or the report of the Commissioners be of any service to the petitioners, it should show that the State line, after crossing the river followed Slick Rock Creek, if, indeed, it be Slick Rock Creek that is indicated on the map, to a junction with

Little Fodder Stack. From the location of this stream marked 'Creek' on the map, considered in the light of all the evidence in the case, I am inclined to the opinion that it is Cheoah River, and not Slick Rock Creek.

"The map and the report upon their faces failing to shed any new light upon the issues in the original case, let us examine the evidence taken upon the issues under the bill of review.

"Here we are met with the testimony of witnesses seemingly of equal credibility and of equal opportunity to know the facts about which they testify that is contradictory and unreconcilable. Instead of elucidating the newly found map, it tends to confuse that which appears upon the face of the map, and also it is confusing in its relation to the evidence and findings in the original case.

"Indeed, if this map sheds any additional light upon the issues, it is to make clearer and more certain the correctness of the conclusion reached in the original case, now under review.

"An examination of the Commissioner's map, discloses that the State line approaches the north bank of the Little Tennessee River, running in a southwesterly direction, crosses it at right angles, leaving the south margin of the river in a southwesterly direction immediately at the point of crossing, and runs along the crest of a ridge toward Unaka Mountain, and in this particular follows the direction of the Cession Act, from the Smoky to the Unaka Mountains, wherein it is provided as follows: 'Thence along the extreme height of the said mountain to the place where it is called Unicoy, or Unaka Mountain.'

"The report of the Commissioners and the Confirmatory Acts of the North Carolina and the Tennessee Legislatures all use identical language in describing this line from the Tennessee River, to wit: 'From the Tennessee River to the main ridge and along the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain.'

"This is the course and location given the State line by the final decree in the original case. There is nothing in the newly discovered evidence to warrant this Court in holding that had it been before the Court

at the original hearing, a different conclusion would have been reached, but, on the other hand, the newly discovered evidence rather tends to strengthen the correctness of the original decree.

"It would require a far stretch of the imagination to hold that the newly discovered map, which is silent on this point, except the use of the word 'creek' is sufficient to warrant the Court to reverse the holding in the original case, and write upon the face of the map, and into the Commissioners' report, according to the showing on the Burns Map, the words: 'Thence along the North bank of the Tennessee River to the mouth of Slick Rock Creek. Thence westerly up said creek with its meanderings about five miles to Little Fodder Stack lead; thence along the extreme height of Little Fodder Stack to Big Fodder Stack; thence along the crest of Big Fodder Stack to its junction with Hangover.' Yet this, in substance, must be done, if the petitioners are granted the relief sought by their bill of review.

"As indicated above, there are other grounds upon which the relief sought by the bill of review should be denied, but I prefer to base my action upon the ground that the newly discovered evidence, if it had all been before the Court at the original hearing would not have led the Court to a different conclusion than the one reached."

Petitioners state that in 1836 Tennessee caused the lands ceded to her to be surveyed and sectionized and platted to Slick Rock Creek, "recognizing it as the line." The facts are as follows:

By the Act of Tennessee, 1836, Chapter 2, Section 10, a surveyor's district, known as the Ocoee District, was established, and was surveyed by the surveyor of that district who for some reason unknown, but probably by reason of the difficulty of the work, stopped at Slick Rock Creek, as to sectionizing lands on his plat. These facts were all before the Master and the Court in the original case, Belding vs. Hebard. As will further appear, the State of Tennessee never recognized by any Acts, that the boundary

line between Tennessee and North Carolina was Slick Rock Creek.

The Act of Tennessee of 1854, Chapter 22, declares that all lands in the Ocoee District, *whether surveyed or not, and whether on the plat of the office of the Surveyor of the Ocoee District or not*, should be granted upon certain procedures therein set forth in detail. Thus the State of Tennessee by said Act set forth her claim of right to the lands now in dispute, from which claim she has never receded, and has never acquiesced in any claims of North Carolina as to this land in dispute or as to parties claiming under North Carolina.

The very land in dispute was and is the only land in the Ocoee District not sectionized prior to 1854, under the evidence in this case.

The significance of this Act of Tennessee of 1854 is apparent when it is recognized, as the record shows, that all grants for lands by the State of North Carolina anywhere in the vicinity of the State Line here in dispute, were subsequent to 1853. It is also significant that the said Act of Tennessee of 1854 declares that all lands in the Ocoee District, whether surveyed or not, and indicates that some of the lands of the Ocoee District had not been surveyed *and the only land* ever claimed by Tennessee or parties claiming under Tennessee, in the Ocoee District, which had not been sectionized, as far as in evidence, *is the land which was in dispute in this case.*

The statement of petitioners that

> "afterward the case came on regularly for hearing and was submitted to the Circuit Court of Appeals and was under consideration; merely by an accident an authenticated copy, or possibly the original of the field notes of Davenport, one of the original surveyors in 1821 of the line who accompanied the joint commission were discovered in an old Secretary by the descendants of the said Davenport in the home of said Davenport which were duly authenticated, and an application was made to the Circuit Court of Appeals

> suggesting a diminution of the record and asking leave to put in these field notes which in every way corroberated the Slick Rock line; that application with additional testimony proving the authenticity of the notes and what they proved was refused,"

is not a full and correct statement.

The evidence submitted by petitioners and respondent to the Circuit Court of Appeals shows there was no authenticated copy of any field notes of Davenport (surveyor for the State of North Carolina on the survey of 1821), and it appears by said evidence that these notes were not original field notes of Davenport or anyone else, and it clearly appears by said evidence that it is unknown what notes said field notes were copied from.

The motion of petitioners to the Circuit Court of Appeals, suggesting that the record be remitted to the Circuit Court at Knoxville to admit evidence of these field notes was denied by said Circuit Court of Appeals on May 11, 1911.

GENERAL REPLY TO PETITIONERS' BRIEF ON "POINTS OF LAW"

Petitioners quote authorities at length on the point that even though they were assignees, if aggrieved by the final decree, they are proper parties to file a bill of review. We are not concerned with the technical consideration as we would be if petitioners were aggrieved by the final decree in the original case of Belding vs. Hebard. The fact is that petitioners are not and never were aggrieved by the said final decree. The legal position taken by respondent was that petitioners not being aggrieved by the decree complained of, could not prevail upon proceedings for the reversal of that decree.

The Circuit Court of Appeals, upon bill of review proceedings, in their decision rendered October 2, 1911, found that respondent was an innocent purchaser for value after

final decree, and that petitioners were only concerned as having made a speculative purchase, and the case presented to the equitable discretion of the Court was not one which would allow the Court to review a decree upon the grounds sought.

This finding of the Circuit Court of Appeals in the judgment of the said Court, as expressed in their opinion, was controlling, and made it unnecessary for the Court to consider any other legal defences or the merits of the newly discovered evidence.

In conclusion, it is submitted that the petitioners wholly fail to show any reasons for granting a petition for *certiorari*. Petitioners also fail to show any contention whatever that exists or would be decided by review of this case by this Court, except the contentions existing between the petitioners and respondent, which have already been adjudicated by a Court of final jurisdiction under the law.

We submit that the writ should be denied.

Respectfully submitted,

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T. E. H. McCROSKEY
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Office Supreme Court.
FILED
OCT 6 1914
JAMES D. MAHER

No. 30

October Term, 1913.

IN THE

Supreme Court of the United States.

WILLIAM R. HOPKINS and Others,
Petitioners,

v.

THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY,
Respondent.

DAVID W. BELDING and Others,
Plaintiffs,

v.

CHARLES HEBARD,
Defendant.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Brief of the Smoky Mountain Land, Lumber and Improvement Company, Respondent.

JOHN FRANKLIN SHIELDS,
WILLIAM A. STONE,
T. E. H. McCROSKEY,
Counsel for Respondent.

International, 336 Chestnut St.

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IN THE

Supreme Court of the United States.

October Term, 1913. No. 232.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, FRED W. BRUCH, GEORGE REEVES, JOHN MATTHEWS,

Petitioners,

v.

CHARLES HEBARD AND THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT, THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY.

STATEMENT.

During 1895 Charles Hebard, who claimed the lands in dispute under a grant from the State of Tennessee, filed the bill in the original case to restrain trespass and remove a cloud from the title of said lands, in the Court of Chancery, Monroe County, Tennessee, praying that Belding, et al., who were named as defendants and claimed the same lands under a grant from the State of North Carolina, be restrained from cutting timber on the said lands, etc.

During January, 1896, the case was removed upon petition of Belding, et al., to the United States Circuit Court of the Northern Division, Eastern District of Tennessee.

The title to this disputed tract of land turned upon the location of the boundary line between the State of Tennessee and the State of North Carolina. The portion of the said boundary line thus in dispute begins at or near the north bank of the Tennessee River, at a "*spruce pine*" (*hemlock*) *tree,* admitted by all parties to the original case to be a marked fore and aft State Line tree, and runs to a point on the south side of the Tennessee River near the summit of a mountain known as Stratton Bald, being the junction of the Hangover and Fodder Stack Ridges and referred to in the evidence as the "Junction" (R., pp. 336-401, 404-405).

The land in dispute lies immediately south of the Tennessee River and is part of a basin drained by a stream about seven miles long, known as Slick Rock Creek, and containing about 6600 acres. The disputed territory is about one-half mile wide on the north, where it is bounded by the Tennessee River; at about the mid point of the tract, its width is from three to three and one-half miles and then the width gradually narrows to zero at the undisputed point on the south, near Stratton Bald Mountain, called the "Junction" (Hale map, R., p. 754).

Hebard, the Tennessee claimant, contended that the State Line from the said undisputed "spruce pine" State Line tree, on or near the north bank of the Tennessee River, crossed said river direct to a ridge or spur leading up to the Hangover Mountain ridge (which is on the east side of the Slick Rock Creek basin), thence along the said Hangover ridge to the Junction, the undisputed point on the south near Stratton Bald Mountain. This contention of Hebard was

sustained and determined that the lands in dispute were in Monroe County, Tennessee (R., pp. 336-401).

Belding, et al., claimed that the boundary line from the undisputed "spruce pine" State Line tree on or near the north bank of the Tennessee River, followed down the Tennessee River for a half mile, crossing said river to the south side at the mouth of a stream known as Slick Rock Creek, thence following the meanders of said Slick Rock Creek for about five and one-half miles, thence departed from the stream, following a lead or ridge to the westward, to Big Fodder Stack Peak (which is on the west side of said Slick Rock basin), thence to the Junction, the undisputed point near said Stratton Bald Mountain. This contention of Belding, et al., would place the lands in dispute within Graham County, North Carolina (R., pp. 336-401).

The territory now comprising the State of Tennessee was ceded to the United States by the State of North Carolina in 1789. The Cession Act described the eastern boundary line, a portion of which is involved in this case, as follows:

> "Beginning on the extreme height of the Stone Mountain, at the place where the Virginia line intersects it, running thence along the extreme height of the said mountain to the place where the Wautauga River breaks through it; thence a direct course to the top of the Yellow Mountain, where Bright's Road crosses the same; thence along the ridge of said mountain, between the waters of Doe River and the waters of Rock Creek, to the place where the road crosses the Iron Mountain; from thence along the extreme height of said mountain to where Nolinchucky River runs through the same; thence to the top of the Bald Mountain; thence along the extreme height of the said mountain to the Painted Rock, on French Broad River; thence along the highest ridge of the said mountain to the place where it is called the

> Great Iron or Smoky Mountain; *thence along the extreme height of the said mountain to the place where it is called Unicoy or Unaka Mountain,* between the Indian towns Cowee and Old Chota; thence along the main ridge of the said mountain to the southern boundary of this state" (R., pp. 339-401).

The part of the line, which was in dispute and adjudicated by the courts below, is included within the call beginning,

> "thence along the extreme height of the said mountain to the place where it is called Unicoy or Unaka Mountain."

The mountain whose extreme height is to be followed until Unaka Mountain is reached, is the "Great Iron or Smoky Mountain."

The Acts of Congress accepting said cession and creating the State of Tennessee use the same words of description of the eastern boundary line as the Cession Act quoted above, United States Statutes at Large, Vol. 1, pages 106 to 109, and 491 and 492.

The State of North Carolina (during 1819) and the State of Tennessee (during 1820), each enacted a statute authorizing their respective Governors to appoint three commissioners "to settle, run and mark the boundary line between the State of North Carolina and the State of Tennessee, agreeably to the true intent and meaning of the Act of General Assembly of North Carolina, entitled 'An Act for the purpose of ceding to the United States of America certain western lands described therein.'" Revised Statutes of North Carolina (1837) on pages 94 and 95. Acts of Tennessee, 1820, Chap. 22. (The Act of Tennessee uses the word "re-mark" instead of the word "mark.")

The joint commissioners did run and mark the line and each state passed an act ratifying, confirming

and adopting the line as run and reported by the commissioners. Acts of Tennessee, 1821, Ch. 35, p. 45; Iredell & Battle Rev. Statute of North Carolina, p. 96.

The Tennessee confirmatory act is as follows:

"Be it enacted by the General Assembly of the State of Tennessee, that the dividing line run and marked by Alexander Smith, Isaac Allen and Simeon Perry, commissioners for and on behalf of this state, and James Mebane, Montfort Stokes and Robert Love, commissioners for and on behalf of the State of North Carolina, which dividing line, as run by said commissioners, begins at a stone set up on the north side of Cataloochee Turnpike Road, and marked on the west side, Ten., 1821, and on the east side, N. C., 1821; running thence on a southwestwardly course to the Bald Rock, on the summit of the Great Iron or Smoky Mountain, and **continuing southwestwardly on the extreme height thereof to where it strikes Tennessee River**, about seven miles above the old Indian town of Tallassee, crossing Porters Gap at the distance of twenty-two miles from the beginning, passing Meigs' boundary line at thirty-one and a half miles, the Equovettly path at fifty-three miles, and **crossing Tennessee River** at the distance of sixty-five miles from the beginning; **from Tennessee River to the main ridge, and along the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain**, striking the old trading path leading from the valley towns to the overhill towns, near the head of the west fork of Tellico River, and at a distance of ninety-three miles from the beginning; thence along the extreme height of the Unicoy or Unaka Mountain to the southwest end thereof, at the Unicoy or Unaka Turnpike Road, where a cornerstone is set up marked Ten. on the west side, and N. C. on the east side, and where a hickory tree is also marked on the south side Ten., 101 M., and on the north side N. C., 101 M., being one hundred and one miles from the beginning; from thence a

due course south two miles and two hundred and fifty-two poles to a spruce pine on the north bank of the Hiwassee River, below the mouth of Cane Creek; thence up the said river the same course about one mile, and crossing the same to a maple marked W. D. and R. A., on the south bank of the river; thence continuing the same course due south eleven miles and two hundred and seventy-three poles to the southern boundary line of the State of Tennessee and North Carolina, making in all one hundred and sixteen miles and two hundred and twenty-three poles from the beginning, and striking the southern boundary line twenty-three poles west of a tree in said line marked 72 M., where was set up by said commissioners a square post, marked on the west side Ten., 1821, and on the east side N. C., 1821, and on the south side G., be, and the same is hereby ratified, confirmed and established as the true boundary line between this state and the State of North Carolina" (R., pp. 340-402).

The boundary is described in the North Carolina Confirmatory Act in words identical with those used in the Tennessee act, but concludes with these words:

> "The whole distinctly marked with two chops and a blaze on each fore and aft tree, and three chops on each side line tree, and mile marked at the end of each mile" (R., p. 340-402).

By a stipulation filed in this case, it is agreed that **the Unicoy or Unaka Mountain is** a part of the main ridge dividing Tennessee and North Carolina at a point **about fifteen miles southwest of any point in dispute in this case.** (Rec., p. 327.)

When the case was placed at issue it was referred to Asbury Wright, Esq., as special master, and his report was submitted July 7, 1898, wherein he found that the Hangover Ridge was the main ridge, that *each* of the lines contended for had trees marked as State Line trees thereon, and that the true boundary

line between the said states, run and adopted by their commissioners of 1821 from the undisputed "spruce pine" fore and aft State Line tree on or near the north bank of the Tennessee River to the Junction, near Stratton Bald Mountain, south of said river, was the line contended for by complainant Hebard, to wit: over Hangover Mountain, and that the disputed territory was therefore located in Monroe County, Tennessee (R., pp. 295, 335-343 and 358-359).

Defendants Belding, et al., filed exceptions to this report which were heard by the United States Circuit Court at Knoxville, Tennessee (Judge Clark sitting), on June 10, 1899, and decree was entered overruling the exceptions and confirming the report of the special master, and entered **a decree setting forth that the titles of complainant Hebard to the lands described in the bill were valid, and that the titles of defendants Belding, et al., were void.** (R., pp. 368-373.)

From this decree an appeal was made to the United States Circuit Court of Appeals for the Sixth District, where the same was heard on March 14, 1900, and decree entered on July 13, 1900, in an opinion by Judge Lurton, in which, with great care, the whole case was reviewed, and the decree of the Circuit Court affirmed (R., p. 400). Hebard v. Belding, et al., 103 Fed. 532.

The decree of the Circuit Court of Appeals was a final decree by a proper court. See United States Judiciary Act of 1891, and also the case *Stevenson v. Fain*, 195 U. S. 166.

After this decree was entered, said Charles Hebard conveyed the lands in dispute together with other land to Blaisdell, et al. (R., p. 565), and Blaisdell, et al., to the Smoky Mountain Land, Lumber and Improvement Company, the appellee in this case (R., p. 569), who therefore claimed the disputed territory under grants from the State of Tennessee, and relying upon

said decree of the United States Circuit Court of Appeals for the Sixth Circuit.

After title was thus decreed to be finally vested in Hebard, said Belding, et al., purported to convey such right and title as they might have to the land in dispute, together with other lands to Hopkins, et al., the appellants in this case. Therefore Hopkins, et al., claim the disputed land under grants from the State of North Carolina, and contrary to the said final decree of the United States Circuit Court of Appeals for the Sixth Circuit.

During December, 1903, or during January, 1904, or during February, 1904, the archivist of the State of Tennessee, in clearing out certain rubbish in the basement of the State House at Nashville, Tennessee, discovered in a barrel, a map purporting to have been made by the joint commissioners of the States of North Carolina and Tennessee, appointed in 1821, and authorized to run, in pursuance of the Cession Act, passed prior thereto, that part of the boundary between said states south of the Pidgeon River (R., p. 639).

This said map is the "newly discovered evidence" urged by complainants as the basis for renewing the original suit by the bill of review now filed.

At the same time and place that the said map was found said archivist found the report of said joint commissioners as to said boundary line (R., p. 639).

On September 25, 1906, application by petition for leave to file bill of review was first made by present petitioners to the United States Circuit Court of Appeals of the Sixth Circuit, and leave was granted to said W. R. Hopkins, et al., to file their petition for bill of review in the United States Circuit Court at Knoxville, Tennessee, in the following words:

> "Without deciding any question which may be involved in the application for leave to file such

a bill, this court for reasons satisfactory now consent that the petitioners may apply directly to said Circuit Court, which court will grant or refuse permission as it may be advised" (R., p. 752).

On August 6, 1907 (more than seven years after final decree was entered by the Circuit Court of Appeals), W. R. Hopkins, et al., presented their petition for leave to file bill of review to the United States Circuit Court at Knoxville, Tennessee (R., p. 421).

On the same date the Circuit Court entered an order that a rule be issued and served on the Smoky Mountain Land, Lumber and Improvement Company to show cause why said petition should not be granted and directing the said company to answer on or before the next rule day. (R., p. 439.)

Leave to file said bill of review was granted by the said United States Circuit Court in an opinion by Judge Clark, who had heard the original case.

The court, in its decision upon petition and answer filed, said:

"It does seem, upon examination of this case, that there is no ground on which the success of the proposed bill of review might finally be expected. The objections which are made to permitting this bill to be filed go to the very merits of the bill, and can, and, in my opinion, should more properly be taken up by demurrer to the bill if filed. If, in the exercise of discretion I refuse to allow the bill of review to be filed, it is not certain that my refusal to do so would be subject to review. On the contrary, if the bill is filed and a demurrer should be sustained to it on the same grounds that are now urged against its filing, the action of the court would be subject to easy review, and so the petitioners for review would suffer no error at the hands of this court that could not be readily corrected.

"In view of these considerations I have determined to allow the bill of review to be filed,

subject, of course, to all legal objections, by demurrer, answer, plea, or otherwise, as the defendants may be advised, and it is ordered accordingly" (R., pp. 468-469).
Thereupon said bill of review was filed.

The case coming on to be heard upon bill of review the United States Circuit Court at Knoxville, the prayer of said bill was denied and the petition and the bill dismissed (September, 1909) by the said court in an opinion by Judge John E. McCall, the pertinent conclusions of which were as follows:

> "An attentive examination of this record leads me to the conclusion that the relief sought by those filing the bill of review should be denied upon more than one of the grounds relied upon by the defendants. I shall content myself, however, with discussing only one of them, and that one goes to the merits of the controversy, and in my judgment, is clearly conclusive of the case.
> . . .
> "Now, what is there in the newly discovered map that would have warranted the Circuit Court in rendering a different decree in the original case and to have found in favor of the defendants in that case?
> "Upon an examination of the newly discovered map, it appears that the State Line crosses the Little Tennessee River at right angles, and at the point where the line first reaches the river, and that it proceeds in a southwesterly direction along the ridge, lying adjacent to and immediately south of the river, towards the Unicoy Mountains. There is a black line upon the newly discovered map, marked 'creek' which forms a junction with the Tennessee River a short distance above where the line crosses the river, and east of the line. But there is no indication upon the map, nor in the report accompanying it that this line ran up said creek for any distance, or that it touches the creek at any point. Indeed, if the line followed either the river or creek for any distance, that fact is not

indicated upon the map, nor is there any reference to such thing in the commissioner's report.

"In order that the map or the report of the commissioners be of any service to the petitioners, it should show that the State Line, after crossing the river, followed Slick Rock Creek, if, indeed, it be Slick Rock Creek that is indicated on the map, to a junction with Little Fodder Stack. From the location of this stream marked 'creek' on the map, considered in the light of all the evidence in the case, I am inclined to the opinion that it is Cheoah River, and not Slick Rock Creek.

"The map and the report upon their faces failing to shed any new light upon the issues in the original case, let us examine the evidence taken upon the issues under the bill of review.

"Here we are met with the testimony of witnesses seemingly of equal credibility and of equal opportunity to know the facts about which they testify that is contradictory and unreconcilable. Instead of elucidating the newly found map, it tends to confuse that which appears upon the face of the map, and also it is confusing in its relation to the evidence and findings in the original case.

"Indeed, if this map sheds any additional light upon the issues, it is to make clearer and more certain the correctness of the conclusion reached in the original case, now under review.

"An examination of the commissioners' map, discloses that the State Line approaches the north bank of the Little Tennessee River, running in a southwesterly direction, crosses it at right angles, leaving the south margin of the river in a southwesterly direction immediately at the point of crossing, and runs along the crest of a ridge toward Unaka Mountain, and in this particular follows the direction of the Cession Act, from the Smoky to the Unaka Mountains, wherein it is provided as follows: 'Thence along the extreme height of the said mountain to the place where it is called Unicoy, or Unaka Mountain.'

"The report of the commissioners and the confirmatory acts of the North Carolina and the

Tennessee Legislatures all use identical language in describing this line from the Tennessee River, to wit: 'From the Tennessee River to the main ridge and along the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain.'

"This is the course and location given the State Line by the final decree in the original case. There is nothing in the newly discovered evidence to warrant this court in holding that had it been before the court at the original hearing, a different conclusion would have been reached, but, on the other hand, the newly discovered evidence rather tends to strengthen the correctness of the original decree.

"It would require a far stretch of the imagination to hold that the newly discovered map, which is silent on this point, except the use of the word 'creek' is sufficient to warrant the court to reverse the holding in the original case, and write upon the face of the map, and into the commissioners' report, according to the showing on the Burns map, the words: 'Thence along the north bank of the Tennessee River to the mouth of Slick Rock Creek. Thence westerly up said creek with its meanderings about five miles to Little Fodder Stack lead; thence along the extreme height of Little Fodder Stack to Big Fodder Stack; thence along the crest of Big Fodder Stack to its junction with Hangover.' Yet this, in substance, must be done, if the petitioners are granted the relief sought by their bill of review.

"As indicated above, there are other grounds upon which the relief sought by the bill of review should be denied, but I prefer to base my action upon the ground that the newly discovered evidence, if it had all been before the court at the original hearing would not have led the court to a different conclusion than the one reached . . ." (R., pp. 696-704).

Upon appeal, on October 5, 1910, the case came on to be heard in the United States Circuit Court of

Appeals before Hon. Henry F. Severns, the Hon. Loyal E. Knappen and the Hon. A. M. J. Cochran (R., p. 759).

After the case had been argued and submitted to the said Circuit Court of Appeals, complainants, Hopkins, et al., on January 27, 1911, filed in said Circuit Court of Appeals a petition to remit the record to the United States Circuit Court at Knoxville, Tennessee, alleging the discovery of a copy of the field notes of William Davenport, surveyor of the State of North Carolina, on the survey of the State Line between North Carolina and Tennessee in the year 1821 (R., pp. 760-761). The Circuit Court of Appeals permitted each side to take and submit affidavits as to the authenticity of said field notes (R., p. 780) and on May 11, 1911, the Circuit Court of Appeals denied the motion to remit the record (R., p. 839).

And afterwards, October 2, 1911, the Circuit Court of Appeals affirmed the decree of the Circuit Court below with costs on December 1, 1911, and filed an opinion in which, inter alia, the court said:

> "In our opinion, taking into account not only the speculative purchase by appellants, but also the good faith purchase by the Smoky Mountain Company, a case is not presented which appeals to the equitable discretion of the court to allow the review of a decree upon the ground alone of newly discovered evidence. We rest our decision solely upon this proposition. Bearing in mind the rule that this bill of review for newly discovered evidence is not of right, no matter how persuasive of error in the original decree the new evidence may be, and that it should not be allowed if such allowance would result in mischief to innocent parties, and having in view the stability necessary to be afforded to decrees, especially of courts of last resort, where disturbance thereof is not essential to the protection of the real equities of the parties before the court, we think the review asked for should be denied. In our opinion, the

> stability of judgments, and thus the protection of rights acquired in reliance upon them, are such as, under the peculiar circumstances of this case, to make the review asked for inequitable. Nor do we think the situation is changed by the fact of the conveyance by Belding and his associates to the trustees pending the suit, nor by the fact that appellants were negotiating for, and possibly may be said to have had, to some extent, an option for the purchase of the land previous to the final decree. The appellants were not bound to make the purchase until contract therefor was actually made, which was after the decree sought to be reviewed was entered; and the purchase then made, as has been said, was speculative as to the land here involved'' (R., p. 844).

Upon petition for writ of certiorari to this court and granting thereof, said case comes to be heard in this court.

Both complainants and respondents claim the newly discovered evidence—map and report of commissioners—conform to their respective contentions of the location of the said boundary line.

There is pending in this court for hearing a case of original jurisdiction, styled State of North Carolina v. State of Tennessee, in which case the same portion of the State Line is in dispute and it is sought to have this court determine the same, in order to define the jurisdictional boundary of each state.

The questions on the merits of the newly discovered evidence.

Arising from the foregoing statements, are:

Is said evidence of a clear, decisive and controlling character?

If so, does said evidence confirm the conclusion reached in the original case as determined by the master, the Circuit Court and the Circuit Court of Appeals?

Or, does said evidence clearly show that had it been available in the original case, the decree would probably have been reversed?

THE ISSUES OF LAW.

Regardless of the merits of the newly discovered evidence, further questions of law growing out of the foregoing statements of fact are:

First.—Have the petitioners, who purchased the right, title and interest of Belding, et al., to the lands in dispute, after title to said lands had been declared by the decree of the final court to be vested in Charles Hebard, and before the discovery of any new evidence, any interest, under the facts of this case, which gives to them, the petitioners, a right in equity to secure a reversal of said final decree upon newly discovered evidence?

Second.—Can the Smoky Mountain Company, purchaser in good faith of the right, title and interest to said lands, and claiming under Charles Hebard, the successful party in the original suit, after final decree of the final court vesting title in said Charles Hebard, have its title affected by this bill of review, filed by petitioners, and based upon newly discovered evidence, which was not discovered until after the time the Smoky Mountain Company purchased?

Third.—Considering all the circumstances of the case, would not the disturbing at this time of the final decree in the original suit, while benefiting none, excepting those who have suffered no loss, be productive of such mischief and injustice to innocent parties as to require the dismissal of the bill of review?

Fourth.—Are not petitioners barred by the Statute of Limitations of Tennessee, as set forth in section

4848, Shannon's Code of the Statute Laws of Tennessee, wherein it is provided:

> "No bill of review shall be brought or a motion made therefor, except within three years from the time of pronouncing the decree; saving to infants, married women, persons of unsound mind, imprisoned or beyond the limits of the United States, a right to a bill of review within three years after such disability has been removed."

Fifth.—Have not the laches of petitioners been sufficient to bar their right to sustain any benefits from a bill of review, even were the merits of the evidence otherwise sufficient?

Sixth.—Was the Circuit Court of Appeals right in denying the motion to remit the record to the lower court with permission to petitioners to make said evidence a part of the record?

Seventh.—Can the determination of the issue in the case State of North Carolina v. State of Tennessee, a case of original jurisdiction, No. 5 on the docket of this court, have any effect upon the determination of this case now before the court?

MERITS OF THE NEWLY DISCOVERED EVIDENCE.

In order that a bill of review for newly discovered evidence may be permitted to prevail, the new evidence must be vital to the issue and clear, decisive and controlling in character; sufficient in the judgment of the court, had the evidence been available in the original suit the decree would have been reversed.

It is held in the case *Southard v. Russell,* 57 U. S. 566, that newly discovered evidence which goes to impeach the character of witnesses examined in the original suit or the discovery of cumulative (not controlling) evidence of the litigated fact is not sufficient.

It must be different and of a very decided controlling character.

This is further supported by the decision in *Shakers Society v. Watson*, 77 Fed. 515. The original suit had been upon certain promissory notes. Certain memoranda and letters bearing on the merits of the suit were afterwards discovered by the unsuccessful party, and they sought to introduce the evidence by a bill of review. The court held the new evidence offered was merely cumulative, and not controlling in character—at most only increasing a doubt and not sufficient to allow the bill to prevail.

Other decisions in point are:

U. S. v. Throckmorton, 98 U. S. 66;
Craig v. Smith, 100 U. S. 226;
Keith v. Alger, 124 Fed. 35;
Richardson v. Lowe, 149 Fed. 635;
Acord v. Western Pocahontas Co., 156 Fed. 996.

We submit that the newly discovered map does not raise any doubt as to the correctness and justice of the final decree rendered in the original case, but to the contrary the map confirms the conclusion reached by the master, the Circuit Court and the Circuit Court of Appeals.

When the original case was decided, the description of the disputed boundary, as set forth in the Cession Act of 1789; the Acts of North Carolina and Tennessee authorizing the joint commissioners to run and mark the said boundary line according to said Cession Act; the Acts of North Carolina and Tennessee adopting the report of said joint commissioners, and *the fact that the "Slick Rock Creek Line" had more marked trees than* the Hangover Ridge Line, were all exhaustively considered by the master, the Circuit Court and the Circuit Court of Appeals.

When the original case was heard the original report of the commissioners had not been found. The original report of the commissioners was found at the same time and by the same person as was the map now in evidence (R., p. 639). Said report was filed by your respondent and not by petitioners (R., p. 466). The original report is practically identical, in its description of the boundary line, with that contained in the Confirmatory Acts of the State of North Carolina and Tennessee (R., pp. 340-402), which were submitted in evidence in the original case and reads as follows:

> "*To His Excellency Joseph McMinn, Governor of the State of Tennessee:*
>
> "The undersigned Alexander Smith, Isaac Allen and Simeon Perry, commissioners on the part of the State of Tennessee; and James Mebane, Montfort Stokes and Robert Love, commissioners on the part of the State of North Carolina, duly appointed under the authority of the Acts of the Legislatures of the said states respectively; having met at the town of New Port in the State of Tennessee on the sixteenth day of July, A. D. 1821, to settle, run and mark the dividing line between the two states, from the termination of the line run by McDowell, Vance and Matthews in the year of our Lord 1799, to the southern boundary of the said states, respectfully report, That we proceeded to ascertain, run and mark the said dividing line as designated in the XIth Article called the Declaration of Rights, of the Constitution of the State of Tennessee, and in the Act of the General Assembly of the State of North Carolina; entitled 'An Act for the purpose of ceding to the United States of America, certain western lands therein described, passed in 1789: Which said dividing line as run by us, begins at a stone set upon the north side of the Catalauchee Turnpike road, and marked on the west side Tenn. 1821; and on the east side N. C. 1821, running thence a southwestwardly course to the Bald Rock on the summit of the Great Iron or Smoky Mountain, and continuing

southwestwardly on the extreme height thereof to where it strikes Tennessee River about seven miles above the old Indian town of Tel'assee, crossing Porters gap at the distance of twenty-two miles from the beginning; passing Meig's boundary line at thirty-one and a half miles—the Equonettly path at fifty-three miles—and crossing Tennessee River at the distance of sixty-five miles from the beginning. From Tennessee River to the main ridge and along the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain, striking the old trading path leading from the valley towns to the overhill towns, near the head of the west fork of Telico River, and at the distance of ninety-three miles from the beginning. Thence along the extreme height of the Unicoy or Unaka Mountain to the southwest end thereof at the Unicoy or Unaka Turnpike road, where a corner stone is set up, marked Ten. on the west side and N. C. on the east side; and where a hickory tree is also marked on the south side Ten. 101 M. and on the north side N. C. 101 M. being one hundred and one miles from our beginning. From thence a due course south two miles and two hundred and fifty-two poles to a spruce pine on the north bank of Highwassee River, below the mouth of Caine Creek; thence up the said river the same course about one mile, and crossing the same to a maple marked W. D. and R. A. on the south bank of the river; thence continuing the same course due south eleven miles and two hundred and twenty-three poles to the southern boundary line of the States of Tennessee and North Carolina; making in all one hundred and sixteen miles and two hundred and twenty-three poles from our beginning; and striking the southern boundary line twenty-three poles west of a tree in said line, marked 72 M.—where we set up a square post marked on the west side Ten. 1821; on the east side N. C. 1821; and on the south side G. The said dividing line run by us in its whole length is distinctly marked with two chops and a blaze on each fore and aft tree, and three chops on each side line

tree; and mile marked at the end of each mile; agreeably to the plats which accompanies this report, and which said plats and report are certified by us in duplicate, one for each of the said states, in the same words, marks and figures; which we respectfully submit to the Governors of the said States of Tennessee and North Carolina.

"Given under our hands at Knoxville in the State of Tennessee on the thirty-first day of August, A. D. 1821.

"A. Smith, Isaac Allen, Simeon Perry, Commissioners of Tennessee; James Mebane, M. Stokes, R. Love, Commissioners of North Carolina" (R., p. 466).

It will be noted that neither of the confirmatory acts of the respective states; nor, the original report of the commissioners; nor, the map makes any reference to any field notes and that the only reference is to natural monuments, and not to courses and distances, until the line reaches the one hundred and first mile, where the line leaves the mountains, from which point the next call is "a due course south" and so continues to the Georgia line.

Observing the map and the original report of the commissioners together, it will be found that pictorially the map closely represents the words of the report.

The report from the beginning point calls for the line "running thence in a southwestwardly course to the Bald Rock *on the summit* of the Great Iron or Smoky Mountain and continuing southwestwardly *on the extreme height* thereof to where it strikes Tennessee River." The map between the beginning point and the Tennessee River conforms to this call, showing the line the entire distance on the crest of the mountains.

The next two calls of the report are "Crossing the Tennessee River" and "from the Tennessee River to the main ridge and *along the extreme height* of the

same to the place where it is called Unicoy or Unaka Mountains." The map conforms to these calls, the line crosses the Tennessee River *direct* (shortest route) from where it strikes the north bank of said river, and, on leaving the south bank of the river the line is shown, by the same character of marking as used on the map north of the river, to be located on the crest of mountains, and the line so continues on the crest of the mountains after leaving the Tennessee River.

The next call of the report is "thence along the *extreme height* of the Unicoy or Unaka Mountain to the southwest end thereof." The map conforms to the call.

At this point the line leaves the extreme heights of the mountains and the next call is "a due course south . . . to . . . the north bank of the Highwassee River below the mouth of Cane Creek." The map conforms to the call.

The next call of the report is: "Thence *up the said river* the same course about one mile and *crossing the same* to . . . the south bank of the river." The map conforms thereto.

The last call of the report is: "Thence continuing the same course due south . . . to the southern boundary line of the States of Tennessee and North Carolina." The map conforms to the call.

The map conforming to the calls of the report as to natural monuments, the report being identical with the description of the calls of the boundary line as contained in the confirmatory acts of the respective states concerned, and all conforming to the calls of the Cession Act of 1789, which says:

> "Thence along the *highest ridge* of said mountain to the place where it is called the Great Iron or Smoky Mountain; thence along the *extreme height* of said mountain to the place where it is called the Unicoy or Unaka Mountain" (R., pp. 399-401),

absolutely confirm the findings of the master, the Circuit Court and Circuit Court of Appeals in the original case.

This was fully recognized by Judge McCall, as stated in the Circuit Court's opinion, where he says:

> "Indeed if this map sheds any additional light upon the issues, it is to make clearer and more certain the correctness of the conclusion reached in the original case, now under review" (R., p. 701).

In the original case, petitioners' grantors, Belding, et al., contended that the true State Line from the marked "spruce pine" tree on the north bank of the Tennessee River followed down the river one-half a mile and crossed the river to the mouth of Slick Rock Creek; thence followed up said creek about five and one-half miles to the lead to Big Fodder Stack, thence followed the Fodder Stack Ridge to the "Junction" near Stratton Bald Mountain, an undisputed point to the south (R., pp. 336-401).

Hence, to be such controlling evidence as to convince the court that the final decree in the original case ought to be reversed, or that said decree was unjust to the Beldings, et al., the newly discovered map must show that the State Line followed down the Tennessee River one-half mile from where said line strikes the north bank of the Tennessee River, thence crossing said river and thence up a creek five and one-half miles, thence up a mountain ridge, etc., *which facts said map does not show, but to the contrary, shows* the boundary line conforming to the line claimed by Hebard, et al., in the original case; conforming to the calls of the Cession Act of 1789; conforming to the calls of the commissioners' report of 1821; conforming to the acts of the States of North Carolina and Tennessee adopting the line run by the said commissioners; conforming to the line decided upon as the true State Line by the

master in the original case, the Circuit Court and the Circuit Court of Appeals, to wit: The map shows the State Line following the crest of mountains on the north side of the Tennessee River to the river, crossing the river direct when it reaches it, that on crossing the river the line is immediately located on the summit of mountains and so continues until the said line reaches a point far south on the "Junction," the undisputed point on the south.

True, where the line strikes the south bank of the river there is a "creek" to the east. As the map shows the line on mountains at this point, the only reasonable interpretation of the map, as the commissioners' report, etc., makes no mention of this stream, is that the line runs on a ridge immediately on crossing the Tennessee, and the "creek" represents some stream east of the Hangover Ridge line.

In further consideration of the merits of the new evidence, we should note the findings of material facts, reported in the original case, which unaffected by the new evidence, continue to be governing facts, to wit:

(1) The location of the boundary line northeast of the Tennessee River was agreed to by each party, and its location shown, by the Hale map filed in the case and inserted in the record at page 754 (R., pp. 336, 401, 404, 405).

(2) A "spruce pine" or hemlock tree, marked as a fore and aft tree on the north bank of the Tennessee River; one-half a mile up said river from Slick Rock Creek is a State Line tree and so marked as to show the State Line crossed the river at that point to a lead of Hangover Mountain (R., p. 405).

(3) At least two trees marked as State Line trees and showing the proper age, were found on the Hangover Ridge (R., pp. 337-409).

(4) *The Hangover Ridge is the main ridge* between the river and the junction, the undisputed point to the south (R., pp. 336, 342, 358).

(5) That the trees marked as State Line trees on the Slick Rock Creek line are more numerous and strangely scattered (R., pp. 337, 342, 408, 409).

With these facts in mind, let us observe the controlling reasons, which the master, the Circuit Court, the Circuit Court of Appeals, in the original case, each respectively have stated governed their decision; that the line over Hangover Ridge is the line run and adopted by the commissioners in 1821. Then let us note whether the newly discovered map shows the location of the boundary line so as to eliminate or neutralize any of the reasons thus given.

The special master, Asbury Wright, in his report, after referring to the various acts describing the line and the evidence, says:

> "It must be kept in mind that these commissioners were not making a new line, but were simply determining the true location of the line fixed by the Cession Act of 1789. They got on the top of the Great Iron or Smoky Mountain, and were then to determine the true location of the line between that point and the Unaka Mountain, and to do so, they were to run along the extreme height of the mountain. They report that they run on the extreme height of the mountain to where it strikes the Tennessee River, and the river being a natural object, permanent and notable, they stopped in their description to call attention, particularly and minutely to the several prominent and notable objects passed. The first reference to the Tennessee River is 'to where it strikes the Tennessee River,' and the next is 'crossing the Tennessee River,' and then the report says, 'from the Tennessee River,' and yet if the line was run up Slick Rock Creek, as contended for by defendants, then either before crossing the river or after-

wards, the line would have had to run down the river one-half mile, and this not in the general course the line was running (southwestwardly), but back at an acute angle to the line run and in a northwest course, and in running down the river and up Slick Rock Creek they would not have been running as the line called to run in the Cession Act, along the extreme height of the mountain to where it is called Unaka, but for one-half a mile would have been running down a large river in the deep gorge cut through the mountain, and for more than five miles up Slick Rock Creek in a basin or valley six miles long and three miles wide, surrounded by mountains from one to three thousand feet high. It would certainly not have been in compliance with the Cession Act. It is true that it is my purpose to determine where they actually run and located the line and not whether they complied with the Cession Act, but I cannot believe that they would abandon the line called for in the Cession Act, and be diverted from their course in this way and make no mention of it in their report. They had just paused in their report to make particular mention of many objects, less prominent and less noteworthy, than either the Tennessee River or Slick Rock Creek. They mention the fact that they reach the Tennessee River, that they cross it and that they leave it, and I do not believe that they would have run down the river for one-half a mile and made no mention of that fact, nor do I believe that they would have run for five miles up Slick Rock Creek, a creek with numerous tributaries, apparently of considerable size, so large in fact, that there is another creek in the same basin called Little Slick Rock, and not have mentioned it in their report. After this call has reached Unaka Mountain they are particular to call attention to every object that could give permanency and notoriety to the location and when the Hiwassee River, which at that point is running the same course as the line they were running and they go up the river about one mile, they call attention to the fact (the river

was then running in their direction. See Government map, Exhibit 'G,' to Dep. H. S. Hayes), and if necessary to call attention to the fact when the river was in direct course, how much more necessary it would have been when by following it the line is deflected and caused to turn back at an acute angle. In running up Hiwassee River they passed the mouth of Cane Creek and they mention this fact, and yet, shall we say they run up Slick Rock Creek for five miles and made no mention of that? As soon as Hiwassee River, by a bend, leaves the general course of the line, being run they leave the river. They were not running with rivers, they were locating a line that was to be run along the tops of mountains. But again, the line runs 'from the Tennessee River to the main ridge and along the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain.' How shall it get to the main ridge, by running down the river and up Slick Rock Creek to a spur of Fodder Stack and thence to its junction the Hangover? I am satisfied from the proof that the Hangover is the main ridge, and that to get on the main ridge, they would have had to be on the Hangover either before or after its junction with the Fodder Stack, and according to the proof, when they came to the river on the northeast side and looked across, there directly opposite them was a continuation of the same ridge along the height of which they were running. This main ridge was on the southwest side of the river higher than it was on the northeast side and run in the general course of the line they were running. They were locating a line which was to run along the extreme height of the mountains from the Great Iron or Smoky Mountain to the Unaka and at the time the line strikes the Tennessee River they say they are on the extreme height of this mountain and immediately across the river is the same mountain, some higher, but the same, and I think that unquestionably this is the main ridge on which they say they run and located the line.

"There are other reasons disclosed by the record of greater or less weight to the same effect.

"There are more marked trees on the Slick Rock Creek line than on the Hangover, but I am inclined to believe from the record that it would not be safe to attempt to pull this line away from the well defined natural objects to follow marks as shown on either side. This section of country was inhabited by the Indian tribes until 1836 or 1837, and is crossed by numerous trails and paths, and numerous marks are found similar to these State Line marks. The defendants' witness, Patton, testified to following the State Line marks in 1867 along the Fodder Stack lead to within 300 or 400 yards of the head of Little Slick Rock Creek, which would be two or three miles further along this lead than where the defendants' marked line leaves it. There are many ways in which these marks could have been placed there without having been made by these state commissioners, but if made by them it was evidently run as a tentative line and not adopted or reported by them, and if they are to mark the line actually run and adopted, why did they mark so carefully for a mile and a half and then not mark any trees for three or three and a half miles? There was an abundance of timber all the way, that they might have marked" (R., pp. 341-342).

Every reason stated in the above report of the special master for concluding that the line over Hangover Ridge is the line which was adopted by the commissioner applies with equal force and effect to the line as represented on the newly discovered map, which shows the line on the crest of mountains north of and to the Tennessee River, crossing said river direct at the point it strikes the river and on leaving the south bank of the river, is shown on the crest of mountains and so continuing southwardly beyond any point in dispute.

Judge Clark, in his opinion in the original case, said:

"It must not be forgotten, however, that the commissioners in surveying and marking the line, followed the mountain range down to the Tennessee River, and that according to the calls actually made, they would cross that river and proceed along the mountain crest where complainants contend the line is. It was the crest of this same mountain range which brought them to the river, and it was the obvious and conspicuous range to have followed by directly crossing the river and keeping up the previous course. It is extremely difficult to believe that the commissioners at this point would have dropped down the river for half a mile and then followed Slick Rock Creek for a distance of five or six miles without ever making the slightest reference to this water stream. Granting as argued that the creek may, at that time have had no name whatever, nevertheless it would have been so natural and so necessary to avoid misleading, for the commissioners to have said that they changed their course, and instead of going directly across the river went down and then followed a creek or water stream up the valley and then to the ridge which led out to the junction; that it is next to impossible to think that such a deviation as this would have been made without a word to give any indication of the fact. Following the calls as actually given, it would be impossible to run the line as claimed by the defendants" (R., p. 369).

The reasoning of Judge Clark applied to the newly discovered map locates the line shown on the map, over the Hangover Ridge.

Judge Lurton, in his opinion, after stating the facts of the case and referring to the various acts describing the boundary lines, inter alia, says:

"How did the commissioners locate the line between the Tennessee River and the Unaka Mountain? It is to be borne in mind that their authority was to 'settle, run and remark' the line 'agreeably' to the Cession Act. The Tennessee

River was a water course, which cut a deep gorge through the main mountain range which the line was following between the Smoky and Unicoy Mountain. The Cession Act placed the boundary 'along the extreme height of said mountain (that is, the Great Smoky) to the place where it is called Unicoy or Unaka Mountain.' It was the duty of the commissioners to locate the line 'agreeably' to this call. They had been following the extreme height of the ridge between the Smoky and the Tennessee River. The river cut through the ridge by a deep gorge, the mountain on either side gradually lowering and terminating at the river in a bluff.

"The last monument on the northeastern side is a tree marked as a fore and aft tree. A fore and aft tree is a tree in the line, and the chops are on the sides showing the direction of the line. The chops on this tree indicated that the line *there* crossed the river. The general course of the line, as called for by the call which brought the line to the river, was southwesterly, and this course was to be continued to the Unaka. The course would, therefore, require the line to there cross the river, as also indicated by the chops on the tree. The general direction of the Cession Act would keep the line on the extreme height of the mountain ridge or range. Immediately across the river, and in the general course of the line, was the Hangover Ridge. This ridge is joined by another ridge called the Fodder Stack some eight or ten miles southwest. Its height increases after it leaves the river, and the highest points between the river and the junction with the Fodder Stack are the Hangover and Hao Peaks, the former having an altitude of about 4500 feet. From the point where it is joined by the Fodder Stack Ridge or spur, it is admittedly the *main ridge*, and further southwest becomes the Unicoy or Unaka. From the river the general course of Hangover is southwesterly, and, therefore, in the general course of the line as described in the Cession Act. One-half mile below the State Line fore and aft tree, a

creek known as Slick Rock Creek empties into the river on the opposite side. That creek is some eight or ten miles in length, and has one or more branches. A short distance below its mouth a low spur approaches the river, called Slick Rock Spur, being a spur of Fodder Stack Ridge. Some seven miles up the creek another spur of Fodder Stack is found. The basin of the Slick Rock is about eight miles long and three miles wide. It is bounded on the south and southeast by the Hangover Ridge, on the north and northwest by the Fodder Stack Ridge, and on the north and northeast by the Tennessee River and the Slick Rock Ridge. The mountains shutting it in are from 1000 to 4000 feet high, and the basin itself is a rough broken mountain valley, almost impenetrable by man.

"The master reports than the Hangover Ridge was the main or highest ridge, having an average height of 800 feet greater than the Fodder Stack.

"It is admissible, in locating a line where a difficulty exists in identifying monuments, natural or artificial, to run the line in a reverse way if, thereby, doubts may be the better solved.

" 'The footsteps of the original surveyor may be traced backward as well as forward.' *Ayers v. Watson,* 137 U. S. 584, 590; *Simmons Creek Coal Co. v. Doarn,* 142 U. S. 417.

"So any ascertained monument may be adopted as a starting point, where difficulty exists in ascertaining the lines of a survey as actually run. *Ayers v. Watson,* 137 U. S. 584.

"We have two established points in the line as actually run by the state commissioners of 1821, between which points the disputed line exists. One point is the fore and aft tree on the northeastern side of the Tennessee River, and the other is some eight miles southwest from that tree, being the well marked line on the height of Hangover, where a junction is made with the Fodder Stack Ridge. If we reverse the survey and take this junction of the two ridges, or leads, as they are sometimes called, as a starting point in

running backwards, one can not doubt but that the line should follow Hangover to the river. The Fodder Stack Ridge would not be observed by surveyors who had reached that point while following the highest ridge from Unicoy or Unaka, for it branches off several hundred feet below the crest of the Hangover, and the fact that a spur was there could only be learned by going down the mountain from three to four hundred feet. To abandon the Hangover in running backwards would also involve a change in direction from northeast to north, and then northwest and then west, and the Tennessee River would not be reached at all but by again diverging and following one or other of two lateral spurs. This situation is most plainly shown by the map of the appellees, adopted by the master, as correctly showing the general course of the ridges or leads at the locality in question. This map is here shown upon a much reduced scale (R., p. 754).

"If the joint commissioners obeyed the call to follow the highest mountain tops and adhered to the course pointed out in the Cession Act, they undoubtedly located the line on the Hangover; and if we follow the line which they reported and adopted, whether we endeavor to track them backward and forward, we must conclude from the call for the 'main ridge' and 'along the extreme height thereof,' in the act adopting their survey, that they did in fact locate the line on the Hangover, between the river and the junction of the Hangover and the Fodder Stack.

"The Hangover is undoubtedly the 'main ridge' called for in the survey made by the commissioners, and definitely locates the line, unless there appears such definite and positive evidence of another and different actual location of the line as to justify us in finding that the line as described and located by natural monuments is not in fact the line actually run and marked and adopted by the commissioners. Every presumption is that the commissioners obeyed the directions of the Cession Act, and so also every presumption is that

the line as actually run, marked and adopted, was a line which conforms to the call to follow the extreme height of the 'main ridge' from the Tennessee River to Unaka.

"But appellants say that they have shown a well marked line from the mouth of Slick Rock Creek, which follows the meanders of that creek for about seven miles and then runs up a spur of the Fodder Stack and connects with that ridge at the peak called Little Fodder Stack. The Fodder Stack Ridge does not run to the Tennessee River at all. North of the peak called Little Fodder Stack its general course is to the northwest. It can not, therefore, be regarded in any sense as the 'main ridge' called for by the survey of the joint commission, irrespective of the fact already noticed, that its average altitude is about 800 feet less than that of the Hangover, which does start at the river immediately opposite the main ridge on the northeast side of the river, and upon which the line on that side is confessedly located. From the top of Fodder Stack the appellants claim that the State Line runs south with the summit of that ridge to its junction with the Hangover Ridge, which, from there, runs southwest.

"To support this contention, appellants rely upon the fact that between the mouth of Slick Rock and the junction of Hangover and Fodder Stack Ridges they show forty-one trees marked as State Line trees, and from this circumstance they contend that this was a line actually marked by the commissioners and adopted by them as the line, and that the calls for course and the 'main ridge' must yield to the actually marked line.

"That the commissioners marked the line run by them, is made clear by the existence of a marked line over those parts of the undisputed line on either side of the place in dispute.

"The North Carolina Act of 1821, adopting and confirming the survey of the commission, concludes with the words, 'the whole distinctly marked with two chops and a blaze on each fore and aft tree, and three chops on each side line

tree.' These words of description do not appear in the Tennessee Act of 1821, and neither the original report of the commissioners nor the surveyors' field notes are in existence.

"The marked trees on this line are shown by blocking to have been probably made in 1821, and correspond in appearance to those existing in the undisputed line. They are strangely scattered along the line claimed. About one-half of the whole number are found within one and one-half miles of the mouth of the creek. Then for a distance of three and one-half miles not a marked tree is shown, though the line is still in the valley, where there was and is a great abundance of timber. Then, where the line is claimed to have left the creek, there are found a great number of marked trees within a short distance after starting up the spur leading to the Fodder Stack, but from the junction of this spur with the Fodder Stack to the Hangover, only two or three trees are found. It is most difficult to account for this line of marked trees, irregularly as they are grouped. The probabilities are that they were marked by the commission.

"For what purpose, is the question. Their evidential value as establishing the actual State Line is greatly impaired by the following circumstances:

"1. The line thus marked is not upon the course which is called for by the survey as reported and adopted.

"2. It departs from the line of the 'main ridge' called for in the commissioners' survey, and a natural monument of the utmost significance. When a monument, natural or artificial, is called for and its identity is doubtful, great importance may be properly attached to an actually marked line upon the ground.

"But in this instance there was no reasonable doubt as to the identity of the 'main ridge' called for in the commissioners' survey.

"The greater altitude of the Hangover Ridge, as well as its general course, makes it most clear

that there could have been no difficulty in determining that the Hangover and not the Fodder Stack was the 'main ridge.'

"It is, therefore, not a case of ambiguous calls or doubt as to the identity of a natural monument in the description. The indisputable facts that the Hangover is much the greater in elevation, was in the direct course called for by the Cession Act, and was indicated by the chops on the established monument on the north side of the river, leave no reason for supposing that the commission mistook the Fodder Stack Ridge as the 'main ridge,' and undertook to reach it by a line up the creek.

"3. If we adopt the Slick Rock Creek line, we must believe that the commissioners not only turned down the river at an acute angle from the course they had been following, followed the river for half a mile, and yet made no call in their report which would indicate such a departure, or that the river was made the boundary for any part of the line.

"4. We must also believe that instead of following a mountain boundary, which according to the Cession Act, ran with the summits of the highest mountains, they deliberately abandoned the heights of the mountain ranges and followed a water course from its mouth for seven miles, and yet made no mention of this natural object in their report whatever.

"5. The significance of these trees as marking the State Line is also affected by the fact that other trees similarly marked are found on the Fodder Stack Ridge, which, confessedly, are not upon any line now claimed as the actually located State Line. The surveyors who testify to such trees express the opinion that they were marked to designate Indian trails. As this whole region was the habitat of the Cherokee Indians at the time of this survey, in 1821, it is altogether possible that all of this marking was done by the Indians as mere trail marks, or in a spirit of imitation, though the stronger probability is that it was tentatively marked and then abandoned for the

Hangover lime, as the one indicated by the Cession Act, andl the report made accordingly.

"6. But the significance of the marked trees on the Slick Rock Creek line is also weakened greatly by tlhe fact that two, and possibly three, old marked State Line trees are found on the Hangover lime. One of these trees is a black or red oak, andl the other a sourwood. These trees stand on the summit of the Hangover Ridge. The question as to whether they bore the proper marks for State Line trees, marked in 1821, was much controverted. The master, after seeing and hearing most of the witnesses and weighing the evidence and seeing the blocks cut from the oak, reached the conclusion that the marks were State Line marks made in 1821, and so reported. . . .

"We have then two lines run and marked. One is the better marked, possibly because it passed through more timber and timber better adapted to carry the marks than the other which followed a rocky, barren, mountain ridge, where the trees, as shown by the evidence, were scrubby and scarce. The other line, though more scantily marked, is found just where the course and natural monuments called for in the report of the survey would locate the line if neither had been marked. That the line ought to run on the extreme height of the Hangover Ridge from the Tennessee River to the Unaka Mountain, if the calls of the confirmatory boundary acts of both states are to control, is most evident.

"The order of applying descriptions of boundaries is first to natural objects, course and distances. . . .

"The description of the boundary as run and marked by the commissioners, calls for a course from one natural object, the Tennessee River, to another, the Unaka Mountain. In the absence of any further description the line should be run straight from one monument to the other. 3 *Washburn Real Estate*, side page 632; *Burnett v. Jones*,

6 Jones (Law), N. C. Rep. 210; *Jenks v. Morgan*, 6 Gray, 448; *Caraway v. Chancey*, 6 Jones, 364.

"The first call in the boundary act of both states is 'from the Tennessee River to the main ridge.' There are no words of intermediate description. The line should therefore be a straight one from the last monument on the river, the fore and aft pine tree, to the 'main ridge.' There being no possible doubt as to the identity of the 'main ridge' referred, to, there can be no doubt on the face of the description following, that the line should then run 'along the extreme height of the same' to the next natural monument, to wit, 'to the place where it is called the Unicoy or Unaka Mountain.' Finding, as we do, upon the line thus located by identified natural objects, two old State Line marked trees, marked, as shown by blocking and examining the annular growth, in 1821, we have no difficulty in agreeing that the line, as run and marked by the commissioners in 1821, was the Hangover line, as founded by the special master and as claimed by the appellees. The probabilities are that the surveyors tentatively or experimentally marked the line up Slick Rock Creek. Discovering that thereby they made a radical departure from the 'extreme height' of the mountain chain called for by the Cession Act of 1789, they abandoned the creek and ran, adopted and reported the line as running along the extreme height of the 'main ridge,' now known as Hangover Ridge. This is the only reasonable explanation consistent with the absence of descriptive words calling for a line running down the Tennessee River and then up Slick Rock Creek" (R., pp. 405-411).

The map of 1821 shows the boundary line between the two states located over the Hangover Ridge for the very reasons stated by Judge Lurton in the above opinion.

Upon petitioners being allowed to file their bill of review in the United States Circuit Court, Judge

Clark (whose opinion is quoted from above, and who also heard and wrote the said court's opinion in the original case), said:

> "It does seem, upon examination of this case, that there is no ground on which the success of the proposed bill of review might finally be expected" (R., p. 468).

Upon hearing and determination of bill of review proceedings in the said Circuit Court, Judge McCall, in his opinion thereon, states:

> "Now, what is there in the newly discovered map that would have warranted the Circuit Court in rendering a different decree in the original case and to have found in favor of the defendants in that case?
>
> "Upon an examination of the newly discovered map, it appears that the State Line crosses the Little Tennessee River at right angles, and at the point where the line first reaches the river, and that it proceeds in a southwesterly direction along the ridge, lying adjacent to and immediately south of the river, towards the Unicoy Mountains. There is a black line upon the newly discovered map, marked 'creek' which forms a junction with the Tennessee River a short distance above where the line crosses the river, and east of the line. But there is no indication upon the map, nor in the report accompanying it, that this line ran up said creek for any distance, or that it touches the creek at any point. Indeed, if the line followed either the river or creek for any distance, that fact is not indicated upon the map, nor is there any reference to such thing in the commissioners' report.
>
> "In order that the map or the report of the commissioners be of any service to the petitioners, it should show that the State Line, after crossing the river, followed Slick Rock Creek, if, indeed, it be Slick Rock Creek that is indicated on the map, to a junction with Little Fodder Stack. From the location of this stream marked 'creek' on the map, considered in the light of all the evi-

dence in the case, I am inclined to the opinion that it is Cheoah River, and not Slick Rock Creek" (R., p. 701).

When petitioners filed their bill of review they filed therewith affidavits of Surveyor Denton and M. E. Cozad (R., pp. 433436), which set forth how they had located, on the ground, the line shown on the map of 1821 and therein state that by the angles, distances and other data shown thereon they easily found the line went down the river and crossed to the mouth of Slick Rock Creek and after running up said creek one and one-quarter miles the line left the creek and followed up a ridge to Fodder Stack Ridge, thus including all of the lands of Slick Rock Basin instead of a portion thereof (as now claimed by petitioners). Later both Denton and Cozad testified that this same map absolutely determines that the line runs up Slick Rock Creek five and one-half miles and that they were in error as to the statements set out in their affidavits filed with the bill of review (R., pp. 533-539, 670).

In other words, petitioners thus demonstrated that the new evidence is *not* so clear, decisive and controlling in character, but that at different times for different reasons the same map shows two lines miles apart from each other. Which fact also shows the wisdom of the commissioners in limiting the calls in their report and shown on their map to the crest of the mountains as unchanging, ever present, natural monuments and on leaving said mountains to have only one course—due south.

Upon adopting the line the commissioners, contrary to the general custom, carefully excluded from their report and maps any reference to any field notes of courses and distances and call only for the natural monuments. By the report and the map the trees marked by the commissioners on the line adopted by them are located on the natural monuments called for.

PETITIONERS' CLAIMS AS TO THE MAP OF 1821.

The entire contention of petitioners is that the line run by their witnesses and surveyors, Messrs. Burns and Libby, from the point where the undisputed line northeast of the Tennessee River strikes the river, down the river one-half a mile, crossing the river to the mouth of Slick Rock Creek, thence up the creek five and one-half miles, thence up the Fodder Stack lead to Big Fodder Stack Peak, thence to the "Junction" near Stratton Bald Mountain, is similar in form and shape to the line shown by the map of 1821.

(Maps 386g and 386h inserted in Record, 755.)

Disregarding for the moment the elementary principle of law applied to the interpretation of boundary calls, to wit, that even courses and distances must yield to natural monuments called for, let us observe the testimony as to whether the platted line on the map of 1821 can, by its angles and distances, be located on the ground from the map itself.

Mr. Burns testifies:

"XQ. 20. Did you undertake to survey and locate the State Line as shown on the map of 1821?

"A. You mean by that question to show every little angle that they have shown?

"XQ. 21. Yes, sir.

"A. No, sir; I didn't try to do that.

"XQ. 22. Did you undertake to run that line at all?

"A. Which, the line of 1821?

"XQ. 23. Yes, sir.

"A. I undertook to—I took that map of 1821 and with my line it run the leading natural boundaries, that is the main ridges and the leading water courses that that map of 1821 was run on.

"XQ. 24. Please answer my question. Did you undertake to survey and locate the line as shown on the map of 1821, following the angles, mile marks, etc.?

"A. I didn't attempt to show all the little angles shown on the map of 1821; no, sir.

"XQ. 25. Did you undertake to locate and follow that line at all as shown by contour of the line itself, the circles, angles, etc.?

"A. I undertook to follow the ridges that conform the closest to that map of 1821 and the water courses. *I was governed by the marked trees that I found, along those ridges and water courses* . . . (R., p. 506).

"XQ. 27. You did not understand my question evidently. Did you take this map of 1821 and undertake to follow that particular line as located on that map, following the degrees and the angles, showing the mile marks exactly as it is shown on that map? Please answer that question, yes or no.

"A. You stated in your question, as I understand it, if I tried to run the courses and distances in the map of 1821. *You will notice in the map of* 1821 *there are no courses and distances, so all I could do to answer your question intelligently* as I can is to take the platting of the map of 1821 and test its accuracy by these test lines which I have shown. That is the only way I can answer your question.

"XQ. 28. At the left-hand end of said map of 1821 the points of the compass are given showing exactly north and south; the line as marked by the commissioners shows different deviations and angles from that direct north and south line. Did you take the map itself and the deviations as shown thereon and undertake to get the exact angles on each line and changes in the lines as shown by the map?

"A. No, sir; I didn't try to locate every little angle as is shown in there. You see the only resort——

"XQ. 29. Wait; no explanation. Can you take any part of that line on either side of the

river and point out to me where and how much of that particular line you undertook to survey showing the exact degree and the exact angles as shown on that map?

"A. Well, as I stated before, *there is no exact degrees or exact angles shown on the map, that is, there are no figures on it, and not having those figures, of course it would be impossible to try to scale off an exact distance which they measure on the ground on a scale that small, and therefore I couldn't attempt to try to show every little detailed angle* . . . (R., p. 507).

"Mr. Burns thus clearly admits that it was impossible, without field notes, to follow the map in locating the line, and that he did not even try to do so. He also clearly admits *that he was governed by the marked trees which were in evidence in the previous suit, and which therefore is not new evidence.*

"Mr. Libby, another of petitioners' surveyors, says:

"XQ. 18. To take the line as indicated on 'Exhibit A' to Mr. Burns' deposition it would be impossible for you or any other surveyor to take the distances and degrees as indicated on the map and correctly locate that line; would it not?

"A. It would be impossible for any civil engineer or surveyor to take that map and locate it according to the north point there and fit it on any ridge that is in that country today (R., p. 521).

"Mr. Hale, surveyor of respondents, testified as follows:

"Q. Where is the fifty-ninth mile tree with reference to the State Road Run, from Tennessee to North Carolina?

"A. It is two and one-half miles northeast of the State Road.

"Q. Then you tried to run a line in accordance with the degrees and angles as shown upon the newly discovered map from there to the Tennessee River; did you?

"A. Yes.

"Q. Were you able to follow the marked trees on top of the ridge from that point?

"A. No.

"Q. Please explain whether you were on one side or both sides of the top of the ridge, and if so, how far did you get from the top of the ridge where the State Line marks are at any point?

"A. In the first mile run southwest from the fifty-ninth mile tree, I got something like 300 yards on to the North Carolina side; in the second mile, I crossed on to the Tennessee side and got more than half a mile down off the mountain across streams and spurs, and ran down a stream a good ways. When I crossed the Pike Road I was, by the distance on the Pike Road, judging by walking it, at least a mile from the State Line, following the State Road. Then in the next mile I crossed into North Carolina a quarter of a mile from the State Line; then I crossed back into Tennessee and got from one-half to three-quarters of a mile from the State Line.

"Q. From your efforts and the work you did there, and your knowledge of the State Line, is it possible to take said newly discovered map and with it locate the State Line as indicated along the territory where it is undisputed?

"A. No, it is not. The map instead of being an aid to locating the State Line or finding the State Line is rather a hindrance.

"Q. Have you heard the testimony of D. B. Burns and C. Z. Denton taken yesterday and today in this suit?

"A. I have heard part of it; I didn't hear very much of Mr. Denton's.

"Q. Did you hear them tell where the undisputed State Line struck the Tennessee River?

"A. I did.

"Q. Half a mile above the mouth of Slick Rock Creek?

"A. Yes.

"Q. State whether or not there is where the marked trees in fact show that the State Line does strike the Tennessee River.

"A. It is.

"Q. Crossing the river and taking this newly discovered map as your guide, is it possible to locate the line up Slick Rock Creek?

"A. No.

"Q. Please explain why.

"A. Why, crossing the river at right angles as indicated by the map you would be half a mile east of Slick Rock Creek, and taking the bearings as near as can be ascertained from this map, and following them, and you will be crossing back and forth across the ridges and foot-hills and not be on Slick Rock Creek, and except in one or two places you won't approach Slick Rock Creek any less than a quarter of a mile.

"Q. This map shows that the commissioners crossed the river at or near the mouth of some stream. Please state whether it is possible from your previous experience in surveying, for that to be Slick Rock Creek.

"A. No. Following the track of the commissioners to the river, and then following the courses of the map, as indicated, you would be entirely east of Slick Rock Creek and half a mile east. While the creek on that is shown on the east side of the line instead of the line on the east side of the creek (R., p. 548-549).

Mr. Muller testified as follows:

"Q. Is it possible for you as a surveyor or for any other competent surveyor to take that line or tracing and locate the State Line as indicated upon that map?

"A. The map indicates that the State Line runs on top of the ridge from the shading, and it indicates that it crosses the river at right angles and I could not locate that line on top of a ridge in that country the way it is sketched here on this map.

"Q. North of the river the line shows the shading on the left-hand or southeast side. From your experience and knowledge as a surveyor, what did that shading indicate?

"A. It indicates that the line is on top of the ridge.

"Q. South of the river you find the same shading. What does that indicate also?

"A. It indicates the same thing.

"Q. If I understand you, then, if it was following the ridge on the north side of the river, the same shading would necessarily indicate that it was following a ridge on the south side; is that correct?

"A. Yes, sir.

"Q. Near the mouth of the stream marked 'creek' on the south side of the river, how does the marked line indicate the running with reference to said stream or creek?

"A. It indicates that it runs on the east side —the line runs on the east side of it—the line runs on the southwest side of the water course. And I see some shading on both sides of the line here, right close to the river.

"Q. What does that shading indicate?

"A. It indicates that between the shading is the top of a ridge.

"Q. State whether or not it indicates that the ridge is followed where the shading is shown.

"A. That is my opinion of it.

"Q. State whether or not there are any angles in that part of the line which shows running along the stream or creek, and tell what those angles are.

"A. It runs for about half a mile with no angle; it is a kind of a bend here, and then it turns to the right and runs perhaps forty rods, and then turns again to the left, running about the same distance, and then again to the right, running about eighty rods or perhaps one hundred and sixty, perhaps half a mile.

"Q. Are you thoroughly familiar with the topography of the country at and near the mouth of the Slick Rock Creek, and on both sides of the creek?

"A. I cannot say I am thoroughly familiar with it.

"Q. State whether or not you have been there with a view of examining the topography, and particularly as to the ridges.

"A. I have.

"Q. Is there any ridge at or near the mouth of Slick Rock Creek that would indicate this line as shown on this newly discovered map running the same course as indicated by that map?

"A. We tried to fit the courses and the map to the ridges there, but could not succeed. We could not find anything to fit it" (R., pp. 557-558).

COMPARISON OF BURNS' MAP WITH MAP OF 1821.

Comparing the line on the map made by Burns and Libby with the map of 1821, we note, first, from the undisputed point on the north bank of the Tennessee River the Burns line follows down the north bank of the river to a point opposite the mouth of Slick Rock Creek and crosses the river to the mouth of the creek. This location of the Burns line is absolutely controverted by the map of 1821 as from the undisputed point on the north bank of the Tennessee River the map of 1821 shows the line crossing the river direct (shortest route), at right angles to the stream. Second, the Burns line from the mouth of Slick Rock Creek follows the creek by its various courses, crossing the stream in its meanderings many times for a distance of five and one-half miles. This location is contrary to the map of 1821. The "creek" on the map is east of the line and the line only conforms in direction to the direction of the creek for about one-half a mile, when it sharply departs from the creek and returns in the direction of the stream, at the first mile. Thereafter the further course of the stream is away from the line and finally is several miles *east* of the boundary line located on the map.

Thus far Burns has run a line from the undisputed point in the north bank of the Tennessee River,

all of which is absolutely contradicted by the newly discovered map and report of commissioners and contrary to all the acts describing said line.

It is apparent that Burns was controlled *not by the new evidence,* but by the old evidence presented in the original case, to wit, the marked trees on Slick Rock Creek.

This is confirmed by Burns himself in his direct testimony.

> "Q. 33. Now what determined the location of this red line as shown on the map (Burns' map) that you made?
>
> "A. The red line is the transit line in which I ran.
>
> "Q. 34. I understand; what determines that line though; what do you find along there?
>
> "A. Why, marked trees were found in a great many places along this creek which determines or proves clear to my mind that that is where the line was run in 1821" (R., p. 484).

And again in cross-examination Burns said:

> "XQ. 25. Did you undertake to locate and follow that line at all, as shown by contour of the line itself, the circles, angles, etc.?
>
> "A. I undertook to follow the ridges that conform the closest to that map of 1821 and the water courses. *I was governed by the marked trees that I found along those ridges and water courses*" (R., p. 506).

The line run by Burns on leaving Slick Rock Creek, after following the same for five and a half miles, goes westward up Big Stack lead to Big Fodder Stack and then *southeastwardly* to the Junction. Great stress is laid by Burns and petitioners on the fact that the angle of his line at Big Fodder Stack Peak has its vertex to the west and in this conforms to a similar angle on the map of 1821 at "about" the same distance south of the Tennessee River. This angle with its vertex to the west on Burns' map is, by his route,

about eight or nine miles from the undisputed point on the north bank of the Tennessee River.

Referring to the Hale map of the disputed territory (R., p. 754) it will be observed that the course of the line over Hangover Ridge is generally parallel to the course of Slick Rock Creek for several miles and that at the "Junction," *which is about nine miles from the undisputed point on the north bank,* the angle of the State Line has its vertex to the west.

Burns, for the purpose of comparison, letters his line (map 386h, R., p. 754) at the mouth of Slick Rock Creek *B;* Big Fodder Stack Peak is lettered *C*, and the "Junction," the undisputed point to the south, is lettered *D*. Burns then draws lines *B C* and *C D*. Then taking the newly discovered map, Burns letters the mouth of the "creek" at the Tennessee River *B* and a pronounced angle, with vertex to the west, south of the Tennessee River, he letters it *C*, and the next pronounced angle, or break in the general direction, on the map of 1821, he letters *D*, and on said map draws lines *B C* and *C D*. It will be observed that all Burns' comparison and deductions therefrom amount to is that the general trend of his line is similar to the general trend of the line on the newly discovered map of 1821.

General trend is not location, similarity is not identity.

Note also that the scale of the newly discovered map is 13,200 feet to the inch, and the scale of Burns' map is 1000 feet to the inch, *so that any variation of the state map compared to Burns' map would be apparently less than one-thirteenth of what that variation really is.*

Further it will be noted that by placing Point B on Burns' map at Slick Rock Creek, and assuming it to be the same point as that represented by Point B (as placed by Burns) on the newly discovered map, Burns has made a departure of half a mile from the

newly discovered map in order to uphold his contention as to the location of the State Line, *when the distance between the disputed lines at this point, the south bank of the Tennessee River, is only one-half mile, which one-half mile Burns thus allows himself by assumption.*

Also Point C on Burns' map is only one and one-half miles west from Slick Rock Creek, whereas Point C on the newly discovered map is nearly four miles west from the "creek," a difference of two and one-half miles.

Hence Burns, to make his comparison of the *general trend* of the lines of the respective maps, as to Point C on his map departs from the newly discovered map three miles, to wit: Half a mile down the Tennessee River, and Point C on the newly discovered map being practically four miles from the "creek," and on Burns' map only one and one-half miles from Slick Rock Creek, gives an additional departure of two miles and a half. The distance between the disputed lines at this point (opposite Big Fodder Stack) *is but three miles.* In other words, Burns to place the line over Big Fodder Stack, where he contends it should be, has been driven to the necessity of showing a discrepancy between his map and the newly discovered map of three miles, when the distance between the disputed lines at Big Fodder Stack is *only three miles.*

The "Creek" on the Map of 1821 East of the Line Where it Crosses the Tennessee River is the Cheoah River.

Referring to Hale's map of the disputed territory (R., p. 754), Slick Rock Creek is clearly shown to be enclosed within the basin formed by the Hangover Ridge on the east and south and the Fodder Stack Ridges on the west. The "Junction" is shown directly south of the head of the Slick Rock Creek. It is clearly

apparent that no one could follow the Burns route up Slick Rock Creek, and via Big Fodder Stack Peak to the "Junction," as petitioners contend the commissioners of 1821 did, and not see that Slick Rock Creek heads directly below the "Junction," *a point in the undisputed State Line.*

The "creek" on the map of 1821 is *not* shown as having its source or head at or near a point in the State Line, as shown on said map, but is shown thereon as having its source or head miles east of the State Line and far within North Carolina, which fact conforms only to Cheoah River.

Neither could anyone follow the "Burns line" and not know that at the "Junction" that the highest and most prominent ridge (to the top of which they would have to climb from where the Fodder Stack Ridge joins it), enclosed Slick Rock Creek on the east. According to the Burns theory the commissioners were running their line to reach this same ridge, and yet Burns asks the court to credit that the commissioners not only did not sketch this ridge joining the Fodder Stack Ridge at the "Junction," but placed the "creek" running across the territory where said ridge is located. But to the east of that said ridge, which according to the Burns contention, the commissioners do not show on their map, does lie the Cheoah River. The said ridge is the main Hangover Ridge.

Under these facts, it cannot be reasonably assumed that the commissioners would adopt a map, intending to show they followed the meanders of said creek five or more miles, and then sketch said creek with its course shown *miles east of any point in the State Line.* But it is reasonable to believe and is evident that the "creek" on said map of 1821 was intended to represent the Cheoah River, which drains the eastern slopes of the main ridge, which ridge includes the Hangover Peak, the "Junction" and which is followed by the undisputed State Line, south of the "Junction."

Further, the course of the "creek" on the map of 1821, with reference to both the course of the Tennessee River and the compass, is similar to the course of Cheoah River and not the Slick Rock Creek. The right angle turn to the eastward of said "creek" near the mouth on the map of 1821 corresponds to the right angle turn which the Cheoah River makes near its mouth. (See Exhibit A, map of J. L. Williams, Rec., p. 858.)

But it is urged that the Report of the Commissioners calls for crossing the Tennessee River at the distance of 65 miles and that the line claimed by respondent would strike the south bank of the river within 65 miles or about 64½ miles. That the map of 1821 further shows a mile circle where the line strikes the south bank and that these facts indicate the "creek" is Slick Rock Creek. It will be noted that all natural monuments and trails called for in the commissioners' report, from its beginning and down to the Highawassee River, as crossed by the line at certain distances are made in even and not fractional miles,—Porters Gap, 22 miles—Equonettly path at 53 miles,—Tennessee River at 65 miles—old trading path leading from the valley towns to the overhill towns, at 93 miles—Unaka Turnpike at 101 miles.

Further, it is admitted that the width of Tennessee River, on the map of 1821, where the line crosses the same, is represented as being several times its actual width, so that it is apparent that if the Tennessee River were sketched in according to its true width the mile circle, now claimed to be shown on the south bank of the Tennessee River, would be shown considerably south of the said river.

The contention of petitioners that this map supports the line claimed by them, and at the same time denying many facts that the map and commissioners' report call for as to natural monuments, claiming that

the same are errors, is in effect asking the court to accept the new evidence as corrected by petitioners; *their addenda*, as a basis of their bill of review.

Immediately east of the Hangover Ridge is the larger drainage basin of the Cheoah River. The mouth and gorge of the Cheoah River, lying eastward from the line they were running, would be very noticeable to the commissioners as they came down the ridges north of and approaching the Tennessee River (R., pp. 602-604). Also, the commissioners' party would clearly see, as they approached the north bank of the Tennessee River, the high bluff which runs down the south side of the Tennessee River from the mouth of the Cheoah River almost to the mouth of Slick Rock Creek *appearing as the base of the great Hangover upheaval* (R., p. 586). It should be remembered that the commissioners when they first saw the Tennessee River, as they approached it from the north, had run the line through a wild country over extreme elevations of the highest ridge of the Smoky Mountains for a distance of sixty miles or more, and the sight of the great gorge and valley of the Tennessee River was the most notable view and monument of their entire course. It was the first and greatest stream they had to cross. They would carefully observe the valley and gorge of the Tennessee River and the high ridges south of the river. Their course on the north shows they were careful to follow the highest ridges. How their line, as adopted by them, approached the Tennessee River and how said line crossed and departed from the river would certainly be facts clearly fixed in their minds. After getting on the south side of the river the surveyors and commissioners would also see the head waters of some of the tributaries of the Cheoah River to the eastward of their line. It cannot be reasonably contended that the commissioners ran the line down the Tennessee River, thence crossing to Slick Rock

Creek and thence up Slick Rock five and one-half miles, and then marked their map, and made the calls in their report, for crossing the Tennessee River direct and departing from the river on the crest of mountains.

Mr. Muller, referring to the "Creek" on the map of 1821, testified that they have pictured the Cheoah River for the creek, but have got it further down stream than it actually is (R., p. 585). Also, that, following Burns' course, going to the river, crossing the river, then up the creek is not possible, as it makes a gap that is not accounted for (R., p. 561). He further testifies *that the indications are that the line takes the crest of the mountain immediately after leaving the river* (R., p. 561). He says, on his cross-examination, that the bluffs extend from the mouth of the Cheoah all the way down to the mouth of Slick Rock Creek; that is, the Hangover Ridge bluffs (R., p. 586).

And further testified on the cross-examination as follows:

> "Q. Now, standing at that point, about six thousand feet back there, could you see the Cheoah River from there?
>
> "A. I do not remember whether we could see the Cheoah River or not.
>
> "Q. Could you see the gorge out of which it came?
>
> "A. Yes, sir."

On the direct examination, Mr. Hale says that *the stream or creek marked on the map is the Cheoah River* (R., pp. 549, 550, 601).

And on his cross-examination, *that the line runs on the crest of the mountain and not up a stream.* There are streams marked on the map, but the map shows that the line followed a ridge. He also says, on his cross-examination, *that when they reached the Tennessee River, they went directly across* it (R., p. 599). Again, that there is no other way of locating the line, other than over the Hangover, and that the commis-

sion did locate the line on the Hangover. Again, he says, approaching the river you see two streams. The stream sketched on the map is on the left of the line, but too close to the line. Also, *that the Hangover line is more consistent with the line on the map, when taken in connection with the report of the commissioners, than the Slick Rock Creek line* (R., p. 603). Also, *that as you stand a mile north of the river, looking towards the river, you see Cheoah River on the left and Slick Rock Creek on the right; that Slick Rock Creek actually runs northeast, and the Cheoah River northwest, each several miles* (R., pp. 602-603). The Cheoah River turns north as it approaches the river (R., p. 604).

Witnesses Muller and Hale were surveyors for respondent.

W. P. Chambers, a witness called for petitioners, contending that the said "creek" is Slick Rock Creek, testifies *that the "creek" is not laid down correctly on the map* (R., p. 619).

Mr. Ed. Mayfield, a witness called for petitioners, says *that Slick Rock Creek is not plotted on the map to run as Slick Rock Creek does run* (R., p. 622).

Mr. Libby, a witness for petitioners, says, that the creeks and rivers are probably sketched in, inasmuch as they show the Tennessee River to be about one-half a mile wide, when, as a matter of fact, it is only about 300 feet wide and he says *they were probably sketched in after the ground was platted* (R., p. 522).

Mr. Denton, surveyor for petitioners, says, *that the creek marked on the map cannot possibly be Slick Rock Creek, if it is correctly marked on the map* (R., p. 539).

Mr. Burns, surveyor for petitioners, says that they sketched in the "creek" on the map of 1821, and sketched it too low down (R., p. 631). Mr. Burns says that the main thing is to show by this map the right ridges and water courses (R., p. 630), yet he followed

the Slick Rock Creek five or five and a half miles up a valley, and not up a ridge, to get onto the ridge, and the only ridge, which would bear out their location of the line. Although he says the main thing is to show by this map the right ridges and water courses, he testifies that the water course marked "creek" is three miles east of where it ought to be.

Granted that the State Line from the admitted State Line fore and aft tree on the north bank of the Tennessee crosses direct to the south bank and thence to Hangover peak, and the "Junction," then the "creek" on the map of 1821 demands no abnormal or unusual explanation. The "creek" on the map of 1821 drains the waters east of the State Line shown on the map and according to the contention of respondent, this answers the description of the Cheoah River. The fact that the "creek" at its mouth is sketched in a little too close to the State Line is not misleading nor surprising, as a sketch, since the "creek," considered as representing Cheoah River, is no part of the line. But if it were *part of the line* it necessarily would be actually located by running that line. This contention of respondent that the "creek" is Cheoah River calls for no interlineation to be suggested for the definite and plain calls of the Cession Act, the report of the commissioners and the confirmatory acts of the respective states. The theory of the line up Slick Rock Creek and that the "creek" on said map is Slick Rock Creek, demands that words or changes be added to all of the authoritative documentary evidence in this case, describing the location of the State Line and forces the theorizer into the domain of speculative surmises.

Burns himself says that one of the leads to the Hangover is right at the Tennessee River on the south side (R., p. 508). They were following the Smoky or Stone Mountain Range; they crossed the river, the call then is *thence to the main ridge*, and along *the extreme height thereof*. The call does not say what course to

take when going from the river to the main ridge. We must remember that courses are not given until the mountains cease, and then they are given. Yet Mr. Burns runs up Slick Rock Valley five miles, for the purpose of getting onto a ridge, because the call is for a ridge; but he gets onto the Fodder Stack instead of the Hangover simply because the theory of appellants takes them to the Fodder Stack instead of the Hangover; and yet in order to comply with the call in the Cession Act and in the report of the commissioners, they do not get onto a ridge after going five miles up the creek. If the creek ran on the crest of a mountain that would do, but it does not. It is down in the Slick Rock Basin between the Hangover and Fodder Stack Ranges. We get onto the highest range of the Smoky Mountain chain immediately after crossing the river, thereby complying with the call in the Cession Act and the report of the commission, which says, after crossing the river "*thence to the main ridge.*" We follow *along the extreme height thereof*, while Burns, in order to get on the Fodder Stack has to go five miles up the valley.

Mr. Muller, on his examination in chief, says that the most prominent ridge you see from the north of the river is the Hangover Ridge (R., pp. 560-561).

Mr. W. P. Chambers, a witness called for appellants, says *that standing a mile or a mile and a half on the line north of the river, and looking south, the first thing you would see would be the Hangover* (R., p. 607). It is the most prominent ridge from that point. He also says that the Hangover is four or five hundred feet higher than the Fodder Stack (R., p. 608). This fact is admitted by all the witnesses.

Opposite to the undisputed "spruce pine" on the north bank of the Tennessee River stands the high bluff of the Hangover Ridge; to the east is the Cheoah River, which river drains the eastern slope of the

Hangover Ridge, the eastern slope of the "Junction" and several miles of the State Line south of the "Junction." Why seek to deny the map of the commissioners and their report; the Cession Act; the confirmatory acts which conform to this stream being the Cheoah River, and contradict its being Slick Rock Creek? According to Hale's map and Burns' map, the Slick Rock Creek runs at right angles or nearly so to the course of the Tennessee River at that point. It will be observed that the course of the "creek," referred to on the map of 1821, approaches the course of the Tennessee River at that point, which course corresponds closely to the course of the Cheoah River as it flows to the Tennessee River. Further, the Cheoah River drains a much wider area than the Slick Rock Creek, and is a much more notable stream. If the "creek" on the map of 1821 is not to represent Cheoah River, then the Cheoah River is not shown on the map, although the map shows some care in indicating the more *prominent* streams down the entire length of the line.

Slick Rock Creek, draining only about 10,000 acres or about fifteen square miles, is comparatively an unimportant stream. Further, the Cheoah River does flow a number of miles east of the "Junction" and does rise southeast of the "Junction." Also, the map of 1821 shows a mountain range east of the upper half of the stream marked "creek," which mountain range apparently represents a watershed of the creek, which, though roughly sketched, is clearly far east of the boundary line, which also conforms generally to the Cheoah River watershed, and certainly not to that of the Slick Rock Creek.

Also, on the map of 1821 on the north bank of the Tennessee River, the first stream shown flowing into the Tennessee River is about six miles eastward (North Carolina side) from the boundary line and opposite

the mouth of said stream south of the Tennessee River, the "creek" under discussion on said map extends eastward into North Carolina many miles beyond a point immediately opposite the mouth of said stream shown on the north side of the Tennessee River. In other words, the "creek" on the map of 1821 is shown to have its source within the State of North Carolina, twelve or fifteen miles east of the State Line, which fact alone, by its course and drainage basin, conforms only to its representing the Cheoah River.

The only possible, as well as reasonable, interpretation of the "creek" on the map of 1821, under discussion, which will harmonize with the description of the commissioners' map and report, the various acts describing the line; all of which call for crossing the Tennessee River direct on reaching the river and departing from the river following the crest of a mountain ridge, is that the "creek" on the map of 1821 is intended to represent the Cheoah River; which river and its junction with the Tennessee River, the commissioners could not fail to see, lying to the east of the line they ran as they approached the Tennessee River, and they must have recognized that the "creek" drained the eastern slope of the Hangover Ridge, on a continuation of which ridge is located the undisputed State Line south of the "Junction."

WEIGHT OF THE EXPERT TESTIMONY.

When complainants filed their petition for leave to file this bill of review they filed therewith an affidavit made by Mr. C. Z. Denton as to his having gone on the ground with the newly discovered map and by its aid located the State Line. Mr. Denton's testimony admits this affidavit to be incorrect and that he permitted statements to be inserted in his affidavit which he was not willing to stand by (R., pp. 533-534-535). Therefore, it would not appear that his testimony con-

firming Messrs. Burns' and Libby's testimony is of any weight in the matter.

While we do not raise the question of the integrity of any of the witnesses, it is material to consider the competency and experience of these men, as shown in their testimony, in order to appreciate the value of their testimony.

Mr. Burns, witness for the petitioners, testified that he had done ordinary land surveying for several years, that he had been draftsman in an office for about a year and had been connected with railroad engineering, but had never done any work locating State Lines and was not familiar with this particular territory where the disputed land lies (R., pp. 478-479).

Mr. Libby, witness for the petitioners, testified in effect that he had had considerable less experience than Mr. Burns (R., p. 518).

Mr. Hale and Mr. Muller, witnesses for respondents, each testified they had had many years of surveying in the particular territory where the lands lie, and had surveyed many times portions of the State Line between North Carolina and Tennessee, and that they are familiar with the marks used on the trees in the locality concerned, and possess a thorough knowledge of the ridges and streams, as a result of life-long experience in pursuing their profession in this class of work in the locality (R., pp. 546, 547, 555).

It is not necessary to discuss the qualifications of Messrs. Chambers and Mayfield, witnesses for petitioners, as their testimony consists of general "opinions," intended to be favorable to petitioners' theory as to the location of the State Line, with no expert data stated by them as a basis for their "opinions." Mr. Chambers described the general topography of the territory in dispute. Mr. Mayfield gave his opinion as to how he would have run the line had he been a commissioner.

SUMMARY.

1. The map of 1821 shows:

(a) That the line adopted by the commissioners from the beginning to the Tennessee River was located on mountains.

(b) That the line crosses the Tennessee River direct (shortest route) from where it strikes the north bank of the said river.

(c) That the line as it departs from the south banks of the Tennessee, is located on mountains and continues on said mountains, beyond any point here in dispute.

(d) That eastward of the line, where it strikes the south bank of the Tennessee River, is a "creek"; the course of which, to its source, departs further and further from the State Line, which stream as shown would drain the eastern slope of the mountains on which the map shows the State Line located at that place.

2. The undisputed "spruce pine" State Line tree on the north bank of the Tennessee River is opposite the Hangover Ridge, and so marked as a fore and aft tree as to show that the line crosses the river direct at that point.

3. A line run from the said marked "spruce pine" and crossing the Tennessee River direct (shortest route) locates the line on Hangover Ridge.

4. The Hangover Ridge is marked with State Line trees.

5. The Hangover Ridge is the "main ridge."

6. Immediately to the eastward of the Hangover Ridge, draining the eastern slope of said ridge, lies the basin of the Cheoah River, the mouth of which stream

is plainly visible from the undisputed line north of the Tennessee River, as you approach the river from the north.

7. The Cession Act of North Carolina of 1789 granting the territory now Tennessee, describes the line as follows:

> "Thence along the *extreme height* of said (Great Iron or Smoky) Mountain to the place where it is called Unicoy or Unaka Mountain,"

which description conforms only to the line located over Hangover Ridge from the undisputed spruce pine tree on the north bank of the Tennessee River.

8. The report of the commissioners of 1821 and the confirmatory acts of the States of North Carolina and Tennessee described the line under discussion as follows:

> "Thence in a southwestwardly course to the Bald Rock on the summit of the Great Iron or Smoky Mountain and continuing southwestwardly on the *extreme height* thereof to where it strikes Tennessee River—crossing the Tennessee River—from Tennessee River *to the main ridge* and along the *extreme height* of the same to the place where it is called the Unicoy or Unaka Mountains,"

which calls conform only to the location of the line over the Hangover Ridge from the undisputed "spruce pine" on the north bank of the Tennessee.

No contentions of petitioners can avail to write into the report of commissioners and the confirmatory acts of the States of North Carolina and Tennessee, or the Cession Act of 1789 "down the Tennessee River one-half mile to the mouth of a creek, thence up said creek five and one-half miles, etc., nor can any contentions of petitioners change the facts on the map and trace the line down the Tennessee River one-half a

mile and replace its location on mountains with a line running five and one-half miles up a creek. If creeks flowed along the crest of mountains instead of the lowest elevations of valleys petitioners' argument would have virtue.

I.

By the General Principles of Equity, Parties Not Aggrieved by a Decree Cannot Claim the Reversal of the Decree Upon a Bill of Review.

Mr. Justice Story said, in delivering an opinion in *Whiting v. Bank of U. S.*, 13 Peters, 6:

> "No party can, by the general principles of equity claim a reversal of a decree upon a bill of review, unless he has been aggrieved by it, whatever may have been his right to insist on the error at the original hearing or on the appeal."

It is said by the court in *Keith v. Alger*, 124 Fed. 35:

> "Moreover, the court, in inquiring whether the party has been aggrieved, will look to the consequences which have ensued or are likely to ensue in consequence of the fault complained of. In other words, the court takes into view all the circumstances of the situation, for a bill of review is a dernier ressort, devised to relieve a party who has suffered a substantial wrong from the miscarriage of justice in the former proceedings. And the inquiry deals with the state of things existing at the time of filing the bill of review. That facts which might have availed to prevent the decree, or to reverse it upon appeal, will not suffice to enable a party to maintain a bill of review, unless such facts defeat a substantial equity, is a doctrine well established."

Other authorities on the same principle are:

Thomas v. Harvie's Heirs, 10 Wheaton, 146, and *Brown v. White*, 16 Fed. 900.

The rule of the law laid down, as to who may be a party to a bill of review, is that none but parties to the original suit or their privies can have a bill of review, *and that it does not lie for assignees* (that is, parties without *any* interest).

In *Thompson v. Maxwell*, 95 U. S. 391, an assignee of the defendant in the original suit filed a bill of review. The original suit involved the title to land both of which facts are true in this case now before this court. The court held:

> "The bill is filed by and on behalf of an assignee of the original defendant; whilst another rule, relating to bills of review, is that none but parties and privies can have a bill of review. It does not lie for assignees."

Also:

Bank of U. S. v. White, 8 Peters, 262;
Perkins v. Hendyx, 127 Fed. Rep. 448;
Shaw v. Little Rock Co., 100 U. S. 605;
Fitzgerald v. Cummings, 1st Lea. 232.

Petitioners have labored to quote authorities at length on the point that, even though they are assignees, if they are aggrieved by the final decree, they are proper parties to file a bill of review. The fact is, petitioners are not, and never were, aggrieved by the final decree in Belding v. Hebard.

The petitioners for the bill of review were Hopkins, et al. (R., p. 421), who claimed under Belding, et al., and the deed purporting to convey said lands to Hopkins, et al., was executed and delivered to them (at least), nearly three years after the final decree in the original case, Belding v. Hebard (R., pp. 445-449), which decree set forth that the Belding title to the lands in dispute was void, and that the title of Hebard, under whom respondents claim, to said lands, was valid (R., pp. 371-415).

The depositions taken at Cincinnati on June 19, 1909, show the history of the title of the Belding lands as now vested in Hopkins, et al., to be:

1. That Belding, et al., by certain articles of agreement, dated December 9, 1899, made a certain conveyance to Robert N. Archer and Thomas F. McGarry, as trustees, which agreement of trusteeship was for the purpose of paying certain debts and liens on the lands and to purchase certain outstanding title in said lands, and the necessary monies were to be secured by selling the timber or operating, as it would be advisable and necessary in order to pay said debts, &c. The trustees, upon said debts being paid, &c., were to reconvey the land of Belding, et al. The term of the trusteeship was for five years, and it was also provided that in case of default in the payments, the trustees should have the power to sell the lands and timber thereon (R., p. 678-683).

Note that appellants were not a party to this agreement.

2. M. E. Cozad testified that in the spring of 1900 he met at a hotel in North Carolina one J. C. Creith, who claimed to be an agent for said Archer and McGarry, trustees for the sale of the Belding lands, and that he brought the matter to the attention of Hopkins, et al., and that a contract in writing was entered into October, 1900 (R., pp. 664-666). William R. Hopkins testifies to the same effect (R., p. 674).

It will be noted that this was not even a contract to purchase, that Mr. Creith was an authorized agent *was not even shown*, and further, it was a verbal understanding at most, merely that they might have the opportunity of entering into a contract to purchase these lands later should they desire to do so. Under any statement of these facts whatever, there was no contract cognizable at law or in equity. Hopkins, et al., will surely not deny that they purchased these lands since the statute of frauds became law.

3. On October 29, 1900, Robert N. Archer and Thomas F. McGarry, as trustees, gave an option to Hopkins, et al., to purchase certain lands in Graham County, North Carolina, and this option included certain terms of sale, but was *conditioned* that Hopkins, et al., *need not purchase said lands unless the lands offered contained an acreage of* 38,000 *acres* and not less than 140,000,000 feet of timber of merchantable character, not estimating hemlock, and *conditioned also that the said acreage* and timber *could be conveyed by good title unincumbered;* and also conditioned that *in no event would Hopkins, et al., be compelled to purchase said lands,* but that $7500 should be liquidated damages for the breach of the contract (R., pp. 676-678).

Therefore it is apparent that the above, the first agreement between Hopkins, et al., and their vendors, was an option to purchase not an absolute contract to purchase. By clause 3 it is expressly provided "that in no event would Hopkins, et al., be compelled to purchase said lands," and then it is provided, if they do not, what in effect is that they shall pay $7500 for having had the option.

Further, it will be noticed, as vital to the equities in this case, that said agreement of October 29, 1900, was made several months after the final decree in the case Belding v. Hebard, which was entered July 13, 1900.

4. The deed, Robert N. Archer and Thomas F. McGarry, trustees, to Hopkins, et al., under which Hopkins claims the lands now in dispute, was dated *March 3, 1903,* but the deed in fact, as the acknowledgments show, was not executed until *June 5, 1903, and when it was delivered to Hopkins, et al., does not appear,* but it was not recorded until some time in 1904 (R., pp. 689-694).

This deed describes the land which it purports to convey as 65,000 acres in Graham County, North Caro-

lina, and after describing said lands by grant numbers, entries and acreage, adds the significant words, to wit:

> "Subject, nevertheless, to all deductions, if any arising, by, through, or under the 'State Line' suit hereinafter mentioned, grants No. 8100 for 16,800 acres and No. 2336 for 14,800 acres above mentioned being for the same lands" (R., p. 691).

and further in the warranty of said deed we quote:

> "But there is especially excepted from the covenants of this conveyance all those lands situated at or near the State Line between the State of North Carolina and Tennessee, *which were recovered* in a certain action known as the State Line suit, which was pending in the United States Circuit Court for the Eastern District of Tennessee, and was brought by one Hebard against David W. Belding, and others, if future proceedings do not recover the title thereof" (R., pp. 693-694).

The evidence offered by petitioners themselves thus conclusively demonstrates that at the time that the final decree in the original suit, Belding v. Hebard, was entered, petitioners had no interest whatever in said lands, and that they were, therefore, at that time in no wise affected by said decree. They did not enter into any contract to purchase said lands until October 29, 1900, which contract was not an absolute agreement to purchase said lands, whereas the final decree was entered July 13, 1900. Further, it appears from their own evidence that they did not secure title to said lands until some time after June 4, 1903.

It will also be noted within the deed itself *there is described as conveyed about* 65,000 *acres of land*, and that said described lands are *subject to the deductions arising over the State Line suit*, and further *excepts* from the warranty clause the *lands situated at or near the State Line recovered by Hebard* in the suit

brought by him against Belding and others. When we note, with this clause of conveyance of 65,000 acres, that the option or contract of October 29, 1900, of said trustees to Hopkins, et al., sets forth that there *is to be at least* 38,000 *acres of lands*, conditioned upon being good and unincumbered title, it becomes apparent that Hopkins, et al., did not regard said deed as a conveyance of the land in dispute, but at most merely endeavored by it to secure to themselves whatever possible or unknown rights Belding might have in and to the lands recovered by Hebard in the State Line suit.

It is pertinent to state to this court that a certified copy of this deed, Archer and McGeary, trustees, to Hopkins, et al., was first filed by the Smoky Mountain Company in its answer to the original petition for bill of review, filed by complainants in this case, and therefore not originally filed by Hopkins, et al.

The testimony of petitioners thus conclusively shows that at the time the final decree was entered in the original case of *Belding v. Hebard*, Hopkins, et al., had no interest whatsoever in said lands, and they had *actual notice that the title to said lands was vested in Charles Hebard* and the title they claim under was declared void. Petitioners were in a position, therefore (not technically, but actually), to protect themselves, and that they did so do is shown from the recitals of the deed itself. If they claim to have given consideration for the lands now in dispute (which they never have claimed), they certainly were not innocent purchasers. Upon the recitals set out in their deeds, appellants have no place in equity or in law to complain now to this court.

Under the authorities cited and argument stated above, it is clear beyond any doubt whatsoever, that Hopkins, et al., cannot now prevail upon a bill of review to reverse a decree by which they were never aggrieved. To show themselves proper parties, under

the facts, to prevail upon the bill of review filed, Hopkins, et al., are driven to the necessity of showing authority to the effect that a decree may be reversed by a party not aggrieved by said decree. Such authority they have not shown and are unable to find, as it is antagonistic to all legal precedent and justice. The equities of the dispute lies not with them and their contention.

The Circuit Court of Appeals in its opinion rendered by Judge Knappen, when this case was heard upon bill of review, *inter alia*, said:

> "What we do mean to decide is that, in our opinion, taking into account not only the speculative purchase by appellants, but also the good-faith purchase by the Smoky Mountain Company, a case is not presented which appeals to the equitable discretion of the court to allow the review of a decree upon the ground alone of newly discovered evidence. We rest our decision solely upon this proposition. Bearing in mind the rule that this bill of review for newly discovered evidence is not of right, no matter how persuasive of error in the original decree the new evidence may be, and that it should not be allowed if such allowance would result in mischief to innocent parties, and having in view the stability necessary to be afforded to decrees, especially of courts of last resort, where disturbance thereof is not essential to the protection of the real equities of the parties before the court, we think the review asked for should be denied. In our opinion, the stability of judgments, and thus the protection of rights acquired in reliance upon them, are such as, under the peculiar circumstances of this case, to make the review asked for inequitable. Nor do we think the situation is changed by the fact of the conveyance by Belding and his associates to the trustees pending the suit, nor by the fact that appellants were negotiating for, and possibly may be said to have had, to some extent, an option for the purchase of the land previous to the final decree. The

appellants were not bound to make the purchase until contract therefor was actually made, which was after the decree sought to be reviewed when entered; and the purchase then made, as has been said, was speculative as to the land here involved" (R., p. 844).

It is not open to question that *the said decree of the United States Circuit Court of Appeals at Cincinnati, Ohio, entered in the original case July* 13, 1900, *was a final decree,* but we refer nevertheless to the case of *Hugh Stevenson v. William Fain, et al.,* 195 U. S. 166, which was a suit of exactly like character, and decided in the United States Circuit Court of Appeals at Cincinnati. The complainants in that suit having lost, sought to carry it to the Supreme Court of the United States. The suit was dismissed in the Supreme Court on the ground that there was no right of appeal. See also U. S. Judiciary Act, 1891.

II.

A Bill of Review Will Not Affect the Title of a Bona-fide Purchaser (of the Property in Controversy) From the Successful Party, After a Final Decree and Without Notice That a Bill of Review Is to Be Filed.

In the case of *Lee County v. Rogers,* 7 Wall. 181, certain bonds were issued by Lee County, and in a case to determine their validity, the highest court of the State of Iowa decided that the county possessed the power to issue the bonds, for the purpose for which they were issued, and that the same were therefore valid. After this decision the bonds were sold. After the sale of said bonds, on another action, the same court reversed the previous decision. It was contended that Lee County was therefore not liable to pay said bonds, and the matter was brought for review to

the Supreme Court of the United States, and it was held that the bonds being in the hands of bona fide purchasers, were valid and binding upon the county issuing them. This principle is supported by this court in a decision in *Whiting v. Bank of U. S.*, 13 Peters 9.

In *Rector v. Fitzgerald*, 59 Fed. Rep. 808, the Circuit Court of Appeals held, that where a final decree dismissed a suit filed by Rector, which dismissal was in 1881, and in 1884 Fitzgerald took a mortgage on the land involved from the grantee of the defendant who had prevailed in the suit, and afterwards Rector filed a bill of review against Fitzgerald and his grantor to reverse the decree, that Fitzgerald was a purchaser of the mortgage in good faith, after the term at which a final decree in favor of his grantor had been rendered, and his title could not be affected by a decree subsequently rendered on a bill of review subsequently filed. The court said:

> "We are of the opinion, both on principle and authority, that a bill of review ought not to be regarded as a continuation of the original suit, merely for the purpose of affecting a purchaser in good faith, after a final decree with notice. In our judgment, one who thus purchases after the lapse of the term at which a final decree on the merit is rendered, without notice that a bill of review is in contemplation, or will be exhibited, should be protected from the effect of a decree, if it is subsequently filed."

The case of *Ohio River R. Co. v. Fisher*, 115 Fed. Rep. 929, presented the same questions of law as the above cited case of *Rector v. Fitzgerald*. The court, in its opinion *upholding the title of the bona fide purchaser*, said:

> "This decree, filed January 21, 1885, invested H. J. Fisher, Jr., with all the evidence of an absolute title. Then these appellants purchased, paid their money, entered into and remained in posses-

sion of the realty thus acquired. 'No equity can be stronger than that of a purchaser who has put himself in peril by purchasing for valuable consideration without notice of any defect in the title. *Boone v. Chiles*, 10 Pet. 177, 9 L. Ed. 388.' How are they affected, as respects the rights of Mrs. Maria P. Fisher, by bill of review filed in 1890, several years after their purchase? In *Rector v. Fitzgerald*, 59 Fed. Rep. 808, we find this: 'A bill of complaint had been filed by R., and a final decree had been entered May 2, 1881, dismissing the bill. R. appealed from the decree, but failed to prosecute the appeal, and it was dismissed December 6, 1881. On February 29, 1884, one F., took a mortgage on lands, the subject matter of the litigation, from one who had purchased from successful party. On April 29th thereafter R. filed his bill of review, to which he made F., the mortgagee, and the mortgagor parties. He sought to reverse the former decree for error appearing on the record. F. pleaded his equity as a *bona fide* purchaser without notice. After a full and elaborate discussion, the court held that the purchaser without notice bona fide, after a final decree in favor of the grantor, had a title which could not be affected by a decree rendered on a bill of review subsequently filed; that a bill of review will not be regarded as a continuation of the original suit, so as to affect a person purchasing the property in controversy in good faith from the successful party after a final decree and without notice of any intention to file a bill of review. This case cites Ludlow's *Heirs v. Kidd's Ex'rs*, 3 Ohio 541. Certain infants filed a bill to obtain the legal title to certain lands. The bill was dismissed on final hearing. The defendants, who were in possession of the land and had an apparent legal title, sold the same to third persons, strangers to the suit. A statute of Ohio allowed infants five years after attaining majority to bring a bill of review in cases of this character. The complainants availed themselves of this statutory right after becoming of full age, and prayed a reversal of

the original decree. It was held, after a careful scrutiny of the authorities, that the intermediate purchasers were not affected by the decree of reversal. This case also quotes *Lee Co. v. Rodgers*, 7 Wall. 181, 19 L. Ed. 160, in which it is held that a purchaser *bona fide* of bonds, after a final decree declaring them valid, and before a decree on bill of review declaring them invalid, was not affected by the latter decree, because they were distinct and independent suits. This doctrine seems also to have been recognized in *Bank v. Ritchie*, 8 Pet. 146, 8 L. Ed. 890. On a bill of review Chief Justice Marshall set aside sales made under the authority of a decree which he reverses. He, however, gives it as a reason for this that the title acquired by the purchasers was defective in itself, inasmuch as the executor, who made the sale, had not complied with the terms of the decree under which he claimed to act, and because it also appeared that the bill of review asked that these conveyances be set aside on this ground. These authorities present a strong case."

The Supreme Court of Appeals, in *Dunfee v. Childs*, 59 W. Va. 239, says:

"During the interval between final judgment and commencement of proceedings in error, there is no suit pending, and a purchaser in good faith does not take title *pendente lite*, and is not affected by subsequent reversals of the judgment."

And further:

"I ask if it can possibly be the law that one who buys or recovers land under decree must wait three years for a bill of review, or two years for an appeal, or five years for a motion to reverse, before he can sell to a *bona fide* purchaser and give him good title? Is it the policy of the law to thus tie up land? The decree is presumed to be right until reversed. May not the victor in the suit or the purchaser act upon this presumption? The successful party ought not to have his title

clouded and the value of his property correspondingly diminished for three years by doubtful contingencies: 1. That a writ of error will be sued out; and 2. That a reversal will take place. *Cheever v. Minton*, 13 Am. St. R. 258. So says *Bank v. Bank*, 6 Peters, p. 17."

The same principles of law as expressed in the above opinion are upheld in the case of *McCormick v. McClure*, 6 Blackf. (Ind.) 466, and *Cheever v. Minton*, 13 Am. St. Rep. 258 (a Colorado case).

The history of the title from Charles Hebard unto the Smoky Mountain Land, Lumber and Improvement Company is as follows: The deed of Charles Hebard to P. C. Blaisdell, et al., was a special warranty deed. At the time that P. C. Blaisdell, et al., executed their deed and placed it in escrow, no title had been vested in P. C. Blaisdell, et al., because the deed of Charles Hebard to P. C. Blaisdell, et al., had not been delivered, therefore Blaisdell, et al., gave a quit claim deed.

The depositions of J. Newton Peck and the papers filed by him are conclusive evidence that the Smoky Mountain Land, Lumber and Improvement Company came into active existence about November, 1900, and entered into a contract to purchase the lands in dispute; that the deed placed in escrow was not delivered to the Smoky Mountain Company until January 9, 1903, or later (R., pp. 646-658).

The history of the title as shown by testimony and papers from Charles Hebard to the Smoky Mountain Company filed is (R., pp. 562-632-646-658):

On November 24, 1899, Charles Hebard gave the right of an option in letter form to Messrs. F. L. Andrews, P. C. Blaisdell, et al. The terms of this option were not complied with and it was not consummated (R., p. 657).

On July 12, 1900, F. L. Andrews and P. C. Blaisdell secured $20,000 from J. M. Carpenter, W. L.

Haskell, John F. Stone and J. Newton Peck. Messrs. Carpenter, Haskell, Stone and Peck were given ninety days to examine the lands known as the Charles Hebard lands, and if they did not conclude to purchase, the $20,000 was to be returned to them by Messrs. Andrews, Blaisdell, et al. (R., pp. 652-653, 656-657).

On July 16, 1900, F. L. Andrews, P. C. Blaisdell, et al., and Charles Hebard entered into an agreement different in terms and conditions of the option of November 24, 1899, and Charles Hebard and wife executed a deed for lands in Monroe County, Tennessee, including the lands now in dispute, to P. C. Blaisdell, et al., and said deed was not delivered, but placed in escrow, and was not delivered out of escrow, in accordance with the terms of said agreement, until January 9, 1903, or later (R., pp. 565-656-657-648).

On October 4, 1900, Messrs. Andrews and Blaisdell, et al., agreed to sell an undivided one-half interest in the same tract of land to Messrs. Haskell, Stone, Carpenter and Peck, if they decided to purchase by December 1, 1900, and if they did not decide to purchase, Messrs. Stone, Carpenter, Haskell and Peck, and other parties mentioned, were to have one-twentieth each of the stock of the company organized to purchase said lands (R., p. 653).

On January 28, 1901, P. C. Blaisdell executed a deed for the said lands, including those now in dispute, to the Smoky Mountain Company, which deed was placed in escrow and not delivered to the Smoky Mountain Company until January 9, 1903, or later (R., p. 569).

On February 12, 1901, Messrs. F. L. Andrews and P. C. Blaisdell, et al., sold and transferred their interest in the contract of Charles Hebard for the purchase of these lands to the Smoky Mountain Company (R., p. 653).

On February 12, 1901, a formal paper of subscription to the stock of the said Smoky Mountain Company was executed by those who agreed to become stockholders in said company to purchase the said lands which Charles Hebard contracted to sell to P. C. Blaisdell, et al. (which contract and all its rights had been assigned to the said Smoky Mountain Company, as above stated) (R., p. 654).

Applying the principles as decided in the cases cited, to the facts of this case, we have strong and convincing authority that the Smoky Mountain Company, a purchaser in good faith of the lands in dispute, having purchased said lands after the final decree (July 13, 1900) in the original suit (*Belding v. Hebard*) had been rendered, and before the newly discovered evidence, upon which this suit has been reopened, had been found, *cannot now have its title to these lands affected by a bill of review.*

Petitioners strive to find some ground for distinguishing the cases referred to from this case now at bar. Fortunately the cases referred to in our brief are fully reported and the facts are similar, in effect identical, and the principle of law stated by the courts in their decision is clearly and with great care set forth, viz., that a *bona fide* purchaser of property purchased from the successful party after final decree, cannot have his title affected by a bill of review of which he had no notice at the time he purchased.

Petitioners argue what the law is between equally innocent purchasers which under the facts of this case is not relevant, as appellants purchased from the unsuccessful party after final decree with actual notice, and accordingly protected themselves as per recitals in the deed under which they claim.

We submit, were there no other defence to this bill of review than the one now under discussion, it is suf-

ficient ground upon which this court should dismiss this bill of review.

The deeds, Hebard to Blaisdell, et al., and Blaisdell, et al., to Smoky Mountain Land, Lumber and Improvement Company, show that they included the lands in dispute, and that they were made after final decree in the original suit, *Belding v. Hebard*, July 13, 1900; and furthermore the deeds were in escrow until 1903. The deeds did convey what Mr. Hebard *owned*, and not what he did not own, whereas Belding, et al., in their deed to Hopkins, et al., endeavored to convey what *they did not own*, without receiving money therefor, and Hopkins, et al., endeavored to get something for nothing, and thus cloud the title which had been decreed in Charles Hebard after equity proceedings to remove that cloud.

In the testimony of J. Newton Peck, Mr. Peck was asked by appellants' counsel the following question:

> "Q. When the Smoky Mountain Company took that property over was there not something said guaranteeing you against any action of the Beldings?
>
> "A. Not one word that I ever heard of.
>
> "Q. Was not this property that had been in dispute simply thrown into general purchase?
>
> "A. No, sir" (R., p. 650).

III.

The Court Will Dismiss a Bill if, Upon Looking to All the Circumstances, the Court Deems it Productive of Mischief to Innocent Parties.

In upholding this principle, we cannot do better than refer to the authorities quoted in the opinion of the Circuit Court of Appeals in this case, upon bill of review proceedings, as stated by Judge Knappen in his opinion, from which we quote as follows:

"In the opinion of the majority of the members of this court, the decree of the Circuit Court, dismissing the bill of review, should be affirmed. This bill of review is not filed for error apparent upon the face of the decree, but solely for newly discovered evidence. The rule is well settled, that while a bill of review, on account of error upon the face of the decree, may be filed as matter of right, the granting of a bill of review on account of newly discovered evidence is not of right but of sound discretion in the court. In *Dexter v. Arnold,* 5 Mason, 303, 315, Justice Story, speaking of such a bill, said: 'It may be refused, therefore, although the facts if admitted would change the decree, where the court, looking to all the circumstances, deems it productive of mischief to innocent parties, or for any other cause unadvisable. *Bennett v. Lee* (2 Atk. 528); *Wilson v. Webb* (2 Cox, 3); and *Young v. Keighley* (16 Vez. 348), are strong exemplifications of this principle.'

"The rule thus laid down by Justice Story is not only adopted by the text-books generally, but has been declared and affirmed by numerous decisions, which, as well as the text-books, have generally stated the rule in the precise language of Justice Story. 2 Daniell's Ch. Pr. 1577; Story's Eq. Pl., section 417; *Hughes v. Jones,* 2 Md. Ch. Dec. 289, 296; *Harris, Admx. v. Edmondson,* 3 Tenn. Ch. 211; *P. & M. Bank v. Dundas,* 10 Ala. 661, 669; *Massie's Heirs v. Graham's Admrs.,* 3 McLean, 41; *Craig v. Smith,* 100 U. S. 226, 233; *Ricker v. Powell,* 100 U. S. 104, 107; *Thomas v. Harvie's Heirs,* 10 Wheat. 146, 150; *Stockley v. Stockley,* 93 Mich. 307, 313.

In *Ricker v. Powell* this language was used:

"A bill of review on the ground of newly discovered matter can only be filed on special leave, which depends on the sound discretion of the court to which the application is made. *Thomas v. Harvie's Heirs,* 10 Wheat. 146; *Rubber Company v. Goodyear,* 9 Wall. 805; Story Eq. Pl. 421c; 2 Daniell Ch. Pr. (4th Ed.) 1577. 'It may be refused,

although the facts, if admitted, would change the decree, when the court, looking to all the circumstances, shall deem it productive of mischief to innocent parties, or for any other cause unadvisable.' Story Eq. Pl., section 417; *Griggs v. Gear*, 8 Ill. 2."

In *Craig v. Smith* it was said:

"There is no universal or absolute rule which prohibits the courts from allowing the introduction of newly discovered evidence under a bill of review to prove facts which were in issue on a former hearing. 'But the allowance of it is not a matter of right in the party, but of sound discretion in the court, to be exercised cautiously and sparingly, and only under circumstances which demonstrate it to be indispensable to the merits and justice of the cause.' Such was the language of Mr. Justice Story in *Wood v. Mann* (2 Sumn. 334) and he states the rule none too strongly."

In *Stockley v. Stockley* it was said:

"An application for leave to file a bill of review is the method employed to obtain a rehearing and to vacate a decree after its enrollment; but the results to be attained, and the fact properly to be considered, are the same as though it were a motion for a new trial, or a motion for a rehearing and to vacate a decree before its enrollment and in like manner it addresses itself to the fair discretion of a court. In passing upon it, each case stands by itself, and is controlled by the circumstances surrounding it, and without reference to any other case. The power of the court in granting or denying it is largely discretionary, and is always to be exercised in view of the peculiar circumstances of each case, so as to effectuate substantial justice, and protect the legal and equitable rights of the parties.

"In the opinion of a majority of the court, the case is one calling for the application of the principle recognized by the decision cited. The appel-

> lants here are purchasers of the lands after decree and under express exception thereof from the covenants of warranty. Their purchase, so far as concerns the lands here involved, was speculative. On the other hand, the Smoky Mountain Company was a good-faith purchaser for value and in reliance upon the decree."

The only inference which can be taken from these words is, that even if all were true which appellants allege in their bill, yet the court would not allow the bill to prevail if the result would be productive of mischief to the innocent party—the Smoky Mountain Company.

The Smoky Mountain Company gave thousands of dollars for the land in dispute, and purchased from the successful party after final decree in the original suit. For over six years previous to the application to file this bill by appellants, said company had suffered the principal paid and its interest to lie in the property, and had paid large sums for taxes, in addition to the expense incidental to caring for the property (R., p. 656).

The petitioners paid nothing for their interest claimed in the property, *or, if they did, they had no legal or equitable reason for doing so,* as the title of record showed their grantors did not have any title to said lands.

Hence, even were we to admit petitioners' statements as to what the newly discovered map establishes, equity would be compelled to deny the prayer of their bill. Appellants cannot prevail in a court of equity as to interest claimed in these lands based upon no payment, or upon payment (which petitioners never have asserted) made to grantors, when a final decree was on record declaring that said grantors had *no* title, *as against* the Smoky Mountain Company, a *bona fide*

purchaser of the successful party, after a final decree, in the original suit.

The mere statement of the facts is sufficient to demonstrate that there is no principle of equity upon which appellants may base the prayer of their bill of review; *on the contrary, the very significance of the word "equity" demands and directs the dismissal of this bill of review under the facts of this case.*

IV.

In Equity the Federal Courts Will Follow the Analogy of the State Statutes of Limitations, Unless the State Statute Conflicts With Some Statute of Congress, or Unless Some Higher Equity Under the Facts of the Case Would Render the Application of the Statute Inequitable.

Section 4848, Shannon's Code of the Statute Laws of Tennessee, provides:

> "No bill of review shall be brought or a motion made therefor, except within three years from the time of pronouncing the decree, saving to infants, married women, persons of unsound mind, imprisoned or beyond the limits of the United States, a right to a bill of review within three years after such disability has been removed." See also Tennessee Act 1801, chapter 6, section 53.

The court in *Elmendorf v. Taylor*, 10 Wheaton 168, says:

> "Although statutes do not, either in England or in these states, extend to suits in chancery, yet the courts in both countries have acknowledged their obligation. Their application we believe has never been controverted, and in the recent case of *Thomas v. Harvie Heirs* (10 Wheat. 146), decided at this term, it was expressly recognized."

Teckheimer v. Baum, 37 Fed. Rep. 175, holds, where a right is peculiar to the law of the state, and

has no existence in the general jurisprudence of equity in the Federal courts,

> "It is now settled, however, that the courts of the United States may administer an equitable right granted by the law of the state in suits of which, from other reasons, they have jurisdiction."

Also in *Aspen Mining Co. v. Rucker,* 28 Fed. Rep. 222, the court says:

> "It is doubtless true that the jurisdiction of the Federal courts, sitting as courts of equity, is not dependent upon or limited by any state statutes. Neither is the practice therein prescribed by state legislation. Yet it is equally true that an enlargement of equitable rights, given by a state, may be administered in a Federal court. *Holland v. Challen,* 110 U. S. 15. I take it in this respect there is no difference between a legal and an equitable right. The Federal courts enforce and administer the laws of the state; and if any right, legal or equitable, be given by a state statute, the non-resident litigant who may come, or be forced, into a Federal court may avail himself thereof. Such I understand to be the general rule. Any exceptions thereto arise either because the state statute conflicts with some general legislation, or because the right granted is not in its nature administerable in Federal courts. *Clark v. Smith,* 13 Pet. 195; *Brodeuck Mill Case,* 21 Wall. 520."

The case *Davey v. Briggs,* 97 U. S. 628, applies a statute of limitation of North Carolina (and the interpretation of the statute as given by the North Carolina courts) in a suit involving title to land.

Rose's Code of Fed. Proceed., section 870, says:

> "In equity the Federal courts are not strictly bound by any statutory provisions, though they will usually follow the analogy of the statute at

law," and refers to subdivision *M.* of section 10, pages 89, 90 and 91, of volume 1, of said text and the many cases thereunder.

The case *Mexican Nat. Coal, Timber and Iron Co., et al., v. Frank, et al.,* 154 Fed. Rep. 217, held that a state (Texas) statute of limitation of action, while such action does not govern per se in suits in equity the Federal courts, yet the statute will be applied by analogy under equitable circumstances.

There is no Federal statute which conflicts with the Tennessee Statute of Limitations quoted above, and equity and the facts of this case and the foregoing authorities require that the analogy of the statute be followed.

The legal proposition stated is not that state statutes control the procedure of Federal courts, nor that the Federal courts must apply the state statutes and the state court's interpretation of those statutes. The principle urged is:

> "In equity the Federal courts will follow the analogy of the state Statutes of Limitations, *unless the state statutes conflict with some statute of Congress, or unless some higher equity under the facts of the case would render the application of the statute inequitable.*"

The issue in the original suit, Hebard v. Belding, was one in which the Tennessee Courts of Equity and the Federal Courts of Equity had concurrent jurisdiction, to which the principle as decided in the line of cases represented by *Godden v. Kimmell,* 99 U. S. 201, applies, to wit:

> "In cases of concurrent jurisdiction, Federal Courts of Equity consider themselves governed by the Statute of Limitation which govern the state courts of law."

The Tennessee Statute of Limitation contended by us to govern in this case specifically applies only to an equitable remedy. If Federal Courts of Equity require applying a state Statute of Limitation which governs a court of law in cases of concurrent jurisdiction, surely equity in the Federal courts requires that it apply a state Statute of Limitation (in cases otherwise of concurrent jurisdiction) which specifically governs the particular remedy sought.

If this suit were within the courts of Tennessee, respondent's title to these lands could not now be affected by a bill of review, which fact, under the authorities quoted, precludes respondent's title from being now disturbed by a bill of review in this court.

We cite the following Tennessee authorities:

Nelson v. Schaeffer, 107 Tenn. Rep. 300;
Anderson v. The Bank, 5 Snead, 664;
Winchester v. Winchester, 1 Head, 465.

V.

A Bill of Review Not Brought Within the Period for Writs of Error After the Discovery of the New Evidence Upon Which Bill of Review is Based, Cannot Prevail.

Story's Equity Pleading, 9th edition, section 419, declares:

> "The question may arise, whether the like limitation applies to bills of review upon new-discovered facts and evidence. *There can be no doubt that it will be a good bar, that the bill of review is not brought within the period limited for writs of error, after the discovery of the new facts or evidence.* Whether any bill of review will lie after the lapse of that period, from the time of making the decree, although the bill of review is brought within the prescribed period after the discovery

of the new facts or evidence, there does not seem to be any decision settling the point; and as the allowance of a bill of review for new discovered evidence is discretionary with the court, it is scarcely probable that it will arise in judgment, as the lapse of time will always have great weight within the court in refusing the application, in connection with the other circumstances."

In the case of *Thomas v. Harvie Heirs*, 10 Wheat. 146, which was upon a bill of review (appeals in equity at the time were limited to *five years* after the decree under the Judiciary Act of 1789, U. S.), in deciding the question the court says:

"The record shows that the order of the court permitting a bill to be filed was granted eight years subsequent to the final decree in the original case, and the question to be decided is whether this remedy was not barred by length of time. It must be admitted that bills of review are not strictly within any Act of Limitation prescribed by Congress, but it is unquestionable that courts of equity, acting upon the principle that *laches* and neglect ought to be discountenanced, and within cases of stale demand its aid not to be afforded to suits brought in these courts.

"These principles seem to apply very strongly to bils of review in the courts of the United States, and from the circumstances that Congress has thought proper to limit the time within which appeal may be taken in equity, causes thus creating an analogy between two remedies by an appeal and bill of review so apparent, that the court is constrained to consider the latter as necessarily comprehended within the equity of the provisions respecting the former."

The court further says:

"Whether a bill of review founded upon matter discovered since the decree is in like manner barred by the lapse of five years after such de-

cree, is a question which need not be decided in the present case, since we are all of the opinion that it is the discretion of the court to grant leave to file a bill of review for that cause, and that such leave ought not to be granted in the case where it appears that the plaintiff is not aggrieved by the decree on account of error as assigned."

In *Reed v. Stanley,* 97 Fed. Rep. 526, the court holds that the time within which a bill of review may be filed is limited by analogy to the period allowed by statute to taking an appeal in the case, and after quoting largely from *Thomas v. Harvie,* 10 Wheat. 148, says:

"From this it will be seen that an original decree cannot be brought before an appellate court for re-examination by means of a bill of review, after the expiration of the period prescribed by statute for an immediate appeal from such decree, otherwise as said by the court cited, the party complaining of the original decree would by such means be permitted to do indirectly what the Act of Congress has prohibited him from doing directly."

To the same effect are,

Clark v. Killian, 103 U. S. 769;
Trust Co. v. Grant Loco. Works, 108 U. S. 227;
Rector v. Fitzgerald, 59 Fed. 812.

From the year 1789 (Judiciary Act of U. S. 1789) to the year 1878 (U. S. Revised Statutes 1878, section 1008), a writ of error or appeal would lie from a judgment, decree or order of the Circuit Court or District Court, if *taken within five years* after the entry of such judgment, decree or order.

From the year 1878 to the year 1891, *the period for* hearing such a writ of error or appeal, *was two years,* and since 1891 no appeal can be taken or writ

of error sent out to review a decision of a Circuit Court of Appeals *unless within one year* after entry of the order, judgment or decree sought to be revised.

U. S. Compiled Statutes, 1901, page 550, 26 Stat. at Large, 828, Sec. 6.

Therefore under the law it is clear this bill of review based upon newly discovered evidence should, at least, have been brought within one year after the discovery of the map of 1821.

We think it is axiomatic to assert that **when a public document has been lost, and later found and placed among the public records, in the custody of the proper public officer, to have charge of the same, the document is no longer a lost document** and cannot, years afterward be urged as the basis of a legal proceeding as "newly discovered" evidence by one who, "years afterward," has just "heard" of its existence. The date of its being "newly discovered" is certainly when said document comes into the custody of the proper public official to have the same in his care. If petitioners desired to keep their rights alive by due diligence, they should at least have inquired of such public officer, whose duty it was to have custody of said documents once a year.

Let us consider the facts of the case now before the court:

1. Not later than February 29, 1904, the newly discovered map was found by the State Archivist of Tennessee, and placed in the public archives of the state. The newly discovered report of the commissioners of 1821 was found by the same person, in the same place and at the same time, and placed in the public archives of the state (R., pp. 464-639).

2. The discovery of said map was given wide notoriety by the public press (R., pp. 556, 639, 640).

3. The archivist of Tennessee made certified copies of said map as early as March, 1905, for other people (R., pp. 639-754).

4. On March 26, 1906, Mr. Cozad, representative of Hopkins, et al., obtained a certified copy of this map (R., pp. 543-662).

5. On September 25, 1906, petition for permission to file a bill of review was presented to the United States Circuit Court of Appeals of the Sixth Circuit by Hopkins, et al. (R., p. 715).

6. On August 6, 1907 (nearly one and one-half years after they had received their certified copy of said map), Hopkins, et al., filed their petition to file a bill of review in the United States Circuit Court at Knoxville (R., pp. 421-432).

It is thus shown that Hopkins, et al., did not seek permission to file a petition until two and one-half years after the newly discovered evidence had been found by the archivist of the State of Tennesse and placed in the public archives of the state. It is further to be observed that there is no evidence that Hopkins, et al., during a period of six years after the final decree in the original suit of *Belding v. Hebard* entered July 13, 1900, made any inquiry of the State Departments of either Tennessee or North Carolina as to whether any map or papers had been found affecting the State Line between Tennessee and North Carolina.

The contention of appellants is that their *laches* must be reckoned as from the time when they first heard, or learned, of said map's discovery, and not from the date that it was found and placed in the proper public archives. That the only duty of diligence they were under was, that should they at any time chance to hear by rumor of the discovery of any

new evidence they were to exercise due diligence thereafter.

If this principle be true for two and one-half years, should not the same principle apply had appellants not learned of this newly discovered evidence for ten years thereafter, or twenty years thereafter, so long as they moved with reasonable diligence after they heard "the rumor" of the newly discovered evidence? Clearly, such a contention is not the law as to *laches.*

Not later than February 29, 1904, the State Archivist of Tennessee, as shown above, placed the map and report of the joint commissioners in the public archives of Tennessee, and made certified copies for other people as early as March, 1905. Not until September 25, 1906, did petitioners apply to the Circuit Court of Appeals for permission to file bill of review, and not until August, 1907, did they apply to the Circuit Court below.

The discovery of the said map by a public officer, and placed by him in the public archives where the lack of diligence of the complainants caused its discovery to be unknown to them for a period of over two years is gross laches, especially when they made no inquiry in a period of six years.

It is also to be noted Hopkins, et al., petitioners, did not actually file their petition for leave to file bill of review in the United States Circuit Court for nearly one year and a half after they had received their certified copy of said map per their representative, Mr. Cozad.

If appellants for over six years made no inquiry of the public officers of the respective states, as to whether or not the said map and report of the commissioners had been discovered, appellants are not now entitled to complain of the final decree.

Further, evidence of the lack of diligence on the part of appellants is shown by the bill, where it states, "and further attempts were made to find said written report accompanying said map. . . . But after the most diligent search no other papers connected therewith could be found; . . ." (R., p. 430). *When, as a matter of fact, the report of the joint commissioners was discovered at the same time, at the same place and by the same person as was the said map* (R., p. 464). A certified copy of this report was secured and filed by the appellee in this case.

Finally, that a bill of review, predicated upon newly discovered evidence, might prevail, after the lapse of the period of appeal, if the bill be brought within the period limited for appeals after the discovery of the new facts or evidence, if the court in its discretion should so allow, is a principle asserted as *dicta* in various cases. Nevertheless so cautiously and sparingly have the courts permitted this remedy to prevail, after the lapse of the period limited for appeals, that we are unable to find the report of a case in the Federal courts, after a careful search, where a bill of review, based upon newly discovered evidence has been allowed *to prevail* after the lapse of the period limited at the time for appeals.

Story's Equity Pleadings, 9th edition, section 419, quoted above, apparently recognizes the same fact.

> "Whether any bill of review will lie after the lapse of that period, from the time of making the decree, although the bill of review is brought within the prescribed period after the discovery of the new facts or evidence, there does not seem to be any decision settling the point; and as the allowance of a bill of review for new discovered evidence is discretionary with the court, it is scarcely probable that it will arise in judgment, as the lapse of time will always have great weight within the court in refusing the application, in connection with the other circumstances."

In other words, there appears to be no reported case where, as in this case, the bill of review was brought six or seven years after a final decree and said bill of review has been allowed to prevail to affect interests vested in accordance with the adjudication of the original final decree.

VI.

The Denial of the Circuit Court of Appeals of the Motion of Petitioners "to Remit the Records to the Lower Court With Permission to Make a Certain Copy of Field Notes, as Evidence, Part of the Record."

After the case had been argued and submitted to the said Circuit Court of Appeals, complainants, Hopkins, et al., on January 27, 1911, filed in said Circuit Court of Appeals a petition to remit the record to the United States Circuit Court at Knoxville, Tennessee, alleging the discovery of a copy of the field notes of William Davenport, surveyor for the State of North Carolina, on the survey of the State Line between North Carolina and Tennessee in the year 1821. The order of the Circuit Court of Appeals was:

> "It is now here ordered that the motion stand over with leave to complainants' counsel to file within twenty days affidavits with respect to the authenticity of the field notes, and with leave to defendants' counsel to file within twenty days thereafter counter affidavits."

Under this order of the court petitioners proceeded to take depositions to which procedure respondent excepted. The testimony of all witnesses and affidavits offered, established that said field notes were not the original field notes made by William Daven-

port, the North Carolina surveyor, with the commissioners of 1821, as alleged by petitioners, or by anyone else. The field notes were shown to be in the handwriting of some other person than said William Davenport. There was no evidence to show from what said notes were copied.

Clearly they would not have been admissible in evidence in the original suit. The familiar rule of evidence that to admit in evidence a paper purporting to be a copy, it must first be shown that the original existed and that the original was lost or destroyed, or is not available, would have excluded these so-called notes in any court. It is not shown that any field notes ever existed of the survey and certainly none were ever adopted by the commissioners of 1821, as far as the evidence in the case discloses. There is no evidence what the original field notes contained, *assuming* that there were any, and there is no evidence that the alleged notes are purported to be copies of any one's field notes, and therefore no evidence that they are accurate or substantially complete copies.

Further, said notes would not be material even if they had been the original notes of William Davenport, said North Carolina surveyor. There is no reference in the report of the commissioners, the confirmatory acts of the respective states, or the map of 1821 to any field notes. The report of the commissioners and their map called for natural monuments on the portion of the line in dispute, and disclose that the natural monuments called for are not set forth in the field notes. Even if these field notes had proven to be the actual copy of the original field notes of William Davenport, as made by him during the State Line survey of 1821, the controlling evidence being that the commissioners never adopted said field notes, the notes would be immaterial.

The map and report of the commissioners and the confirmatory acts of the states set forth no calls for courses and distances until the line leaves the extreme height of the mountains, from which point the report and confirmatory acts of the respective states call for a course "due south," which is the only course mentioned. The calls from the beginning to the Tennessee River is "with the extreme heights of the Great Smoky Mountain, crossing the Tennessee River—from the Tennessee River to the main ridge and with the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain." The report, the map, the confirmatory acts of the states, the Cession Act of 1789, describing the line, call for its location on mountains immediately north and south of the banks of the Tennessee River and we submit that the court is controlled by this fact.

It is quite possible that the Tennessee surveyor surveyed the Hangover Line and the North Carolina surveyor the Slick Rock Creek route. The material fact is that the commissioners did not adopt the Slick Rock Creek Line, but did adopt the Hangover Line as is made evident by their map, their report and all the various acts describing the line adopted by them.

It has always been admitted that a survey line was probably made up Slick Rock Creek by the commissioners' party, but, as found by the courts below, the commissioners abandoned the Slick Rock Creek Line and adopted the Hangover Line.

The Circuit Court of Appeals below properly denied the motion to remit the record to the Circuit Court to admit in evidence these field notes. At most the disposal of this motion was within the discretion of the court. They are not original notes, and what they are copies of cannot be proven. Further, the report and map of commissioners and the confirmatory acts of the respective states, do not call for any field notes, but

do call for natural monuments which control. Even as previously stated, had the field notes been proven to be those made by William Davenport during the survey, since said commissioners make no call for natural monuments contended for by petitioners, to wit, up a "creek" for six miles, but in fact call for the line adopted by them for the said six miles as being located on mountain tops, under no circumstances could the notes be material.

The petitioners having had one bill of review were in no event entitled to a second, even had their supposed evidence been material.

VII.

The Determination of the Issue in the Case of North Carolina v. The State of Tennessee, a Case of Original Jurisdiction and on the Docket of This Court, Cannot Affect the Decree as to the Parties in This Suit Now Before the Court.

Petitioners have urged that this is a curious and anomalous case by reason of the fact that there is pending for hearing at the present time in this court a case of original jurisdiction, brought by the State of North Carolina against the State of Tennessee, to decide the boundary line between the two states and involving the location of that portion of the State Line which was originally in dispute in this case.

The decree of the United States Circuit Court of Appeals in this case is that the title to the lands in dispute is valid in Hebard, the party under whom respondent claims, and void as to Belding, et al., those under whom petitioners claim. Said decree cannot in any manner affect the decision or decree in the case of North Carolina v. Tennessee, which issue is as to the jurisdiction and sovereignty of the states, nor can the decision as to the jurisdiction and sovereignty of the

states, whatever it may be, ever affect the decree as to the parties in this suit.

The issue in this case is *res adjudicata,* as to the parties, determining the title to the lands and not the jurisdiction and sovereignty of the states.

The United States Judiciary Act of 1891 enacts, *inter alia,* that the United States Circuit Court of Appeals shall be the final Court of Appeals, for all suits between parties claiming under grants of different states, and as it necessarily follows in a suit arising between parties, claiming under grants of different states, that the state boundary would be involved, there can be no question that a case such as this was in the mind of Congress when it passed the act referred to, and it does not appear than anyone except petitioners have ever regarded this as anomalous. The deductions suggested by petitioners that the fact of the decision by the United States Supreme Court in the case pending in this court referred to, to wit, North Carolina v. Tennessee, if the court should decide that the line was located as contended for by petitioners, would be to reinvest title to the lands in dispute in the State of North Carolina, we submit is not worthy of serious discussion.

The decree of the Circuit Court of Appeals which adjudicated a title claimed under a senior grant of North Carolina to be void would not enable a title claimed under a junior grant of North Carolina to prevail. The State of North Carolina having by solemn grant conveyed the title it claimed to have, would under the laws of North Carolina as well as every other state, have nothing to convey by purported junior grants.

We submit further that this question has already been decided by this court in the case above referred to; the State of North Carolina v. the State of Tennessee. In that case the Babcock Lumber and Land

Company, claiming to have succeeded to the title of respondent in May, 1909, filed a petition praying for leave to intervene in the case, on the ground that their title would be clouded by an adjudication in the case between North Carolina and Tennessee, if it should be held that the lands, which it had purchased from the respondent, were in the State of North Carolina. To this petition the State of North Carolina answered, denying the right of the Babcock Lumber and Land Company to intervene in the case, on the ground that the rights of the Babcock Lumber and Land Company could not be prejudiced by a decree of a boundary line between the states, although that decree might put the land in controversy under the jurisdiction and sovereignty of the State of North Carolina, because the issue in suit in this court between North Carolina and Tennessee was for the purpose only of establishing a boundary line, and would affect only the question of jurisdiction and sovereignty of the states, and not affect the private titles of individuals or decrees theretofore made. And the said State of North Carolina did set up in the paper filed in that suit—by its counsel, who are of counsel in this case—called a brief for complainant, meaning the State of North Carolina, in opposition to the motion of the Babcock Lumber and Land Company for leave to file petition to intervene and become a party defendant in this case, that

> "The subject matter of this controversy is a State Line. Nobody is interested in that subject matter except the two states. The direct consequences of fixing the line affecting private interests do not concern the states. They are property rights to be settled between private parties in some other manner."

The application by the Babcock Lumber and Land Company to intervene in the suit pending in this court

between North Carolina and Tennessee, was refused by this court. While not filing any opinion, it is evident that the refusal by this court of the petition of the Babcock Lumber and Land Company for intervention was made on the ground that the Babcock Lumber and Land Company would not be affected or interested in the litigation and decree therein between the two states to establish the boundary line.

In *Fowler v. Lindsay,* 3 Dallas, 411—which was a suit in ejectment arising out of the fact that a State Line between Connecticut and New York had never been authoritatively settled—the State of New York tried to intervene and this court held that a decision as to the right of soil between individual citizens can never affect the right of the state as to the soil or jurisdiction.

Afterwards, in the case of New York against the State of Connecticut, 4th Dallas, 1, the State of New York tried to enjoin the prosecution of suits depending on that State Line location and this court denied the right of the state to interfere in the matter in any way, on the same ground, to wit, that it was not the pary in interest, nor affected in any way by any litigation between private parties. The rule certainly works both ways.

The case of Fowler v. Lindsay even goes further in settling the question raised, for, in rendering the opinion of the Supreme Court of the United States, Washington, Justice, says:

> "It is not sufficient that a state may be consequently affected, for in such case (where the grants of different states are brought into litigation) the Circuit Court has clearly a jurisdiction; and this remark furnishes an answer to the suggestions that have been found on the remote interest of the state in making retribution to her grantees upon the event of an eviction.

"It is not contended that the states are nominally the parties, nor do I think that they can be regarded as substantially the parties to the suits; nay, it appears to me that they are not even interested or affected. They have a right either to the soil or to the jurisdiction. If they have the right of soil they may contest it at any time in this court, notwithstanding a decision in the present suits and though they may have parted with the right of soil, still the right of jurisdiction is unimpaired. A decision as to the former object between individual citizens can never affect the right of the state as to the latter object; it is *res inter alios acta.*"

Justice Cushing, filing an opinion in the case of Fowler v. Lindsay, says:

"Whether the land lies in New York or Connecticut does not appear to affect the right or title to the land in question. The right of jurisdiction and the right of soil may depend upon different words, charters and foundations. A decision of that issue can only determine the controversy as between the private citizens who are parties to the suit, and the event only give the land to the plaintiff or defendant, but could have no controlling influence over the line of jurisdiction."

Also,

New York v. Connecticut, 4 Dallas 1;
Rhode Island v. Massachusetts, 12 Peters 657-726-727.

In other words, the boundary line between two states may be passed upon by a Circuit Court in determining the rights of individuals, but the decision of a Circuit Court in determining the rights of individuals, by locating a boundary line between states, does not prevent nor affect the right of this court to relocate or find a boundary line between the two states for jurisdictional purposes. The only effect which a decree

in the case pending in this court, between North Carolina and Tennessee, finding a different boundary line than the one established in the case in the Circuit Court would have would be that if the lands adjudged to belong to the respondents were found by a decree in this court to be in North Carolina that they would pay taxes to North Carolina and be subject to the jurisdiction of North Carolina in all police regulations and law; but it would not affect the rights adjudicated in this case by the Circuit Court and Circuit Court of Appeals.

It is true that Charles Hebard claimed under grants from the State of Tennessee, and that Belding, et al., defendant in the original suit, claimed under grants from the State of North Carolina, but it is also true that the Smoky Mountain Land, Lumber and Improvement Company, in addition to claiming under the title which was vested in Charles Hebard prior to 1898, purchased said lands after the decree of the said Circuit Court at Knoxville, Tennessee, of June 10, 1899, affirmed by the Circuit Court of Appeals, July 13, 1900.

If there ever was any virtue in the statement and argument of petitioners as stated in their brief and petition, we submit that when the same should have been urged, if at all, was within one year from July 13, 1900, and not fourteen years afterward.

REPLY BRIEF.

It is our desire not to impose upon this court an unduly extended brief beyond the need of properly presenting the case. It appears necessary, in reply to complaint's brief, in order to, at least, point out some of the misleading and incorrect statements or deductions contained therein.

On page 5 of complainants' brief it states:

> "Surveyors who testified for Hebard in the original case found certain marked trees running down toward the Tennessee River from a point about half a mile to a mile northeast of the Tennessee River from the top of the ridge on the Great Iron or Smoky Mountain Ridge."

This statement is only a part of the truth and thereby misleading. The fact is, it was admitted by both parties to this litigation that the State Line north of the Tennessee River was undisputed to a certain "spruce pine" or hemlock tree, marked as a State Line fore and aft tree, standing on or near the north bank of the Tennessee River (R., p. 336-404). That said State Line fore and aft tree was so marked as to show that the line there crosses the river to the south bank, was found and held by the master and the courts in the original case (R., p. 405) and not denied in the evidence by complainants.

On page 93 of said brief, it is stated:

> "Libby says it is impossible to go over the Hangover Lead and fit the map of 1821."

Under cross-examination (R., p. 521), question 18, Mr. Libby answered as follows:

> "It would be impossible for any civil engineer or surveyor to take that map and locate it according to the north point there and fit it *on any ridge* that is in that country today."

On page 97, it is stated, and argument made thereon, that "The Unaka Mountain commences at the junction of Hangover and Fodder Stack," when, as a matter of fact, there is a stipulation filed in this case (R., p. 327), paragraph 2 of which reads as follows:

> "That the main ridge of the mountain dividing Tennessee and North Carolina does not begin to be called Unaka, Unacay or Unicoi Mountain until it reaches a point about fifteen (15) miles southwest of the Junction of the Hangover and Fodder Stack Leads,"

which stipulation in accordance with the facts as they are, shows the fallaciousness of the argument which follows the untrue statement made on page 97 in said brief.

On page 101 it is said, "everyone of our witnesses say that it is impossible for that creek to be anything else than Slick Rock Creek." W. P. Chambers, witness for complainant, testified that the "creek" is not laid down correctly on the map (R., p. 619).

Denton, surveyor for complainants, says that the creek marked on the map cannot possibly be Slick Rock Creek, if it is correctly marked on the map (R., p. 539).

On page 22 of said brief it is stated that the contract for the purchase of what is known as the Belding lands was made by the complainants in the "early part of 1900—about April," which evidently is inserted to leave the impression that this was a fact as to the first contract made by the complainants in the matter. The facts as shown by the evidence are that there was no contract entered into by complainants for the purchase of said lands until October 29, 1900 (R., p. 676-678), and the so-called contract of purchase was merely an option to purchase.

On page 103 the complainants make the following incorrect statements:

> "The testimony of J. Newton Peck, taken at the same time, which shows that the option to purchase the lands claimed by them in this case was taken in November of 1899, eight months before

the original case was decided in the Circuit Court of Appeals, and the lands are described as forty-one thousand acres in Monroe County, Tennessee, and evidently did not include anything except what Mr. Hebard had previously owned there, and that the deed subsequently made was substantially a quit-claim deed, which does not make the vendee an innocent purchaser."

This general statement is evidently meant to indicate that the Smoky Mountain Company in November of 1899 had an option on these lands, or that the parties who had the option represented the Smoky Mountain Company, which as to both the exact facts and the spirit of the statement is untrue. The testimony in the case and the papers filed with the depositions of J. Newton Peck at Cincinnati on June 19, 1909, show to be untrue the statement that the lands are described as 41,000 acres, *and "evidently did not include anything except what Mr. Hebard had previously owned there,"* in that complainants' statement is evidently meant to indicate that the deeds from Mr. Hebard and P. C. Blaisdell did not include the Slick Rock Basin, the lands now in dispute. The deeds show that they included the lands in dispute, and the deeds were made after final decree in the original suit, Belding v. Hebard, July 13, 1900, and were in escrow until 1903. The deeds did convey what Mr. Hebard *owned*, and not what he did not own, whereas Belding, et al., in their deed to Hopkins, et al., endeavored to convey what *they did not own*, without receiving money therefor, and Hopkins, et al., endeavored to get something for nothing, and thus cloud the title which had been decreed in Charles Hebard after equity proceedings to remove that cloud. In the testimony of J. Newton Peck, Mr. Peck was asked by complainants' counsel the following question:

"Q. When the Smoky Mountain Company took that property over was there not something said guaranteeing you against any action of the Beldings?

"A. Not one word that I ever heard of.

"Q. Was not this property that had been in dispute simply thrown into the general purchase?

"A. No, sir." (R., p. 650.)

The deed of Charles Hebard to P. C. Blaisdell, et al., was a special warranty deed. At the time that P. C. Blaisdell, et al., executed their deed and placed it in escrow, no title had been vested in P. C. Blaisdell, et al., because the deed of Charles Hebard to P. C. Blaisdell, et al., had not been delivered, therefore they gave a quit-claim deed.

The depositions of J. Newton Peck and the papers filed by him are conclusive evidence that the Smoky Mountain Land, Lumber and Improvement Company came into active existence about November, 1900, and entered into a contract to purchase the lands in dispute; that the deed placed in escrow was not delivered to the Smoky Mountain Company until January 9, 1903, or later.

The history of the title as shown by testimony and papers from Charles Hebard to the Smoky Mountain Company is set forth in this brief on pages 72, 73 and 74.

Complainants also contend that the deed to respondent was substantially a quit-claim deed and "does not make the vendee an innocent purchaser." The facts of the case, however, do make or establish the respondent an innocent purchaser for value, upon the principles which are decided in the case of *Moelle v. Sherwood*, 148 U. S. 21, from which case we quote as follows:

"The character of bona fide purchaser must depend upon attending circumstances or proof as

to the transaction, and does not arise as often, though, we think, inadvertently, said, either from the form of the conveyance or the presence of, or the absence of, any accompanying warranty."

On page 98 of said brief it is stated:

"Whatever that map may show or not show, one thing is conclusively established by it, and that is, that the commissioners did not cross the river with their line at the so-called bluff or series of bluffs leading to the Hangover. This, both Hale and Muller, Hebard's old witnesses, now reluctantly admit. (See Muller's testimony, R., pp. 190, 191, 192, 193; Hale, p. 213)."

Evidently counsel refers in this quotation to the record of this case at pages 584, 585, 586, 587, as to Muller's testimony, and as to Hale's testimony (R., p. 603).

The testimony referred to in no manner whatever justifies this statement. Complainants' counsel was evidently trying to get the witness to say that if the line did cross the river at the mouth of Slick Rock Creek there was no bluff there, and no ridge at Slick Rock Creek leading up to the Hangover. In regard to the bluffs, all that the witness stated was that the entire south side of the Tennessee River, from the Cheoah River to the Slick Rock Creek, was a series of bluffs. They in no manner stated that the State Line did *not* cross the river where it is contended by respondents that it does cross, and immediately on crossing follows a lead, ridge or spur direct to the Hangover Mountain. No one contends the line goes to the Hangover Mountain following a bluff, but merely that where the line strikes the south bank of the river the said bank is a bluff. The line strikes the bluff but does *not* follow it. The distortion of the testimony as quoted with its deduction by complainants is intended, evidently, to make

an impression that respondents' witnesses admitted complainants' contention, which the record shows is untrue.

Complainants, on page 21 of their brief, express that in *their* opinion the permission given by the United States Circuit Court of Appeals at Cincinnati to Hopkins, et al., to file their petition for bill of review in the United States Circuit Court at Knoxville, Tennessee, should be regarded by this court as a matter of great weight.

As a matter of fact, we think it will be admitted by this court that such leave by an appellate court upon any such application, provided reasonable cause is alleged by sufficient affidavit, is granted by said appellate court practically as a matter of course, accepting the allegations as made by the petitioner to be true. The purpose of this remarkable statement by complainants in their brief is, we think, apparent.

Upon reading complainants' brief an impression would be left therefrom that respondent claims that the line, on leaving the south bank of the Tennessee River, is at that point at once located on the *main ridge, i. e.*, that respondent claims the main ridge reaches the Tennessee River. Neither in the original case nor upon these bills of review proceedings has that been the claim of respondent. What was claimed by Hebard in the original case and has been and is claimed by respondent in this case, is that the line from the undisputed fore and aft State Line tree on the north bank of said river crosses the river, as shown by the fore and aft marks on said three, direct to the south bank of the Tennessee River, and thence immediately is located upon a lead, or ridge, or spur, leading direct to Hangover Peak, which mountain the line thereby strikes in about four and one-half or five miles from the river, thence that the line follows the main

Hangover Mountain as the main ridge to the "Junction" where the line is intersected by the line contended for by complainant.

Complainants, in their brief, state that it has been shown, to their satisfaction, that there is no question in this case regarding an innocent purchaser, and then proceed to devote pages of their brief in an endeavor to support their position.

Complainants, in addition to quoting text-books on general principles, which is so often done by counsel when the authorities are not with him, quotes largely from the case of the *U. S. v. Samperyac, et al.*, 27 Fed. C., p. 932 (which case also appears in the United States Supreme Court Reports, 7 Pet. 241), in argument upon the question of innocent purchaser for value. This case, upon its facts, of fraud, etc., is in no wise in conflict with the principles decided in the cases quoted on the issue by respondent, such as *Rector v. Fitzgerald*, 59 Fed. Rep. 808, and *Ohio River R. Co. v. Fisher*, 115 Fed. 929.

We note, however, that this case of *U. S. v. Samperyac* has been regarded as standing on its own set of facts, as it does not appear to have ever been quoted subsequently by this court. The court finally said in that case, 7 Peters, on page 242:

> "Upon the whole, we think, Stewart was improperly admitted to become a party; *but, considering him a proper party, he has shown no ground upon which he can sustain a right to the land in question.*"

We respectfully submit the decree of the court below should be affirmed.

JOHN FRANKLIN SHIELDS,
WILLIAM A. STONE,
T. E. H. McCROSKEY,
Counsel for Respondent.

APPENDIX.

I. Map of disputed Territory showing lines contended for by each party.

II. Map of 1821 as it is.

III. Map as it would have to be to support contention of Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 232.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, FRED W. BRUCH, GEORGE REEVES, AND JOHN MATTHEWS, PETITIONERS,

vs.

CHARLES HEBARD AND THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY, RESPONDENTS.

MOTION TO HEAR AFTER HEARING OF ORIGINAL CASE No. 4.

To the Honorable the Supreme Court of the United States:

The petitioners and appellants, William R. Hopkins, Benjamin P. Bole, Edward I. Leighton, Fred W. Bruch, George Reeves, and John Matthews, now come and move the court to set the above-entitled case for hearing immediately after the case of The State of North Carolina *vs.* The State of Tennessee, a case of original jurisdiction pending

in this court and being Original Case No. 4, upon the following grounds and for the following reasons, to wit:

The controversy in this case involves primarily the true location of the State line between the States of North Carolina and Tennessee from a point on the south bank of Tennessee River to a point some miles southwesterly of said river, and that is the vital question of fact in this case.

This case was admitted to this court upon a writ of certiorari and the record of the courts below removed into this court for examination upon said writ, on the ground that it involved, in respect to the question of fact, to wit, the true location of said State line, precisely the same question as was involved in the said case of The State of North Carolina *vs.* The State of Tennessee, and your petitioners believe that in granting said writ of certiorari this court was moved by the consideration that said question of fact as to the true location of said State line was involved in both cases and should be disposed of at one time.

Your petitioners further represent that the evidence in said case of The State of North Carolina *vs.* The State of Tennessee was taken at a later time and is more complete, especially by reason of including evidence of the first importance, the existence of which was unknown at the time the record in this case was made up, and your petitioners therefore state to the court that the ultimate fact involved in both cases can be more correctly and conclusively determined upon consideration of the evidence in both cases.

WILLIAM R. HOPKINS,
BENJAMIN P. BOLE,
EDWARD I. LEIGHTON,
FRED W. BRUCH,
GEORGE REEVES,
JOHN MATTHEWS,
By C. BENTLEY MATTHEWS,
Attorney.

Office Supreme Court, U. S.
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No. [redacted]80 October Term, [redacted]1914

IN THE

Supreme Court of the United States.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, FRED W. BRUCH, GEORGE REEVES, and JOHN MATTHEWS,

Petitioners,

v.

CHARLES HEBARD and THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY,

Respondents.

Motion to Hear Immediately After Hearing of Original Case No. 4, Assigned for Argument, October 13, 1914.

THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY,
By
JOHN FRANKLIN SHIELDS,
WILLIAM A. STONE,
T. E. H. McCROSKEY,
Attorneys.

International, 216 Chestnut St.

IN THE

Supreme Court of the United States.

October Term, 1913. No. 232.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, FRED W. BRUCH, GEORGE REEVES AND JOHN MATTHEWS,

Petitioners,

v.

CHARLES HEBARD AND THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY,

Respondents.

MOTION TO HEAR IMMEDIATELY AFTER HEARING OF ORIGINAL CASE NO. 4, ASSIGNED FOR ARGUMENT OCTOBER 13, 1914.

To the Honorable the Supreme Court of the United States:

The Respondent, the Smoky Mountain Land, Lumber and Improvement Company, now comes and moves the Court to assign the above-entitled case for hearing immediately after the case of The State of North Carolina v. The State of Tennessee, a case of original jurisdiction pending in this court and being Original Case No. 4, which case has been set by the

Court to be heard on October 13, 1914, for the following reasons:

This case (No. 232, October Term, 1913) was to have been heard on March 5, 1914. However, upon motion of Petitioners, Hopkins, et al., to continue this case for hearing immediately after the said case of The State of North Carolina v. The State of Tennessee, which motion was presented to this Court on March 4, 1914, and upon the further request to the same purpose made at the same time to this Court by the Attorney Generals of the respective States of North Carolina and Tennessee, this case was ordered by the Court to be continued until October Term, 1914.

At the time said order was made, no date had been set for the hearing of the case The State of North Carolina v. The State of Tennessee, but on April 13th last this Court assigned the said case of The State of North Carolina v. The State of Tennessee to be heard on October 13, 1914. The said case of The State of North Carolina v. The State of Tennessee, and this case (No. 232, October Term, 1913), primarily, involve the true location of a part of the boundary line between the States of North Carolina and Tennessee. This case was admitted to this court upon a writ of certiorari.

The reasons stated for continuing this case therefor it appears will be fully met in granting this motion and the cause expedited thereby.

THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY,

By

JOHN FRANKLIN SHIELDS,
WILLIAM A. STONE,
T. E. H. MCCROSKEY,
Attorneys.

the evidence be persuasive of error in the former decree the bill of relief should not be allowed if it should result in mischief to innocent parties.

Notwithstanding this court has recently decided, in an action between North Carolina and Tennessee, that the boundary between them is different from that which the Circuit Court of Appeals had previously adjudged it to be in cases affecting titles to land now owned by third parties relying on the decrees of that court, it will not now overturn those decisions, as the stability of judgments and the protection of rights acquired in reliance upon them would, under the circumstances of this case, make the review inequitable.

194 Fed. Rep. 301, refusing a bill to review 103 Fed. Rep. 531, affirmed.

THE facts, which involve the principles controlling the granting of bills of review in cases affecting title to land, and their application to property the title to which is claimed under grants of different States, the boundary between which has long been in dispute, are stated in the opinion.

Mr. C. B. Matthews for petitioners.

Mr. John Franklin Shields and *Mr. William A. Stone*, with whom *Mr. T. E. H. McCroskey* was on the brief, for respondents.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

In 1907, petitioners, alleged successors to David W. Belding and others, filed a bill of review against the heirs and representatives of Charles Hebard in the United States Circuit Court, Eastern District of Tennessee, wherein they sought to reverse the decree for complainant granted by the same court, June 10, 1899, and later affirmed by the Circuit Court of Appeals in the cause entitled *Hebard* v. *Belding*, which was instituted to determine the title to some seven thousand acres of mountain land. The Smoky Mountain Land, Lumber and Improvement Company intervened, denied the alleged equities

and set up that it had purchased the property for value and in good faith. The trial court having heard the matter upon the pleadings and evidence dismissed the bill; and this was affirmed by the Circuit Court of Appeals (194 Fed. Rep. 301). The cause is here upon certiorari.

The land in controversy lies on the waters of Slick Rock Creek, an affluent of the Little Tennessee River, and for some time prior to 1895 was claimed by Hebard under a grant from the State of Tennessee. Belding and others claimed it under a North Carolina grant. The rights of the disputants depended on the true location of the dividing line between the two States. If, after crossing the Little Tennessee, the line ran southward along Hangover ridge, the land was within Tennessee and belonged to Hebard; if, on the other hand, it ran along Slick Rock Creek the North Carolina grant was good and Belding and others were the owners. In 1895 Hebard began a suit in the Chancery Court, Monroe County, Tennessee, seeking an adjudication of his rights. This was removed to the United States Circuit Court; elaborate proofs were taken; and, upon the hearing, the court determined that the state line ran along Hangover ridge, as contended by Hebard, and adjudged the title to be in him. The Circuit Court of Appeals in a final decree, entered July 13, 1900, affirmed this action, the opinion being written by the late Mr. Justice Lurton (103 Fed. Rep. 532).

Some years before the present suit was brought, The Smoky Mountain Land, Lumber and Improvement Company, relying upon the last-mentioned final decree in the Circuit Court of Appeals, in good faith and for value, acquired the interest of Hebard. As security for debt, Belding and others, by deeds of December, 1899, and March, 1900, transferred to Archer and McGarry, Trustees, with power of sale, their interest in a large tract of land the boundaries of which included the seven thousand acres now in question "subject nevertheless to all deduc-

tions, if any, arising by, through or under the 'State Line' suit hereinafter mentioned" (*Hebard* v. *Belding*). Default having occurred, the trustees executed a deed to William R. Hopkins and others, petitioners here, with covenants of seisin and right to convey and special warranty; but from the covenants they expressly excepted "all those lands situated at or near the State Line, between the State of North Carolina and Tennessee, which were recovered in a certain action known as the 'State Line Suit' which was pending in the United States Circuit Court for the Eastern District of Tennessee and was brought by one Hebard against David W. Belding and others if future proceedings do not recover the title thereof."

During the year 1821 Commissioners appointed by North Carolina and Tennessee located and marked the southern portion of the dividing line between the two States and prepared a map roughly indicating it. After being lost for many years, in December, 1903, or early in 1904, this was found among old, discarded papers stored in the basement of the Capitol at Nashville. Relying on the map as newly discovered evidence adequate, when considered in connection with that formerly introduced, to demonstrate that the dividing line between the two States ran along Slick Rock Creek and to establish the invalidity of the Tennessee grant under which Hebard claimed, petitioners began the present proceeding.

Likewise relying in part upon the same map, the State of North Carolina in March, 1909, presented an original bill in this court against Tennessee, claiming that the true line between them ran along Slick Rock Creek, and praying an adjudication to that effect. In an opinion recently announced, the contention of North Carolina was sustained. *North Carolina* v. *Tennessee*, *ante*, p. 1.

The function of a bill of review filed for newly discovered evidence is to relieve a meritorious complainant from a

clear miscarriage of justice where the court is able to see upon a view of all the circumstances that the remedy can be applied without mischief to the rights of innocent parties and without unduly jeopardizing the stability of judicial decrees. The remedy is not a matter of absolute right but of sound discretion. *Thomas* v. *Harvie's Heirs*, 10 Wheat. 146; *Ricker* v. *Powell*, 100 U. S. 104, 107; *Craig* v. *Smith*, 100 U. S. 226, 233; 2 Daniell's Ch. Pr. *1577; Story's Eq. Pl., § 417; Street's Fed. Eq. Pr., §§ 2143, 2156, 2159; Gibson's Suits in Chancery, §§ 1058, 1062.

The trial court regarded the newly-discovered evidence as favorable, rather than in opposition, to the original decree and accordingly dismissed the petitioners' bill. The Circuit Court of Appeals, in a well-considered opinion, upheld the result but for a different reason, saying (194 Fed. Rep. 301, 310): "In our opinion, taking into account not only the speculative purchase by appellants, but also the good-faith purchase by the Smoky Mountain Company, a case is not presented which appeals to the equitable discretion of the court to allow the review of a decree upon the ground alone of newly discovered evidence. We rest our decision solely upon this proposition. Bearing in mind the rule that this bill of review for newly discovered evidence is not of right, no matter how persuasive of error in the original decree the new evidence may be, and that it should not be allowed if such allowance would result in mischief to innocent parties, and having in view the stability necessary to be afforded to decrees, especially of courts of last resort, where disturbance thereof is not essential to the protection of the real equities of the parties before the court, we think the review asked for should be denied. In our opinion, the stability of judgments, and thus the protection of rights acquired in reliance upon them, are such as, under the peculiar circumstances of this case, to make the review asked for inequitable."

Notwithstanding our conclusion in the proceeding between the States of North Carolina and Tennessee, where the established facts in respect to the location of the dividing line were for the most part the same as those disclosed in the record now before us, we think the decree of the Circuit Court of Appeals was right and it is accordingly

Affirmed.

MR. JUSTICE DAY took no part in the consideration and decision of this case.

HOPKINS *v.* HEBARD.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 30. Argued October 16, 19, 1914.—Decided November 30, 1914.

The function of a bill of review filed for newly discovered evidence is to relieve a meritorious complainant from a clear miscarriage of justice where the court is able to see, upon a view of all the circumstances, that the remedy can be applied without mischief to the rights of innocent parties and without unduly jeopardizing the stability of judicial decrees.

The relief prayed by a bill of review for newly discovered evidence is a matter of sound discretion and not of absolute right; and even though